

Government, Law and Policy Journal



A Publication of the New York State Bar Association
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Government Law Center at Albany Law School

New York: A Laboratory for Innovative Public Policy

- Progressive Policy and Legislation in New York State
- Pumping Oxygen into the Room:
The Death Penalty
- New York's Leadership Role in Drug
Law and Criminal Sentencing
Reform
- Evidence-Based Public Safety
Management: The Diffusion
of Compstat
- Alternatives to
Incarceration: The New
York Story
- NYC FUSE Reentry Housing
- Great Moments in New
York Pro Bono History
- Pushing the Envelope on
Pro Bono: The New York
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A Guide for Non-New York Attorneys

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AUTHOR

Glen Banks, Esq.
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New York Contract Law: A Guide for Non-New York Attorneys is an invaluable reference allowing the practitioner to quickly and easily gain an understanding of New York Contract Law. Many contracts involving parties outside the United States contain a New York choice-of-law clause and, up until now, the foreign practitioner had no practical, authoritative reference to turn to when they had a question regarding New York Law. *New York Contract Law: A Guide for Non-New York Attorneys* fills this void. In addition to lawyers outside the United States, this book will also benefit lawyers within the United States whose practice includes advising clients regarding contracts governed by New York Law.

Written by Glen Banks, Esq., a recognized authority on contract law with over 35 years' experience, this book is presented in an easy-to-read question-and-answer format to allow easy access to a wide array of topics. All aspects of contract law are covered, from the basic requirements of a valid contract to a contract's termination, assignment or repudiation. Particular agreements and clauses are discussed as well as the role of counsel when working on a transaction governed by New York Law. Resources for further study and to keep up on changes in New York Law are also provided.

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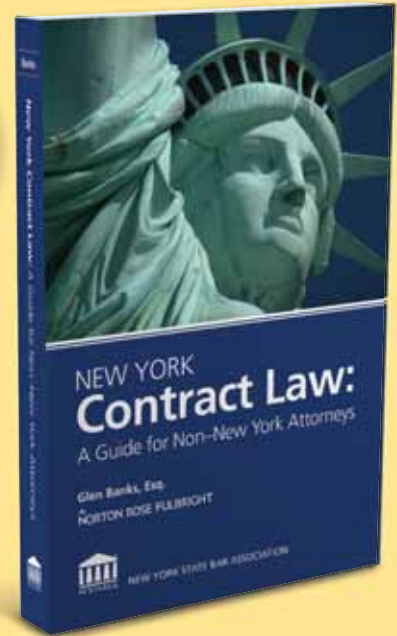
- Is there a binding agreement?
- Is that agreement valid and enforceable?
- How is meaning given to the terms of the agreement?
- What constitutes a breach of the contract?
- When is a breach excused?
- How is action taken to enforce the contract after a breach?
- What remedy can the court grant to redress a breach?

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From the Foreword by Judith S. Kaye, Former Chief Judge of the State of New York





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Editor's Foreword

EXCELSIOR!

New York's motto, *Ever Upward*, is emblematic of this issue, *New York: A Laboratory for Innovative Public Policy*. Scott Fein, Esq., our guest editor and Chairman of the Advisory Board to the Government Law Center, has organized a celebration of New York policy innovations. As Scott notes in his introduction, New York's innovations have influenced the shape of public policy and social welfare far beyond its borders. My thanks to Scott and this group of experts who show us how.

Dan Feldman's article, *Progressive Policy and Legislation in New York State, Continued: The Last Four Decades* provides a history of New York's legislative leadership in fighting crime, preserving the environment, protecting free speech and affording equal rights before the law.

In their article, *Pumping Oxygen into the Room*, Jonathan E. Gradess and Shari Silberstein examine the demise of the death penalty in New York and the influence of that decision on responses to crime here and in other states.

John Dunne and Nicholas Faso explore the difficult work of reforming the Rockefeller Drug Laws in *New York's Leadership Role in Drug Law and Criminal Sentencing Reform*.

Compstat, a public management innovation that originated in New York City to address crime prevention, successfully spread beyond crime. In their article, *Evidence-Based Public Safety Management: The Diffusion of Compstat*, Dennis C. Smith and William Bratton examine that development.

The next two articles, *Alternatives to Incarceration: The New York Story* by Greg Berman and Robert V. Wolf, and *NYC FUSE Reentry Housing: A Scalable, Data-Driven Solution for a "Wicked Issue"* by Martin F. Horn and Ryan J. Moser, explore New York's leadership role in diverting individuals from the prison system and helping those who are incarcerated return to their community successfully.

Hank Greenberg and the Honorable Jonathan Lippman, Chief Judge of the State of New York, in their



respective articles, *Great Moments in New York Pro Bono History* and *Pushing the Envelope on Pro Bono: The New York Judiciary's Initiatives in Legal Education*, explore the past, the present and future of New York attorneys' efforts to bridge the gap in access to justice. In *State Intervention in Municipal Fiscal Distress*, Peter Kiernan

examines how New York State responded to the fiscal crisis facing New York City in the late 1970s and evaluates the soundness of that approach by considering responses to financial distress currently plaguing cities across the country.

Lastly, our guest editor, Scott Fein, discusses public authorities, one of his favorite topics, in *Public Authorities and Their Reform: A New York State Innovation*.

I would like to use this opportunity to express my gratitude to our Executive Editor for 2014, Lindsay Danello, Albany Law School, Class of 2015, for her professionalism, enthusiasm and seemingly unending patience. She and her Albany Law School colleagues, Sarah Coligan, Alexander Cooper, Sarah Engster, Jacqueline Goralzyck, Kerri Tily, and Kimberly Waldin from the Class of 2015 deserve thanks for their forbearance in putting this issue together. My thanks also to the staff of the New York State Bar Association, Dan McMahon, Pat Wood, Megan O'Toole, Wendy Harbour, and Lyn Curtis, for their help and expertise. My thanks finally to Ray Brescia, the Government Law Center's Executive Director, for his help and support.

Responsibility for any flaws, mistakes, oversights or shortcomings in these pages rests in my hands. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Introduction: New York: A Laboratory for Innovative Public Policy

By Scott Fein

Government expresses our desire to operate as a community. Because government is created and implemented by human beings, it embodies our core qualities, fallibility, creativity and the aspiration to excel.

Political cycle after political cycle, our fallibility becomes a refrain...we are told that our State is on the wrong path. Such an assertion merits robust debate, but I would submit that the true measure of our State is whether we reach beyond our traditional approach to age old problems and embrace new and inventive policies in an effort to enhance the community, including those who live at its margins. Some of these new policies work



and others falter, because we are fallible, but New York more than any other State serves as a social laboratory. We do not rest. We develop and road test ideas. We look at hidebound rules that constrain human development and challenge them. We are relentless in the pursuit of social justice. Whether in social services, criminal justice, mental health, or consumer affairs...it has been New York and New Yorkers who have taken the initiative in pushing programmatic frontiers. If Silicon Valley is the home of the wafer, we are the home of the social petri dish. We nourish new policies, refine and export them in ways both pragmatic and dramatic.

In this edition, our authors, experts in their fields, illustrate the State's efforts through invention to serve our fellow New Yorkers better. In so doing, New York influences the national debate and beyond. I thank them for their contribution to this *Journal* and their unrelenting desire to improve governance and our social welfare.

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Progressive Policy and Legislation in New York State, Continued: The Last Four Decades

By Dan Feldman

Introduction

At key moments in American history, New York policy and legislation have led the way toward affirmations of human dignity. Dutch religious tolerance when Amsterdam was Holland's colony, despite Peter Stuyvesant's aberrations, left a permanent imprint on New York City, the Hudson Valley, and beyond, as Russell Shorto so memorably explained.¹ New Yorkers Hamilton and Jay, with their Virginian colleague Madison, left an equally valuable New York legacy.² New York City began a tradition of free higher education in 1847.³ Samuel Tilden⁴ and Charles Evans Hughes⁵ brought national attention to their respective victories over corruption in New York in their presidential campaigns of 1876 and 1916, respectively, and Theodore Roosevelt not only won battles against corruption and business greed in New York as legislator and governor, but won more such victories for the nation as president.⁶ Another New York governor, Al Smith, taught the nation the fundamental legislative elements of the "safety net" that allows the poor to survive, thrive, and rise to help build the American dream,⁷ on which model, yet a fifth former New York governor built the New Deal.⁸ Governor Nelson Rockefeller brought inexpensive higher education to the rural outposts of New York State,⁹ and Governor Hugh Carey showed the nation how to inspire common sacrifice for the common good in dealing humanely with financial crisis.¹⁰

Of course, one could as easily adduce a sample of New York's failures to exercise humane leadership. But in recent decades, complaints seem vastly more prevalent than praise in assessments of public policy leadership in our State. That imbalance somewhat unfairly ignores the ways in which New York from the 1970s to the present has continued to offer policy leadership to the nation—not always, not consistently, and not nearly as dramatically as in the history thus far reviewed, but enough to warrant more respect than our State now seems to enjoy. As will be evident, especially from the first two examples that follow, drawn from public safety legislation, widespread ignorance of New York's worthy legislative efforts often derives, at least in part, from the unwillingness or inability of modern-day news reporting to address somewhat technical issues.



Racketeering¹¹

From the 1950s through the 1970s, books, television and movies brought attention to the heavy costs imposed on Americans by organized crime. In its somewhat belated zeal to address the problem, Congress in 1970 enacted "RICO," the Racketeer Influenced and Corrupt Organizations Act. RICO gave federal prosecutors important new tools to fight organized crime, providing them with far more power to show juries the frightening extent of organized crime's reach, to penetrate the layers of insulation that had hitherto protected some organized crime chieftains and to confiscate the wealth that criminals acquired and used in pursuit of more wealth. However, civil libertarians, legal scholars, and some judges noted that RICO also allowed prosecutors to portray all defendants as racketeers and therefore win the imposition of disproportionately harsh penalties on defendants whose culpability was minimal. Federal RICO charges could be brought against any defendant who had engaged in "a pattern of racketeering activity," defined as having committed two misdemeanors within a ten-year period, taken from a long list of predicate offenses.¹² Thus, the "organization" could be presumed from the fact that a group consisting of some of the same people had committed two crimes together several years apart, and each member of the group could be charged as a racketeer, even if his involvement was very minor: "[T]he RICO net is woven tightly to trap even the smallest fish," said the federal Court of Appeals.¹³ Since RICO also allowed civil suits by private individuals, plaintiffs went so far as to sue a pro-life organization for racketeering, under its terms.¹⁴

The resources of federal prosecutors, however, were then and always have been limited, so state prosecutors, left to deal with those activities of organized crime beyond federal reach, began to press for state versions of RICO. In an era when the American public had little patience for the nuances of civil liberties in the criminal justice context, New York refused to enact a "little RICO" that mimicked the potential for abuse inherent in the federal law, although even the initial 1983 version of the legislation omitted some of the most obvious weaknesses of the federal law, such as the provision for civil RICO prosecutions. While the New York State Senate was more amenable, the New York State Assembly refused even to give serious consideration to that version of New York's "Organized Crime Control Act" (OCCA). But over the next three years, the Assembly bill was amended to reflect more extensive concerns about fairness to defendants, so in 1986 the Assembly leadership signaled that it was open to discussion about further amendments needed to allow enactment.

Under existing New York law, prosecutors could win indictments as co-conspirators only of people who had actually planned or committed crimes together. RICO gave prosecutors the ability to indict as co-conspirators, for example, the boss, the underbosses in charge of the various specialty groups (loan-sharking, drugs, gambling, etc.) and the members of those groups, so long as each had at some point committed a crime with another. But this also meant that people who were not in a real criminal organization, but who had been involved in the same criminal incident—even if some were very minor participants—could suffer additional punishment as “racketeers.”

Lengthy and arduous negotiations throughout the winter and spring of 1986 produced a compromise that honored the fair trial traditions of New York State, which as former Chief Judge Judith Kaye explained, may be stronger than those supported by the federal Constitution.¹⁵ To be convicted of racketeering under New York’s law, prosecutors would have to show that the defendants were part of a group or association of persons engaged in criminal activity and having a “continuity of existence, structure, and criminal purpose beyond the scope of individual criminal incidents.”¹⁶ Further, each defendant must be shown to have had “knowledge of the existence of the criminal enterprise and the nature of its activities, and be[en] employed by or associated with such enterprise.”¹⁷ Early on, the New York bill had differed from RICO in requiring as a predicate for the racketeering charge the commission of a felony in addition to the two misdemeanors, and within five years instead of ten. But the final bill would be even tighter: The crimes had to have been committed “with intent to participate in or advance the affairs of the criminal enterprise.”¹⁸

Only minor technical amendments have altered the form in which OCCA was enacted in 1986, and its provisions assuring fairness to defendants have not hindered prosecutors from using it effectively. Indeed, the only amendment to the law that prosecutors sought in 2013 would add identity theft as a predicate offense, reflecting the increased importance of that particular crime.¹⁹ But the New York State Legislature steadfastly protected the unpopular rights of unpopular criminal defendants in the face of accusations that it was “soft on crime” at a time when doing so incurred real political risk.

Sex Offender Registration and Notification²⁰

In the early 1990s, news stories of sex offenses against children terrified American parents. States began to enact sex offender registration and notification statutes. Somewhat later, Congress enacted legislation making certain federal funds available only to states that had enacted such legislation, now known as variations of “Megan’s Law.”²¹ Victim groups demonstrated and newspapers ran strong editorials calling upon state legislators to enact such laws. New Jersey, our neighboring state, had enacted its sex offender notification law in 1994.²² As written, it required police to notify communities of the presence of

any sex offender resident, and seemed to suggest that the police should distribute leaflets and mount posters with photographs of the individual offenders.²³ The New Jersey courts imposed modifications on those provisions, requiring the state to make notification proportionate to degrees of dangerousness.²⁴

The New York law went further. Leafleting and posterizing a community with photographs of an offender, tactics likely to encourage vigilante violence against offenders, would themselves constitute a criminal act. In addition to existing criminal penalties, abusing information provided under the notification law would incur civil penalties explicitly included in the law itself. A Board of Examiners of Sex Offenders would assign offenders to one of three classification levels, depending on the danger posed. Offenders would have the right to go to court to challenge the Board’s assessments, with appointed counsel if need be, and later could petition the court for relief from the statutory notification and registration requirements, even if the classification itself was upheld, upon a showing of good cause. The most minor sex offenses, like public lewdness, would not subject the offender to the statute at all. Offenders at the lowest level subject to the statute, the least dangerous category, would not have their identities disclosed to the public at all. For “level two” offenders, law enforcement would have discretion as to which local institutions it chose to notify of their presence (a day care center for those who prey on young children, for example, or a senior center for those who prey on the elderly). Information, including photographs, about the most dangerous category, sexually violent predators, would be made available at local police departments. Individuals who sought information about a particular individual, whom they could identify by name, could determine whether that individual was on a registry at all, but unlike many other states, the main thrust of New York’s statute as originally enacted was access to information, not dissemination of information.

In New York, amendments to the statute in later years somewhat expanded its reach. The 2006 amendments, in particular, lengthened the registration requirement for level-one offenders from ten years to twenty and eliminated the original provision freeing defendants from having to register at all upon a showing of good cause.²⁵ In rejecting a constitutional challenge to the amendments, the U.S. Court of Appeals for the Second Circuit noted that “it remains the case that ‘the only affirmative dissemination that can be conducted by the state is to entities with vulnerable populations, and not to neighbors, employers, landlords, or news agencies; even then, law enforcement officials may not reveal a level-one offender’s exact address.’”²⁶ It held that the extension of the registration period was a reasonable recalibration “of registration burdens to risk classification.”²⁷ And, “[a]lthough the statute permits law enforcement officers to provide level-one registrant information to those working with vulnerable populations, that is a far cry from posting the information

on the Internet for all to see—a practice that the Supreme Court held was nonpunitive in *Smith*.²⁸

Megan's Laws continue to be criticized as ineffective products of political pandering.²⁹ But in enacting its Megan's Law, New York insisted on including careful protections for the rights of these convicted criminals, in the face of outspoken elements of the public for whom any expression of concern for the rights of these individuals, perhaps the most despised of all criminals, was tantamount to heresy.

Not all states were as concerned. Some did not make notification proportionate to dangerousness—even, unlike New Jersey, after court review—and made no effort to protect even the least dangerous registered offenders against widespread notoriety. The Supreme Court nevertheless upheld these statutes against constitutional challenges.³⁰ New York, however, took pains to honor its own better vision of constitutional balance.

Environmental Conservation—"Forever Wild"

New York, in the face of its fervent association with commerce, has nevertheless long understood that human well-being requires access to natural beauty. Despite powerful economic pressures to the contrary, New York continues to honor the "forever wild" provisions by which its State Constitution was first amended in 1895, with the voters adopting the proposal of the State constitutional convention of 1894:³¹ "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."³² This preeminently includes the Adirondack Forest Preserve, "the largest publicly protected area in the contiguous United States, greater in size than Yellowstone, Everglades, Glacier, and Grand Canyon National Park combined."³³ Adirondack Park covers six-million acres including private lands.³⁴ The Preserve, within the Park, covers 2.6 million acres of state land, under constitutional protection.³⁵

Between the 1890s and the 1950s, New Yorkers fought off efforts by the railroad, lumber, recreation, and energy industries to amend or circumvent "forever wild" in order to destroy parts of the Preserve for their benefit.³⁶ But more than 135,000 people live within the Park boundaries and need to earn a living. With a variety of zoning classifications, permitting recreational use at various levels of intensity, the Park reflects a model of the kind of economic development that coexists with environmental protection.³⁷

Recent decades have seen renewed commitment to the principles of environmental sustainability that have characterized New York's treatment of the Adirondacks. In 2004 Governor George Pataki signed a deal with the International Paper company to bring more than 250,000 additional acres of land into the Adirondack Forest Preserve under the protection of the State Constitution,

for a total of about 780,000 new acres under such protection in his tenure as governor since 1999.³⁸ To protect it against development, in 2007, the Nature Conservancy purchased the last large tract of land adjacent to the Park, 161,000 acres, from Finch Pruyn and Company, with the understanding that New York State would buy the land, to add it to the Adirondack Preserve, when funding became available.³⁹ That second step is well under way: in 2012, New York bought 69,000 acres of the land; in 2013, it bought another 9,300 acres,⁴⁰ and in 2014, it plans to purchase 8,451 acres more.⁴¹

To understand the significance of New York's leadership in this regard, one must merely contemplate the fact that Adirondack Park includes "ninety percent of 'all wilderness east of the Mississippi and north of the Mason Dixon line.'"⁴² In this regard, New York remains a model for the country and for the world.

Substantive and Procedural Rights⁴³

Beyond "forever wild," the New York State Constitution and decisions in recent decades by our State courts interpreting it guarantee substantive and procedural rights to New Yorkers that reach beyond those offered by the federal Constitution and the constitutions of most other states.

In 1996, Congress enacted legislation excluding from certain Medicaid and other federal benefits aliens who live in the United States legally but are not permanent residents ("green card" holders), in an effort to discourage immigration by those seeking such benefits. In 1997, New York enacted parallel legislation reflecting federal policy, so that state-funded Medicaid would also then become unavailable to such aliens, with some exceptions.

The New York State Constitution says, "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."⁴⁴ In 2001, New York's highest court said, "As this provision demonstrates, care for the needy is not a matter of 'legislative grace'; it is a constitutional mandate."⁴⁵ The court acknowledged that the State Constitution gives the legislature much leeway in deciding who is needy and how to allocate benefits among the needy. It ruled, however, that when, as here, it is unmistakably clear that the State has classified those otherwise eligible for Medicaid assistance as needy, it cannot then refuse aid to such persons.⁴⁶ Notwithstanding that the federal law allowed such an action by a state, the court held that New York's law also violates the equal protection provisions of the federal constitution, because it would have denied equal protection with other non-citizens within New York State.⁴⁷ While the legislature merely acted to extend federal policy, New York's highest court insisted that the State must continue to remain true to its higher standards of compassion.

New York protects more freedom of expression than does the federal government. The New York Constitution provides as follows:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.⁴⁸

A medical journal published a letter accusing a company of planning research which would abuse and endanger chimpanzees.⁴⁹ The journal had first sent a copy of the letter to the company, asking for comments or refutations, which the company did not provide, and did not publish the letter until almost a year later.⁵⁰ The New York Court of Appeals had dismissed the libel action by the company, but on appeal, the United States Supreme Court remanded it back to the Court of Appeals, instructing the state court to reconsider it in light of a Supreme Court decision⁵¹ limiting free speech protection for statements of opinion.⁵²

But the New York Court of Appeals noted the following:

[T]he “protection afforded by the guarantees of free speech and press in the New York Constitution is often broader than the minimum required by” the Federal Constitution.

...

... [T]his state has its own exceptional history and rich tradition. While we look to the unique New York State constitutional text and history, our analysis is also informed by the common law of this State.

...

We therefore proceed to resolve this case independently as a matter of State law.⁵³

And the Court did so, awarding summary judgment to the medical journal⁵⁴ and advancing the protection of free expression.

The New York State Constitution says:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.⁵⁵

While the Fourth Amendment to the federal Constitution provides protection “against unreasonable searches and seizures,” the New York Court of Appeals said “we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure.”⁵⁶ Data from a global positioning system (GPS) secretly stuck inside a criminal defendant’s car bumper by an investigator for the State Police provided persuasive evidence that he had committed the burglary of which he was accused.⁵⁷ No warrant had been issued authorizing the placement of the GPS.⁵⁸ The defendant therefore sought exclusion of this evidence on constitutional grounds, but the court at trial allowed it in.⁵⁹ In 2009, New York’s Court of Appeals ruled that it should have been excluded and overturned the criminal conviction of the defendant.⁶⁰ One of the three dissenting Court of Appeals judges noted “a substantially identical case”⁶¹ when the federal Court of Appeals for the Seventh Circuit refused to hold such a search unconstitutional,⁶² and all three thought Supreme Court precedents supported the position of the Seventh Circuit. The majority thought Supreme Court precedents supported the opposite conclusion but “acknowledge[d] that the determinative issue remains open as a matter of federal constitutional law.”⁶³ They rested their conclusion on New York law,⁶⁴ again extending New York’s tradition of protecting civil liberties.

Gun Control

Most Americans—even most New Yorkers—might tend to underestimate the political courage reflected by the enactment of the NY SAFE Act, the New York Secure Ammunition and Firearms Enforcement Act, in 2013. The Act categorized as assault weapons, and banned or sharply restricted the sale of many of, what used to be considered semi-automatic weapons. It banned any magazines that hold more than ten rounds of ammunition. It required record-keeping and registration for ammunition

sales. Somewhat less controversially, it increased penalties for a variety of firearms offenses, and it included various other provisions.⁶⁵

At a time, between 2009 and 2012, when many states were enacting laws reducing restrictions on firearms,⁶⁶ New York went the other way. While most New Yorkers support gun control, the special politics of this issue has always made statewide initiatives far more difficult to implement than urban efforts, such as the mostly unsuccessful lawsuits launched by many cities against gun manufacturers around the turn of the last century. That is, every state, including New York, has rural areas; New York's are quite extensive. While the National Rifle Association (NRA) has very little influence in New York City, it has many fervent adherents in the rural parts of the State. City residents may prefer gun control, but most of them will consider it merely as one issue among many in weighing their support for an individual politician. Opposing an NRA-supported position on an issue, however, will earn a politician the undying enmity of NRA members, who not only will vote against the politician, but may well campaign tirelessly for an NRA-supported opponent at the next available opportunity. Thus, after signing the new gun control bill into law in January 2013, when the Siena poll reported his favorable ratings statewide at 71 percent, Governor Andrew Cuomo lost four, three, and two percentage points each succeeding month, while his unfavorable ratings increased by the same nine points over the three months.⁶⁷ Upstate voters, willing to re-elect him before the signing with a 57 percent majority, then registered their unwillingness by a 53 percent majority.⁶⁸

Same-Sex Marriage

Similarly, while it took little political courage for most downstate New Yorkers to vote for same-sex marriage in 2011, the Republican leadership of the State Senate needed to rely on its conservative upstate base of support and therefore risked losing its partisan majority in that body merely by bringing the issue to a vote that year.⁶⁹ The Catholic Conference, the voice of New York's bishops, continued to oppose the legislation.⁷⁰ At the time, same-sex marriage had been legalized in only five other states, and enactment of the New York legislation "followed a daunting run of defeats in other states where voters barred same-sex marriage by legislative action, constitutional amendment, or referendum."⁷¹ The Republicans did indeed lose their majority in the New York State Senate the following year, clinging to power only by entering into a leadership agreement with a breakaway faction of Democratic state senators. One long-time Republican state senator, James Alesi, who had previously served for sixteen years, faced such strong opposition because of his vote that he decided not to run for re-election. Another, Roy McDonald, who had served for four years, lost the Republican nomination for re-election, and a third, Steve Saland, who had served for 22 years, lost the Conservative party endorsement for re-election, barely won his

Republican party nomination, and lost the general election to a Democrat.⁷² The last remaining Republican of the four who had voted to legalize same-sex marriage, Mark Grisanti, lost the Republican nomination in a primary in 2014.⁷³

Conclusion

In April 2014, an editorial in *The New York Times* praised Washington State for enacting a statute earlier in the year empowering authorities to order the seizure of guns owned by perpetrators of domestic violence.⁷⁴ New York had enacted a comparable statute in 1993.⁷⁵ The *Times* had not seen fit then, or since, to encourage or recognize New York's effort—or, for that matter, several of the efforts described above. Perhaps critics hold New York to a higher standard, so that progressive law and policy in this State is simply expected of us. If so, they should at least acknowledge as much.

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Pumping Oxygen into the Room

By Jonathan E. Gradess and Shari Silberstein

Introduction

On June 24, 2004 the New York State Court of Appeals ruled in *People v. LaValle* that the death penalty as then configured in New York was unconstitutional.¹ A legislative rejection of the death penalty followed, making New York the first state in the modern era of capital punishment to do away with its death penalty. This made New York a test case for policymakers, researchers, and others to observe the effects of ending the death penalty. Would crime rates soar? Would prosecutors find themselves unable to adequately do their jobs? Would life without parole absorb the wasted costs—both time and money—previously sunk into the death penalty? These assertions and others had been made by death penalty proponents for decades, in every state that was debating the future of its death penalty. New York's experience—and that of the five other states that since followed—proved those fears wrong. The sky did not fall. Social institutions did not crumble. Most encouraging, however, was that the end of the death penalty created space for genuine collaboration among previously entrenched adversaries within the criminal justice system. In the words of one prosecutor, the death penalty sucked all the air out of the room. With its demise came opportunities to replace this failed policy with better ones, from holistic and preventative responses to crime in New York to increased funding for victims' services in other states that followed New York's post-abolition example.

Background: The Death Penalty's Long "Off-Ramp"

New York has had a long and winding, some might say tortured, relationship with the death penalty. It was the last state to reinstate the death penalty in the post-*Gregg*² era, doing so in 1995, nearly 20 years after the U.S. Supreme Court began allowing it again. It was also the first state to abandon it, just 10 years later, making New York home to the shortest death penalty experiment in the modern era.

But New York's ambivalence with capital punishment began centuries earlier. In the middle of the 19th century an Assemblyman from Brooklyn ran for and won his seat solely on the issue of abolishing the death penalty³ and almost succeeded. Yet New York became a national leader in executions (beating out even Texas in the pre-*Gregg* era), carrying out 606 electrocutions between 1891 and 1963.⁴ In 1965, sentiment swung back the other way again



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when the Bartlett Commission called for abolition of the death penalty.⁵ A compromise law for a limited death penalty was passed in 1967. That law was struck down on constraint of *Furman v. Georgia*⁶ in *People v. Fitzpatrick*,⁷ so in 1974, the next year, the Legislature passed yet another limited death penalty statute, this time providing mandatory capital punishment for those who kill police officers or correctional officers, and for those sentenced to life in prison who kill while incarcerated.⁸ A 1977 Court of Appeals decision in *People v. Davis*⁹ effectively eliminated the first two categories, leaving the 1974 death penalty in place only for murder committed in prison by someone serving a life sentence.

Then, an annual legislative/gubernatorial dance began in New York. The legislature, spurred on by two pro-death penalty legislators, passed a death penalty reinstatement bill every year.¹⁰ Every year, the sitting governor vetoed the bill.¹¹ This pageant continued for 17 years, punctuated only briefly in 1984 by *People v. Smith*, which struck the third and only remaining provision of the 1974 death penalty law.¹²

The growing sentiment against the death penalty among lawmakers was sheltered during all these years by gubernatorial valor. The governor's *inevitable veto* allowed politically vulnerable legislators to mask their ambivalence about the policy, knowing that their vote for it would not lead to its actual reinstatement. Even in this environment, New York twice came close to a genuine threat of reinstatement during this period, in 1978 and in 1989. Both times saw the pro-death penalty vote creep high enough that it almost overrode the governor's veto.¹³

This death penalty cat and mouse game between governor and legislature continued until 1994, when George Pataki ran for Governor, campaigning almost exclusively on the death penalty. He defeated 12-year incumbent Mario Cuomo and came to Albany having "reserved" Chapter 1 of the Laws of 1995 for the capital punishment statute for which he had so vigorously campaigned.

In late 1994 a blue-ribbon committee called New Yorkers for Fairness in Capital Punishment came together to shape the best of what was by then an inevitable death penalty. The group included members who both supported and opposed the death penalty; all agreed on basic minimum standards and principles of fairness in how a death penalty process must be carried out. They asserted



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eleven such principles and were responsible for barring the death penalty for the intellectually disabled, for creating a Capital Defender Office, for a proportionality review process, and for racial justice and other critical due process protections.¹⁴

Interestingly, the group also flagged as unconstitutional the jury instruction that would eventually be the statute's demise in *LaValle*, calling it "irrational and coercively skewed in the direction of death sentences."¹⁵ Neither the Governor nor the legislature paused over the group's bill memo or over much else for that matter. After a brief period of drafting and negotiation, the death penalty reinstatement bill passed in March and took effect on September 1, 1995.¹⁶

When the Court of Appeals, nine years later, ruled in *People v. LaValle*¹⁷ that the deadlock jury provision of the statute was unconstitutional, it made life imprisonment without parole the maximum punishment for first-degree murder. The Governor, Senate Majority Leader, and Assembly Speaker all pledged that a legislative fix would be quick, easy, and forthcoming,¹⁸ but that did not happen.

Popular and legislative opinion had reversed itself on the death penalty, driven in large measure by the drumbeat of evidence from around the country that the system was irreparably broken. From the parade of death row exonerations in Illinois to studies of racial disparities and the death penalty's high cost over life imprisonment, it had become clear to New Yorkers that capital punishment generated little return for the enormous amount of resources, attention, and risk of mistake that it carried.¹⁹

Indeed, this futility was a defining feature in the death penalty debate during the ten months that the question was before the legislature. Between 1995 when the death penalty began and 2004 when it ended there were 864 cases investigated as capital by district attorneys in which death was precluded for 786 defendants.²⁰ New York, for all its fanfare, demonstrated the inevitable national pattern of death penalty implementation: high cost with low return, loud hurrahs at death penalty reinstatement, and stifled ambivalence actually using it.

New York spent an inordinate amount of money on what in the end were only 58 death noticed cases and far fewer death sentences—seven total. All those cases were appealed to the Court of Appeals; none were sustained.²¹ New York spent a minimum of \$24 million per case²² to achieve what in the end were very costly life without parole sentences. The question hung heavily in the pre-abolition air: had there not been a better way all along?

During the summer of 2004 the Assembly Majority Conference made clear that it wanted no action taken to fix the now suspended death penalty. That fall the Speaker of the Assembly called for hearings, which were held during the winter of 2004-2005. Although only two were originally scheduled, it took five full days of testimony to accommodate the crowd of witnesses.²³ One hundred

seventy (170) witnesses testified; virtually all condemned the death penalty as policy.²⁴

The issue finally came to a vote in April 2005. The New York State Assembly Codes Committee handily rejected legislation to repair the broken jury instruction, killing the bill and effectively placing New York among the other twelve states without the death penalty. The issue came back before the courts a final time in 2007, after which death row was cleared and dismantled, and New York's status as an abolitionist state solidified. When the dust settled, New York's death penalty was laid to rest by a combination of judicial and legislative initiative.²⁵

Impact of Abolition: The Sky Is Still There

The authors have attended and been intimately exposed to the rhetorical debate fostered by proponents of the death penalty in New York and other states. Although the arguments vary slightly from place to place, the primary argument usually highlights one or more emblematic crimes that "demand" the death penalty to make the broader case that abolition will bring unbridled murder and mayhem to the streets of their state. Corollaries to this prediction include the myth that abolition will drive an increase in the murders of law enforcement, and that prosecutors will be unable to secure maximum sentences without the threat of the death penalty.²⁶

The 1995 reinstatement of the death penalty in New York State was built in part on this false premise, namely that without the death penalty, crime in New York State would continue to escalate.

Laying to rest the tired deterrence debate, the National Research Council of the National Academies conducted a review of more than three decades of deterrence research and concluded in 2012 that studies claiming a deterrent effect on murder rates from the death penalty are fundamentally flawed and should not be used to inform judgments about the effect of the death penalty on homicide.²⁷

New York's real world experience, as well as that of the other states that have since ended the death penalty, confirms the research. None of those states has seen a spike in murders since abolition, and many have seen the crime rates continue on the same downward trajectory that began prior to abolition.

New York's violent crime rate reached a twenty-five year high in 1990 (1180.9 per 100,000—see table below),

Violent Crime Rate per 100,000						
	1990	1994	1995	2004	2007	2012
New York	1180.9	965.6	841.9	440.4	414.4	406.8
National	758.2 (1991)	713.6	684.5	463.2	471.8	386.9

Source: Uniform Crime Reporting Statistics – UCR Data Online

when New York did not have a death penalty. Violent crime, including murder and non-negligent manslaughter, began declining in the four years that followed, while New York continued to be without a death penalty. By the time George Pataki was elected in 1994, the violent crime rate had declined by almost 20% (965.6 per 100,000), still with no death penalty in the state to account for this drop. When the death penalty was reinstated in 1995, the rate had declined further (841.9 per 100,000). This post-1990 downward trend in New York mirrored national statistics where the violent crime rate peaked in 1991 (758.2 per 100,000) before beginning a downward trend that reached 684.5 per 100,000 in 1995. By 2012, after New York had been without a death penalty for eight years, violent crime was less than one-half of its 1995 rate and the national average was down 42%. In other words, the presence or absence of the death penalty had no correlation to the crime rate.

The data around law enforcement murder shows the same thing. The killing of a police officer in the line of duty is a tragedy whenever it occurs. That tragedy is compounded by a false belief that the existence or non-existence of a death penalty statute is a defining factor in these deaths, because such rhetoric prevents the implementation of real world solutions that would actually save officers' lives: better training; more staffing; and protective equipment that would cost a fraction of the cost of a death penalty case but which often goes unpurchased due to tight budgets. Indeed, in the nine years during which New York had the death penalty and the ten years since it has been eliminated, New York police officer deaths by gunfire have remained, on average and unfortunately, consistent.²⁸

These experiences are not unique to New York. New Jersey abolished the death penalty in 2007.²⁹ A year later, the New Jersey *Star-Ledger* conducted a review of prosecutors to assess the impact of abolition on whether or not it hindered their ability to prosecute cases. They found the following: "A year later, prosecutors and defense lawyers agree the demise of the death penalty has had no discernable impact on the way would-be capital cases are prosecuted in New Jersey." One prosecutor was quoted saying, "We have not viewed [abolition] as an impediment in the disposition of murder cases," and another said that abolition had not hindered prosecutors in pursuing tough sentences.³⁰

Looking at the death penalty debate in New York between 1974 and 1994, it is now clear that it represented twenty years of ill-informed rhetoric. The promised dangers that would arise without a death penalty never materialized. Neither did the crime-free New York that death penalty proponents promised capital punishment would bring. In the wake of *LaValle* and *Taylor*, the challenge is and has been to find a better, less costly, smarter, more effective way to respond to and reduce violence. This response, which has largely been limited to courtrooms and

legal sentences, must be more comprehensive—providing crime survivors with the resources and assistance they need to address the trauma and rebuild their lives, engaging communities in programs that prevent crime before it occurs, instead of after it is too late, and strengthening justice models that can hold people accountable for their harm in ways that are constructive rather than destructive.³¹ Fortunately, abolition has opened doors to implementing some of these approaches.

Impact of Abolition: New Opportunities

In the aftermath of the death penalty, first in New York, and then in the states that followed in its path,³² the authors of this report have been part of a national and state dialogue about the value of the moment, thinking through how best to redirect the wasteful resources long spent on futile efforts to execute.

In the wake of abolition in New York and then New Jersey a few years later, David Kaczynski, then Executive Director of New Yorkers for Alternatives to the Death Penalty (NYADP), wrote an agenda-setting piece for the national abolition movement:

Since 1995, more than \$200 million in tax dollars was wasted on New York's death penalty system. But we should not allow ourselves to forget what the 1995 law hoped to accomplish—a reduction in crime and violence. Even as we learn that the death penalty is not the answer to our crime problem, it goes without saying that abolishing the death penalty is not the answer either. If lawmakers were once willing to invest more than \$20 million a year in an unproven crime-reduction program, they should now be willing to invest at least that much in programs that have demonstrated effectiveness in preventing crime from occurring in the first place.³³

Kaczynski's piece focused on crime prevention, but it was easily extrapolated to other issues. For example, proponents of the death penalty also touted it as a salve to heal the wounds of victims' families. Four decades of the modern death penalty gave us ample evidence that capital punishment was often an obstacle for victims' families rather than a solution,³⁴ but eliminating the obstacle alone was neither going to reverse the negative impact nor resolve the original problem it sought to address.

In other words, New York's elimination of the death penalty sparked a new vision for abolition entirely: more than the absence of the death penalty, it was also the presence of a new paradigm driven by those solutions that were previously stymied by the death penalty's disproportionate pull of money, attention, time, and polarization, such as adequate victims' services and effective crime prevention. This idea became a rallying cry for not

only NYADP, but also for its national partner, Equal Justice USA (EJUSA), and abolition groups in other states.

The most concrete result of this new model was the idea that the savings from repealing the death penalty ought to be reallocated to programs that helped families of murder victims to cope with their loss and rebuild their lives. New Jersey was the first state to repeal the death penalty and attempt such a reallocation. The abolition movement rallied behind a 2009 bill to create a grants program for nonprofits providing traumatic grief counseling to homicide survivors, but the bill was not ultimately enacted.

When Illinois repealed the death penalty in 2011, the legislation signed into law created the Death Penalty Abolition Fund, administered by the Illinois Criminal Justice Information Authority (ICJIA) and to be funded with money previously earmarked for death penalty prosecutions.³⁵ This Fund would be used for increased training of homicide detectives and enhanced services for families of homicide victims.³⁶ In April 2013, the Fund requested proposals for comprehensive services to victims' families.³⁷ In FY14, the fund awarded over \$1.9 million for such programs over the next four years.³⁸

Maryland provides the most public example of the reallocation of death penalty costs to victims' family services. The 2013 bill that repealed the death penalty in Maryland included a provision for the reallocation, similar to the Illinois bill. The provision was stripped out of the repeal bill before it was passed. However, death penalty repeal advocates led by EJUSA and Maryland Citizens Against State Executions returned to Annapolis in 2014, building a coalition with crime victims' advocates, including both victims who had supported the repeal effort and those who had not. Together, the coalition successfully lobbied for a \$500,000 earmark in the state budget for programs for families of homicide survivors, as well as companion legislation that passed unanimously to provide consideration of future support. Family members of homicide victims are a particularly underserved population of crime survivors, and Maryland may be the first state in the country to provide them a line item in the statewide budget.³⁹ Throughout the testimony and other public debate on the budget and the bill, it was repeatedly noted that the source of the new funding was repeal of the death penalty the year before.

In addition to the reallocation of resources, campaigns to end the death penalty also provided opportunities for broader education about the flaws in the larger criminal justice system. Former Illinois Governor George Ryan explained that discovering the number of wrongful convictions present in death penalty cases opened his eyes to those risks in all cases. If these kinds of mistakes are happening in the cases where everyone is paying attention, he asked, what is happening in the lower level cases that aren't in the spotlight?⁴⁰ In New Jersey, the champion of the death penalty repeal bill went on to introduce other

criminal justice reforms in subsequent years. His experience learning about the death penalty played a significant role.

In New York, similar justice reforms are also moving forward. The political price of Governor Mario Cuomo's strong moral stand on the death penalty is often said to have forced the creation of a prison empire. While this is simplistic, it bears a substantial grain of truth. Significantly at present his son, Governor Andrew Cuomo, is dismantling some of those same institutions. Joint groups of prosecution and defense on discovery and sentencing are working. The Rockefeller drug law has been reformed. A new Office of Indigent Legal Services designed to improve the representation of the poor has been created. These reforms would have been far more difficult to implement during the reign of the death penalty in New York given both the heightened adversarial tension that capital punishment silently imposes and the practical reality of its high cost.

The New Paradigm in New York

At the heart of the paradigm undergirding these post-abolition efforts was the basic principle that an effective justice system needs to work for all of the impacted parties, rather than continue as a zero-sum game that pits the interests of one party against another. To this end, it was essential to foster dialogue between diverse parties to find common ground. With a spirit of authentic collaboration and dialogue to guide the discussions, a set of shared values emerged among all affected parties for preventing crime, helping victims of crime to heal and rebuild, and restoring communities afflicted by violence to peace and health. To build this new paradigm for criminal justice it was necessary to unite those most affected by violence around common ground solutions that addressed their real and immediate needs, reduce the likelihood of violence, and benefit all involved.

NYADP began this pursuit by looking at former "adversaries" as colleagues, holding stakeholder meetings across New York that were co-facilitated by EJUSA. The group sessions brought together crime survivors and their advocates, people who were formerly incarcerated and their advocates, district attorneys and corrections officials, defense attorneys, restorative justice practitioners, and mental health advocates. Discussions continued individually beyond the local listening sessions, including through a Family and Friends of Homicide Victims (FFHV) group led by Marie Verzulli, NYADP's victim and survivor advocate.⁴¹

It should be noted that everyone involved was (and is) saddled with the contemporary model of adversarial criminal justice. They faced returning to their offices and their jobs when the talks finished. There were flashpoints and some disagreement, and a healthy concern for threats to budgets and existing authority. But what emerged from the dialogue was a shared belief held by those enmeshed

in our criminal justice system that much about the current system is fundamentally flawed. Among the beliefs shared by a majority was that:

- The death penalty is illusory and wasteful in practice (even among those who supported it theoretically) and its resources could be better deployed elsewhere;
- Crime victims and survivors need a voice and funded, robust, trauma-informed healing services;
- Community-based violence prevention is key to transforming the system;
- Proactive, early grassroots responses to violence are a more effective deterrent than anything currently provided by our criminal justice system;
- The criminal justice system has grown to a bloated bureaucracy frequently incapable of meaningful interpersonal intervention;
- Education, job training, substance abuse treatment, and employment have a greater impact on public safety than incarceration and punitive sanctions.

What was remarkable about these discussions with such a diverse group was that they were led by a group previously focused solely on ending New York's death penalty. Yet with the death penalty off the table and with NYADP's primary commitment to violence prevention, safety, and healing, everyone was able to talk about the big picture without interference. The death penalty so often acts as a lightning rod, entrenching each person in his or her emotional or political position in favor or against. People remarked that the absence of capital punishment so changed the nature of discussions that "it was like pumping oxygen into a big room."⁴²

In the years that followed these initial dialogue sessions, NYADP focused its work in the Capital District of New York to partner with nascent and longstanding grassroots organizations and leaders to reduce violence, expand opportunities for healing and trauma-informed care, and build healthy communities.

This organizing brought numerous results. In 2009, New York implemented the \$4 million Operation Snug (GUNS spelled backwards) in 10 cities across New York.⁴³ Based on the successful "CeaseFire Chicago" initiative, a model which reduced shootings in target areas by between 16-35 percent, the program deploys formerly incarcerated people to interdict violence at the street level by preventing revenge killings and stopping violence before it starts. Neighborhood residents, religious leaders and law enforcement work together with skilled, grassroots violence interrupters to change behaviors.⁴⁴ Originally established with programs in Albany, Buffalo, Niagara Falls, Rochester, Syracuse, Yonkers, Mt. Vernon and Manhattan, Queens and Brooklyn in New York City, the program

continues, and it promises greater potential for reducing violence than capital punishment ever did.⁴⁵

In Schenectady, NYADP co-chaired the Community Empowerment Partnership, a broad coalition to address community violence (sparked by the suicide of four high school girls of color over a three-month period).⁴⁶ The Partnership held a series of widely attended meetings and events.⁴⁷ One pinnacle event was a public lecture featuring Syracuse Police Chief Frank Fowler, who presented his community-based Trauma Response Team to 130 community members and the police chiefs of Schenectady, Albany, and Troy. The lecture inspired Schenectady District Attorney Bob Carney to design a program for teen-aged males at high risk of gang involvement, which was funded and launched as the Schenectady Anti-Violence and Empowerment Program (SAVE). Although no longer operating, the community and the district attorney's office maintain an underlying commitment to trauma-informed responses to violence. In fact, NYADP is working hand-in-hand with the Schenectady District Attorney and the Albany Police Department to carry out Project Safe Neighborhoods as part of the Give Program (Gun Involved Violence Elimination) which calls on the DA and local police to work with community groups and formerly incarcerated people to hold forums with parolees to introduce them to available services, to point out potential sanctions, and to build relationships with successfully reintegrated formerly incarcerated people to reduce recidivism.

The Partnership inspired the NYADP-run program, *Limits of Loyalty*, an educational panel that brings together a diverse group of people impacted by the criminal justice system on all sides (law enforcement, crime survivors, former offenders, and their families).⁴⁸ The panel exposes high and middle school children to a frank discussion of what personal responsibility is, how we connect with others, and how our life decisions can have a ripple effect on our family, friends, neighbors, community and eventually the world.⁴⁹ The panel includes people with compelling personal stories as well as those with institutional responsibility for keeping community members safe.⁵⁰ Designed to stimulate students to think about the moral dimensions of bystander behavior, the presentation begs questions from the audience: "When does loyalty to my own values trump loyalty to my friend?" "What is my responsibility to act or to speak up when I witness other people being hurt?" "What is the responsibility of all—including community members and those in authority—to build a community based on respect and trust?" In making itself accessible to young people, many of whom are abused, bullied, and broken, the clear message that we must save and love one another, put down guns and pick up personal courage, give a voice to the voiceless, and build the peaceful community is heard. After full participation in this program over time, the Schenectady County District Attorney stated it was the best crime prevention program he had seen in his 25 years as a DA.

NYADP's victims support group, called Family and Friends of Homicide Victims (FFHV), continues today to work with community based victims service providers, to promote restorative justice practices, to advocate for programs to assist those left behind after murder, and to strive to help other survivors and each other to regain a sense of safety.⁵¹ FFHV educates numerous agencies in New York State to understand the meaning of victimization and the essential need for procedures, systems, and approaches that are trauma-informed and make paramount the need for healing.⁵² Members may or may not agree on the death penalty in theory, but they believe that our time, money, and resources devoured by the death penalty are better spent on victims services, community-based prevention programs, and investing in our youth.

What ties together all of these initiatives is the remarkable reality that an anti-death penalty organization had so successfully transformed itself to be a go-to resource for police, prosecutors, victims' service providers, and other agencies in how to reduce violence, promote healing, and build healthier communities. The unique vision to tackle those root causes of trauma and hurt that the death penalty was ill-suited to address has made New York a model for what is possible in a post-death penalty world.

Looking Ahead

National organizations have embraced this model of holistic thinking to promote a justice system that is responsive to all impacted parties. Advocacy groups in multiple states have been testing out models for collaborative, common ground criminal justice reform, organizing disparate constituencies like crime survivors, people incarcerated, and their families.⁵³ More will begin to do so in the coming years. In 2012, a group of innovative foundations recognized the potential in this small but growing movement and supported a series of national convenings to bring together advocates from the victims assistance field and the criminal justice reform field to explore the new paradigm and break down the silos in which criminal justice work is performed.⁵⁴ Meeting in Los Angeles, San Francisco, Phoenix, and Philadelphia between 2012 and 2014 the group defined core principles that it shared and examined what a new justice system might look like.⁵⁵ The post-abolition successes in New York and Maryland were both shared as case studies for the larger group discussion. In sum, and paraphrasing the group's work:

We want a justice system that embraces the values of safety, accountability, prevention, justice, and healing. We want proper investment in crime prevention while strengthening community responses to violence. This includes greater investment in services that help crime survivors to address trauma and rebuild their lives, and programs so those who

have committed crimes can be held accountable for the harm done and can rebuild their lives as well. This new intentional vision of safe and healthy communities will address racial discrimination in the justice system, both in terms of who is incarcerated and which crime survivors are served. Such a new paradigm will reflect the diversity of crime survivors, amplifying their diverse voices and perspectives in public policy debates and decisions. Our new justice system will recognize that people are more than the very worst thing that has happened to them and more than the very worst thing they have done to another, and will act in pursuit of healing and making all people whole.⁵⁶

Conclusion

Post-abolition in New York some ideas have been born in the spirit of a new paradigm while others remain inchoate. What is indelibly clear is that constraints presented by the death penalty as a moral impediment to cross agency dialogue have been removed. Adversaries are working collegially in many places throughout New York in violence interruption, crime prevention, community organization, and grassroots victim initiatives. The death penalty is a potent, highly visible symbol, but an ineffective way to resolve violence. With this wrong-headed approach out of the way, more effective responses can be expanded and flourish.

Endnotes

1. *People v. LaValle*, 3 N.Y.3d 88, 99 (2004) (holding New York's death penalty statute unconstitutional and that until the Legislature amends a portion of the statute dealing with instructions to the jury in death penalty cases the death penalty could not be imposed as a punishment).
2. *See Gregg v. Georgia*, 428 U.S. 153 (1976).
3. *See J. O'SULLIVAN, REPORT IN FAVOR OF THE ABOLITION OF THE PUNISHMENT OF DEATH BY LAW* (2d ed. 1974).
4. SCOTT CHRISTIANSON, *CONDEMNED: INSIDE THE SING SING DEATH HOUSE 1* (2000).
5. *See STATE OF N.Y. TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE: SPECIAL REPORT ON CAPITAL PUNISHMENT* (1965).
6. *See Furman v. Georgia*, 408 U.S. 238, 239 (1972) (holding capital punishment as then capriciously practiced in the United States violates the Eighth Amendment).
7. *See People v. Fitzpatrick*, 32 N.Y.2d 499, 503 (1973).
8. *See 1974 N.Y. Laws 367*.
9. *See People v. Davis*, 43 N.Y.2d 17, 23 (1977).
10. Known colloquially as the Volker/Graber bill and named for its Senate and Assembly co-sponsors, the bill was often summarily debated with proponents and opponents asserting, by rote, tired old propositions much like senior professors sometimes do in teaching the same course annually. As the national death penalty expanded, shaped by a new dynamic Eighth Amendment jurisprudence, the New York debate remained fairly predictable

growing increasingly outdated as year in and out a veto was all but assured.

11. Governor Hugh Carey vetoed death penalty bills from 1978-1982 and Governor Mario M. Cuomo vetoed the death penalty from 1983-1994. Emily Hart, *New York Without a Death Penalty: 1976-1995*, N.Y. HISTORY REV. (Aug. 21, 2011), http://nyhrarticles.blogspot.com/2011_08_01_archive.html.
12. The post-*Furman* death penalty statute contained three victims making defendants eligible for death: those who kill police officers or correctional officers in the line of duty and people serving life who commit murder. This latter third prong of the bill, not affected by the 1977 *Davis* decision, was struck down in *People v. Smith*, 63 N.Y.2d 41, 50 (1984), presaging by three years the U.S. Supreme Court's decision in *Sumner v. Shuman*, 483 U.S. 66, 67 (1987) (stating that the mandatory death sentence was unconstitutional as the 8th and 14th amendments require heightened reliability in death-penalty determinations through individualized-sentencing procedures).
13. Although a 1986 conference held at The College of Saint Rose in Albany had spawned efforts to organize a movement against the death penalty in New York, it was not until 1989 that this one vote margin had helped remove public complacency. Because no one genuinely expected a death penalty reinstatement bill to pass, New York had not organized a death penalty abolition movement. The solid work of vote counting had been carried on for years by the stalwart lobbyist for the Civil Liberties Union, Barbara Shack. At that time her group, New Yorkers Against the Death Penalty, became the New York State Coalition to Abolish the Death Penalty. Later incorporated and chaired by Bishop Howard Hubbard, this organization changed its name and again became New Yorkers Against the Death Penalty in the early 1990s. Its first Executive Director, Damaris McGuire, was at the helm when Governor Pataki was elected in November of 1994.
14. See 1995 N.Y. Laws 1.
15. Bill Memorandum in Opposition to S2649 filed by New Yorkers for Fairness in Capital Punishment on February 26, 1995. The longer excerpt states, "The Governor's bill provides a deliberating penalty phase jury with 2 options: death or life imprisonment without parole. The jury must be specifically instructed that if they fail to reach an agreement on these options, the judge will sentence the defendant to a minimum of 20 years to life. This sentencing scheme is irrational and coercively skewed in the direction of death sentences." *Id.*
16. 1995 N.Y. Laws 1.
17. See *People v. LaValle*, 3 N.Y.3d 88, 99 (2004).
18. Andrew Smith & Andrew Metz, *They Can't Be Put to Death*, NEWSDAY, June 25, 2004, at A02.
19. Between 1995 and 2005, 148 people charged with first-degree murder had been incarcerated on sentences of life without parole (LWOP), while seven people had been sentenced to death and none executed. *The Death Penalty in New York State: Hearing Before The New York State Assembly Standing Committees on Codes, Judiciary and Correction*, at 33-34 (2005).
20. CAPITAL DEFENDERS OFFICE, Caseload Summary, http://www.nycdo.org/caseload_041231_answers.pdf (last visited Nov. 12, 2014).
21. In 2002 in *People v. Harris*, 98 N.Y.2d 452, 496-497 (2002), Darrell Harris's life was spared by a decision which upheld his conviction but vacated the sentence under *Hynes v. Tomei*, 92 N.Y.2d 613, 620 (1998). *Hynes* had struck as unconstitutional the plea bargain provisions that permitted those who plea bargained to receive life without parole while subjecting defendants who exercised their right to go to trial with the death penalty. *Hynes*, 92 N.Y.2d at 629-630. A year later in *People v. Cahill*, 2 N.Y.3d 14, 35 (2003), the court reduced Mr. Cahill's conviction to second degree murder on the ground his case lacked the aggravating factor required to make it capital. *Id.* In *People v. Mateo*, 2 N.Y.3d 383, 394 (2004) the Court, again on constraint of *Hynes v. Tomei*, reversed the death sentence, as the offending plea provisions had still been in the statute when his death notice was filed. *Id.* The remaining four death sentences that went to the Court of Appeals were all resolved by the decision in *LaValle*. *LaValle* itself struck down the death penalty due to the "deadlock provision" in jury instructions holding additionally that the provision was not severable from the death penalty statute and would need corrective action by the Legislature. *LaValle*, 3 N.Y.3d at 128-134. Both Robert Schulman and Nicholson McCoy were spared directly by the *LaValle* ruling. *Id.* McCoy was resentenced to life in prison before his case reached the Court and in *Schulman* prosecutors conceded *LaValle* error. See *People v. Shulman*, 6 N.Y.3d 1, 17 (2005). In *People v. Taylor*, 9 N.Y.3d 129, 147-148 (2007) the court in a 4-3 decision ruled the death sentence unconstitutional on the authority of *LaValle*.
22. See Andrew Tilghman, *Costly Price of Capital Punishment*, TIMES UNION, Sept. 21, 2003 at A1. However, the Tilghman estimate was by 2005 extrapolated to \$170 million (\$170 million divided by 7 cases equals \$24 million per case). The Gradess testimony points out limitations of the Times Union estimate suggesting an amount much higher when comprehensively calculated. *The Death Penalty in New York State*, *supra* note 19, at 1-3.
23. *The Death Penalty in New York State*, *supra* note 19, at 1.
24. This paralleled the position of New Yorkers polled on the question. In February 2005, 56 percent of surveyed New York voters preferred a sentence of life in prison (either without parole or with the possibility of parole) over the death penalty for people convicted of murder. Only 34 percent of New Yorkers said they supported the death penalty, a significant drop from the 48 percent who supported it in 1994. Michael Slackman & Majorie Connelly, *Pataki's Rating Declines Sharply in Poll of State*, THE NEW YORK TIMES, February 15, 2005; SIENA RESEARCH INST., SIENA NEW YORK POLL: DEATH PENALTY: NY SPLIT; FAVOR LIFE WITHOUT PAROLE 1 (2005), available at https://www2.siena.edu/uploadedFiles/Home/Parents_and_Community/Community_Page/SRI/SNY_Poll/SNY_05Mar_ALL.pdf. A Siena Institute poll released March 8, 2005 found that statewide death penalty support had dropped again, to 29 percent.
25. Although some observers characterize New York's abolition of the death penalty as "judicially imposed," that analysis misses a critically important ingredient in what actually occurred. Of the three chairs who conducted the legislative death penalty hearings in New York, two had formerly voted in favor of capital punishment. Following the extensive hearings before three separate Assembly committees, when the bill to fix the jury instruction appeared before the Assembly Codes Committee, it was defeated with those two legislators and others voting to kill it. Unlike states where repeal occurs only in the legislature or only by court action, the demise of the death penalty actually took place in New York after two branches of Government gave full and thorough deliberation to its viability and formally rejected it. *The Death Penalty in New York State*, *supra* note 19, at 1-3.
26. In addition to the prime argument that the death penalty will reduce murders, other arguments for the death penalty include that it provides healing and closure to victims' families and the death penalty will save the money spent on long-term incarceration of those convicted. Because the purpose of this paper is to detail the positive effect of death penalty abolition on New York's criminal justice system, we do not here detail the bountiful evidence refuting these stale hypotheses. On the subject of victims, the interested reader is directed on a journey. See generally SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (2010) (explaining a just society seeks to heal the wounds that crime has caused, not simply punish offenders); Hugh McQuaid, *Families of Murder Victims Call on Legislature to Abolish Death Penalty* CT NEWS JUNKIE (Feb. 9, 2011), http://www.ctnewsjunkie.com/archives/entry/families_of_murder_victims_call_on_legislature_to_abolish_death_penalty/ (discussing the death penalty's impact on murder victims'); see *infra* note 34; Murder Victims' Families for Reconciliation, available at <http://www.mvfr.org>, and Murder Victims' Families for Human Rights, available at <http://www.mvfrh.org/>; NEW YORK STATE DEFENDERS ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982)

- (demonstrating that since the first death penalty cost study was performed in New York, a myriad of studies across the nation have made clear that the cost of the death penalty far exceeds the costs of life in prison.); DEATH PENALTY INFORMATION CENTER, COSTS OF THE DEATH PENALTY (2014), *available at* <http://www.deathpenaltyinfo.org/costs-death-penalty>; Johnathan E. Gradess & Andrew L. B. Davies, *The Cost of the Death Penalty: Directions for Future Research*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 397–418 (Charles S. Lanier ed., 2009).
27. See DANIEL NAGIN & JOHN V. PEPPER, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMICS, *DETERRENCE AND THE DEATH PENALTY* (2012).
 28. See OFFICER DOWN MEMORIAL PAGE: REMEMBERING ALL OF THE LAW ENFORCEMENT'S HEROES, *available at* <http://www.odmp.org/search?state=new-york&cause=Gunfire>.
 29. See Larini, Rudy, *A Year Later, State Assesses Justice Without Death Penalty*, THE STAR-LEDGER, December 15, 2008, at 1.
 30. *Id.*
 31. See generally HERMAN, *supra* note 26 (discussing more on crime survivors' needs as a separate component of justice from whatever does or doesn't happen to the offender); TED WACHTEL, RESTORATIVE JUSTICE CONFERENCING: REAL JUSTICE AND THE CONFERENCING HANDBOOK (2010); LES DAVEY, INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE JUSTICE AND PRACTICES, *available at* http://www.iirp.edu/pdf/betho6_davey2.pdf (providing an overview of restorative justice).
 32. New York was the first of six states to come to the new wisdom that the death penalty is out of date, cruel, costly, unfair, racist, and dangerous, draining resources from vital other forms of violence prevention and victim service. The five that followed were New Jersey (2007); New Mexico (2009); Illinois (2011); Connecticut (2012) and Maryland (2013).
 33. David Kaczynski, *Taking the Next Step*, DAILY GAZETTE, Dec. 23, 2007.
 34. Brief for N.J. Crime Victims' Law Ctr. as Amicus Curiae Supporting Defendant-Appellant, at 1, *People v. Taylor*, 9 N.Y.3d 129, 137 (2007). The late great Catherine Abate represented the New Jersey Crime Victims' Law Center as *amicus curiae* in the Court of Appeals in *People v. Taylor* and on behalf of a class of New Jersey families of murder victims who had endured nearly a quarter century of capital punishment. The New Jersey families sought to shed "the light that only hindsight can provide" about how the death penalty harmed surviving families, and wished to spare future crime victims in New York State from the similar pain of prolonged waiting for an illusory punishment. In pertinent part the brief stated:

Please, make no mistake. We hope for abolition not out of any respect or sympathy for killers. We are neither bleeding hearts nor reformers advocating for the accused. We are simply pained pragmatists who have watched the system try to work with the best and most noble intentions and continually fail, prolonging our pain and delaying our healing. *Id.*
 35. See Funds for Victims Families, ILLINOIS COALITION TO ABOLISH THE DEATH PENALTY (2009), <http://us2.forward-to-friend2.com/forward/preview?u=6a0597f83fcd4ae04c1c16ef&id=4a07f47260>.
 36. *Id.*
 37. *Id.*
 38. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY 2014 GRANTS TRACKER (2014), *available at* <http://www.icjia.state.il.us/public/excel/AttachmentA/DPA/DPA%20SFY14.xls>.
 39. We consulted several victims' assistance advocates and they were not aware of any state that has earmarked funds in the state budget specifically for services to family members of homicide victims. Private correspondence with Steve Derene, National Assoc. of VOCA Assistance Admins., Dan Levey, Parents of Murdered Children, Susan Howley, National Center for Victims of Crime (on file with the author).
 40. George Ryan, Speech to the National Coalition to Abolish the Death Penalty, Annual Conference, San Francisco, California (2000).
 41. See NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.nyadp.org/content/family-and-friends-homicide-victims-ffhv-meet-albany> (last visited Nov. 12, 2014).
 42. Nothing here should be misconstrued to suggest that NYADP created a new form of process arising from abolition. Scores of grassroots leaders and groups exist in this country who work across disparate constituencies to find common ground. NYADP's unique contribution has been the observation of how much space was provided for genuine collaboration by the elimination of capital punishment as an obstacle. Its desire to collaborate with others to harness the potential of its absence was a function of a freedom to put its money, what there was of it, where its mouth had always been. NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, TURNING IDEAS INTO ACTION 1 (2010), *available at* <http://www.nyadp.org/content/turning-ideas-action>.
 43. See CURE VIOLENCE NEW YORK, *available at* <http://cureviolence.org/partners/us-partners/snug/>.
 44. GREG BERMAN & EMILY GOLD, CTR. FOR CT. INNOVATION, BUREAU OF JUSTICE ASSISTANCE: U.S. DEP'T OF JUSTICE, FROM CHICAGO TO BROOKLYN: A CASE STUDY IN PROGRAM REPLICATION 1–2 (2011), *available at* <http://cureviolence.org/partners/us-partners/snug/>.
 45. NYADP was involved in both lobbying for this program and in urging its extension to Schenectady as a violence prevention model. See CURE VIOLENCE NEW YORK, *supra* note 43.
 46. See Sara Foss, *Anti-Death Penalty Group Turns Focus to Preventing Violence, Aiding Victims*, DAILY GAZETTE, Nov. 14, 2010.
 47. *Id.*
 48. *Limits of Loyalty*, NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.nyadp.org/content/regional-meetings-initiatives> (last visited Nov. 12, 2014).
 49. *Id.*
 50. *Id.*
 51. *Family and Friends of Homicide Victims*, NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.nyadp.org/content/family-and-friends-homicide-victims>.
 52. See *id.*
 53. BRIDGING THE DIVIDE: A NEW PARADIGM FOR ADDRESSING SAFETY, CRIME, AND VICTIMIZATION 2 (2014), *available at* <http://www.safetyandjustice.org/files/Bridging%20the%20Divide%20-%20Full%20Report.pdf>.
 54. *Id.* at 2, 26.
 55. *Id.* at 29–30.
 56. *Id.* at 3.

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New York's Leadership Role in Drug Law and Criminal Sentencing Reform

By John R. Dunne and Nicholas J. Faso

One measure of a state is whether it is prepared to acknowledge that a prior, much-heralded initiative may ultimately be found to be unjust. In such circumstances, a state which is willing to rescind a popular but unfair initiative may also serve to influence the national debate. One such example is the topic of this article: the long and sometimes timorous odyssey to reform New York's policies for treating and punishing illegal drug abuse. It is difficult to overstate the impact that drugs have had on the American criminal justice system—and New York, in particular, in recent years. The rising tide of drug arrests in the last quarter of the 20th century in New York sent shockwaves through the justice system and the impact of illegal, dangerous drugs, particularly in the current epidemic of heroin use, continues to be felt in the quality of justice delivered by New York's courts. This *Journal* article discusses initiatives developed in our state which subsequently have taken root elsewhere, despite a unique set of challenges to public policy reforms in any field, whether in courts, health, education, or welfare.

In 1973, New York enacted the so-called Rockefeller Drug Laws,¹ intended by then-Governor Nelson Rockefeller to reduce illegal drug use and force dealers from the street through a series of criminal sentencing reforms to deter the pushing of a broad spectrum of hard drugs: reforms mandating severely increased penalties which, in the Governor's own words,² would "forbid acceptance of a plea to a lesser charge, forbid probation, forbid parole and forbid suspension of sentence."³ He further described these severe changes as "measures tough enough to deter hard drug pushers," measures "so strong, so effective, so thoroughly enforced that only the most foolhardy or unreasonable would risk their own freedom by jeopardizing the lives of others," and "measures tough enough to deal with addicts who commit violent crimes."⁴

While these harsh measures bear his name, Governor Rockefeller was not alone responsible for their implementation, nor was he out of the then mainstream of national popular sentiment. He called on the legislature to "have the understanding and the courage" to adopt his proposal⁵ and cited a *New York Times* reporter's comments on his



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plan: "The points [the governor] made required courage as well as honesty. He is surely on the right track but no doubt a lot of people are going to tell him he is wrong before his objectives are accomplished."⁶ Those objectives proved elusive and, after the hard experience of more than thirty years, the overwhelming conclusion was that those measures had failed to achieve their intended goals.⁷ Efforts at reform often produce their own perils; and here, as in other attempts to modify the operation of human institutions, the specter of unintended consequences had become the realities of costly and dangerously overcrowded prisons, a seriously strained court system, and thousands of wasted lives.

In 1973, the national "War on Drugs" and New York's efforts in that regard were still fresh in mind.⁸ During the 1960s, New York State had initiated and funded its own three-pronged strategy: the most extensive methadone maintenance treatment program in the nation as part of the state's general policy to divert low-level users of illegal drugs into drug treatment; an overly ambitious and costly State Narcotics Addiction Control Commission; and criminal penalties mostly against higher-level traffickers.⁹ Despite these initiatives, by the early 1970s it was commonly agreed that this approach had largely failed as a device to limit illegal drug use and traffic. "In 1972, accidental narcotics deaths in New York State were six times what they had been in 1960."¹⁰ In his annual message to the legislature, Governor Rockefeller declared, out of an apparent sense of frustration, that "[w]e have tried every possible approach to stop addiction and to save the addict through education and treatment—hoping that we could rid society of the disease... But let's be frank—let's 'tell it like it is': We have achieved very little permanent rehabilitation—and have found no cure."¹¹ In his testimony at the Joint Hearing before the Senate and Assembly, Governor Rockefeller repeated his message that "we have had ample proof during the past ten years that treatment *alone* cannot stop the spread of hard drugs."¹²

One week later, the Governor sent to the legislature a series of bills in which he had personally been involved in the line-by-line drafting.¹³ The package provided, *inter alia*, that conviction for the sale of any dangerous drugs,



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regardless of weight, carried mandatory life imprisonment, with no opportunity for plea bargaining or possibility of parole, penalties which also applied to anyone possessing one pound or more of narcotics.¹⁴ It also proposed the same penalty for any person, convicted of certain violent crimes, who had knowingly ingested a dangerous drug within 48 hours of commission of the crime.¹⁵ The legislature, which was not expected to act immediately in response, held hearings on the Governor's program, which was roundly "criticized by judges, politicians, district attorneys and civil libertarians."¹⁶ In mid-April, following "discussions with various private and public groups involved in the problem of drug addiction"¹⁷ the Governor agreed to modifications to provide for mandatory minimum sentences, a limited form of plea bargaining and some eligibility for parole.¹⁸

The revised proposal, which was signed into law on May 8, 1971, mandated that any person indicted for sale or possession of heroin must, if convicted, go to prison for an indeterminate period, ranging from one year to life with lifetime parole supervision.¹⁹ Classification for each drug violation was based upon aggregate, not pure, weight standards.

Class A-I was defined to include the highest-level dealers, those who sell one ounce or more, or possess more than two ounces. These dealers were subjected to the most severe penalty: a prison sentence of indefinite length, but with a minimum 15 and 25 years and a lifetime maximum.

Class A-II was defined to include middle-level dealers, those who sell one-eighth of an ounce or more, or possess one or two ounces. These offenders were subjected to: prison sentences of indefinite length, with a minimum term of between six and eight and one-third years, and a lifetime maximum.

Class A-III was defined to include street-level dealers, also referred to as "sharer-pushers," those who sell less than one-eighth of an ounce or possess up to an ounce with the intent to sell. These dealers were made liable to prison sentences of indefinite length, with a minimum term of between one year and eight and one-third years, and a lifetime maximum.²⁰

The severity of these laws "was not limited to the mandatory sentences and restrictions on plea bargaining. Even if a person convicted of a class A drug felony were paroled after serving his minimum sentence, he would remain under the formal surveillance of parole officers for the rest of his life."²¹

Later in the legislative session, another "tough on crime" law made some changes that were not limited to drug offenses; the most important of the changes reinstated mandatory prison terms for persons who were convicted of a felony if they had been previously convicted of a felony—the so-called Second Felony Offender Law, which mandated increased prison sentences for all repeat offenders who had committed any second felony within ten years of a prior felony conviction.²²

The 1973 pattern of criminal regulation remained substantially intact until July 1976, when the stringent limitations on plea bargaining by "street-level" dealers (A-III) were abolished.²³ In 1979, the legislature realized the harshness of certain of the penalty provisions and reduced the mandatory minimum prison terms for first-time offenders.²⁴

The legislation doubled the drug weight threshold for class A-I and A-II felony offenses, reduced the mandatory minimum term for A-II felony offenses from six to three years and allowed plea bargaining for class A-I felony offenses to one class lower.²⁵ In addition, the legislation terminated the class A-III criminal category, thereby eliminating a life sentence for minor sale and possession offenses.²⁶

Governor Hugh L. Carey's approval memorandum summarized the purpose behind the legislation, which was to "more fairly reflect the seriousness of the offense.... The law, which has not been effective in reducing drug traffic in New York, has resulted in injustices in numerous cases and has made courts, prosecutors and jurors reluctant to enforce its provisions. As a result, a consensus has developed among judges, law enforcement personnel and the defense bar for the revision in the drug law provided for in this legislation."²⁷

Despite these reforms, the main criteria for culpability remained the weight of the illegal substance in a person's possession when apprehended, not on the actual role played by the defendant in the narcotics transaction. This resulted in the long-term imprisonment of minor dealers or persons only marginally involved in the drug trade and who are readily replaced.²⁸ While these marginal participants were the most easily arrested for street sales or possession, major traffickers usually escaped serious sanctions.²⁹ Aware of the law's emphasis, drug kingpins were rarely foolish or reckless enough to be caught carrying narcotics,³⁰ whereas a teenage mother, employed as a courier by that same kingpin, was more likely to be picked up on the street and charged with a serious felony for possessing a small amount of drugs.³¹

For the following two decades, the legislature did little to address the effects of the laws, except to authorize and fund the construction and operation of new correctional facilities. Compared to only seven prisons built in the preceding decade, in the 1980s and 90s, the state constructed 30 new prisons, at a cost of \$1.9 billion and

rehabilitated existing facilities at a cost of \$548 million.³² This expense more than tripled the operating budget of the State's correction department, which supervised over 71,000 inmates at seventy-nine facilities.³³

During the 1990s, experimental innovations by courts and prosecutors attempted to leverage the criminal justice system to induce non-violent addicts to enter rigorous treatment in lieu of incarceration. These efforts in fifteen counties across the state took "a variety of forms, including "Drug Treatment Courts," prosecutor-initiated "Drug Treatment Alternative-to-Prison" (DTAP) programs, and other similar initiatives."³⁴ In each case, the common denominator was a requirement that the addicted defendant agree to treatment in exchange for a guilty plea, a less onerous outcome.³⁵ "Once a defendant agreed to such treatment, the criminal justice system became a powerful forum in which to supervise treatment and to motivate an addict to succeed."³⁶

Evidence showed that graduates of prosecutor-based diversion programs were rearrested at a much lower rate than comparable groups of offenders. An independent audit of the Kings County DTAP program, the first in the state, showed that only 23 percent of its graduates were rearrested within three years of graduation, as compared to 47 percent of a comparable group of non-participants who were re-arrested within three years of their release.³⁷

Based on the initial success of these initiatives, in the spring of 1999, New York State Court of Appeals Chief Judge Judith Kaye in her role as Chief Judge of the State, called for bold action.³⁸ The State Office of Court Administration responded with legislative proposals which would provide a statutory framework for a uniform felony diversion process for drug offenders statewide. But the proposal received no action, not even the courtesy of introduced legislation. Undaunted by this slight, in October, 1999 Chief Judge Kaye created the New York State Commission on Drugs and the Courts to consider what the state's courts could do to better address the mounting volume of drug and drug-related filings.³⁹

In June 2000, undeterred by the legislature's inaction, Chief Judge Kaye, by administrative fiat,⁴⁰ directed that drug diversion programs for non-violent drug-addicted defendants be established with drug courts in every county in the state. She predicted a savings to the state of as much as \$500 million by 2004 when the plan was fully implemented.⁴¹ Its success required, however, the cooperation of all 62 county district attorneys, the defense bar and, most important, the moral and financial support of the governor and the legislature for support services and personnel needed to identify eligible individuals and their subsequent intensive supervision.

While the New York leadership continued to nibble around the edges of the drug laws, their unanticipated effects continued to impact both state budgets and minority neighborhoods. In 2004, however, after years of false

starts and widespread community reform efforts—and with the public intervention of hip-hop mogul Russell Simmons who had vigorously pushed for changes⁴²—Governor George Pataki and legislative leaders agreed on a series of relief measures,⁴³ including elimination of life sentences of imprisonment for sales by both major and mid-level narcotics dealers and the doubling of the weight threshold for possession or sale. Additionally, prisoners serving indeterminate life sentences could apply for resentencing under the newly adopted scheme to impose determinate sentences, which could be granted wholly in the court's discretion and without consent of the district attorney. This change was estimated to allow more than 400 inmates serving lengthy sentences to apply to judges for earlier release from prison.⁴⁴ Each category of eligibility for resentencing had its own range. "Three categories of drug offenders [were] created in each class of drug offense...[which were] first felony offender, second felony offender with a prior non-violent felony conviction, and a second felony offender with a prior violent felony conviction."⁴⁵ Additional changes included increased eligibility for a sentenced prisoner to apply to court for admission to prison-based Comprehensive Alcohol and Substance Treatment Programs (CASAT) which could lead to community-based treatment, followed by early supervised release.⁴⁶ An additional provision allowed for lesser penalties for lower classes of felony drug offenses, earlier termination of parole, and access to lifetime probation for offenders who provide material assistance in the prosecution of a drug offense.⁴⁷

This overdue break in the logjam did not satisfy a more ambitious reform agenda. This disappointment was readily understandable in light of the final, negotiated law which made no mention of "drug kingpin" penalties and continued prosecutors' restrictions on judicial sentencing discretion.⁴⁸ However, legislative leaders did concede that more was to be done. Then-Assembly Speaker Sheldon Silver acknowledged that "[i]t isn't everything we wanted, and I think we will continue to press for some of those things, but I think the climate has changed here."⁴⁹ The same theme was echoed by then-Senate Majority Leader Joseph Bruno: "There is more to be done, and we're going to get there."⁵⁰

The following year, the legislature recognized that the change which had made resentencing available to A-I prisoners was not available to A-II prisoners serving the less severe sentences and who, thereby, could actually serve sentences longer than those who had become available for A-I convictions. This clear oversight was corrected and discretionary resentencing was extended to A-II prisoners.⁵¹

Spurred by their partial success, advocates for reform, academics and the media launched an even more intense reform campaign which focused on four main components: restoration of judicial discretion in sentencing; elimination of mandatory prison sentences for the sale of

any amount of narcotics or possession with intent to sell; availability of community-based drug treatment alternatives to incarceration; and retroactive re-sentencing under an equitable system that allows for treatment and rehabilitation.⁵² This agenda, based on a paradigm shift toward a public health policy, was forcefully presented at public hearings conducted by a newly created state Commission on Sentencing Reform which then-Governor Eliot Spitzer had established to focus on the criminal justice system.⁵³ Despite numerous studies and forceful testimony, the commission was unable to produce a final statement on drug law reform before the abrupt resignation of Governor Spitzer in 2008. This led to the ascendancy of Lieutenant Governor David Paterson who, as Senate Minority Leader, had been an avid advocate of drug law reform. It also marked the first time in memory that the state government leadership—governor and leaders of both houses of the legislature—were of the same political party!

Still, despite mixed success of the drug courts, New York criminal courts continued to operate, in the words of one Judge of the state's Court of Appeals, "under the legislative yoke of the Rockefeller drug 'solution' of the 70s."⁵⁴ Finally, in 2009, and in contrast to earlier timid measures, New York adopted the most significant reform package since the Rockefeller drug laws had been enacted.⁵⁵ The 2009 drug law reform (DLR) attempted to fundamentally change drug policy in New York by abandoning the "tough on crime" Rockefeller laws in favor of a public health model.⁵⁶ This approach emphasized treatment and rehabilitation over the Rockefeller laws' lengthy mandatory minimum sentences.

To accomplish its public health goals and reduce recidivism, the DLR implemented significant, structural changes which include: elimination of mandatory minimum sentences, increased eligibility for probation, including access to special treatment at shock incarceration (a type of boot camp prison),⁵⁷ a judicial diversion program,⁵⁸ sealing of records,⁵⁹ and resentencing⁶⁰ of offenders convicted under the old regime. Notably, the new law provided for continued study of its impact.⁶¹ As a result of this requirement, in 2014, the State Division of Criminal Justice Services (DCJS) released a report summarizing the impact of the DLR based on data compiled by the Office of Court Administration, the Office of Alcoholism and Substance Abuse Services, and the Department of Corrections and Community Services, among others.⁶²

The DCJS report suggests that the DLR has had an immediate, substantial impact on New York's criminal justice system by reducing incarceration and recidivism rates.⁶³ Moreover, following New York's passage of the DLR, numerous states have followed suit, enacting similar public health-focused measures intended to reduce incarceration rates, increase judicial discretion, and confront the nation's drug problem at its roots.⁶⁴

Based on data showing that mandatory minimum sentences are ineffective, their elimination is a hallmark

of the DLR. Under the new law, prison terms are no longer mandatory for first-time offenders guilty of class B, C, D, and E drug felonies.⁶⁶ The DLR also eliminates 5 mandatory minimums for second-time class C, D, and E drug felonies. As an alternative to incarceration, the DLR permits courts to impose sentences of probation or drug treatment.⁶⁶

In keeping with its public health model, the DLR expanded the availability of "Willard sentences,"⁶⁷ which are sentences of parole supervision that involve an intensive drug treatment program. The new law gives courts greater discretion to impose Willard sentences on defendants convicted of first-time class B felony drug offenses and class C felony offenses (including second offenders) in addition to the class D and E drug felonies that were eligible under the previous version of the law. Most notable is that consent of the district attorney is no longer required for Willard sentences.

One of the most significant reforms of the DLR is the judicial diversion program, which allows courts to divert defendants with drug addictions to treatment instead of incarceration.⁶⁸ Judicial diversion is available to all class B, C, D, and E drug felonies, including second felony offenders.⁶⁹ Upon successful completion of the treatment program, the court may impose a period of probation or even allow the defendant to withdraw his or her guilty plea and dismiss the indictment.⁷⁰ As with Willard sentences, the DLR no longer requires the district attorney's consent for judicial diversion.

Research shows recidivism is less likely when ex-offenders are supported in their transition back into the community.⁷¹ To mitigate the stigma of a criminal record, which oftentimes prevents ex-offenders from obtaining employment or housing, and to encourage ex-offenders' successful reintegration, the DLR provides for conditional sealing of certain offenders' criminal records but only if an offender successfully completes judicial diversion or other treatment programs, such as a Willard sentence or shock incarceration.

Like the 2004 reform, the DLR also includes a re-sentencing provision, which allows some class B drug offenders serving indeterminate sentences to petition the sentencing judge to be resentenced to a determinate term. It is estimated that 1,500 people were eligible for resentencing at the time the DLR was passed.

As compromise measures, the DLR also created two new crimes: criminal sale of a controlled substance to a child (a class B felony)⁷² and operating as a major trafficker (a class A-1 felony).⁷³ The major trafficker offense applies to the leaders of drug organizations with sales in excess of \$75,000 during a six-month period.⁷⁴ Conviction as a major trafficker carries the only remaining indeterminate sentence: a fifteen to twenty-five year minimum with a maximum life sentence.

Criminal sale of a controlled substance to a child applies to defendants over twenty-one years' old who knowingly sell drugs to a person less than seventeen years old.⁷⁵ A conviction carries a determinate sentence of at least two years or the alternative of probation for twenty-five years.

The effects of the DLR in New York were immediate and significant. By eliminating mandatory minimum sentences, the DLR has resulted in a 40% reduction in commitments to prison for felony drug offenses since 2008.⁷⁶ This reduction includes substantially fewer prison commitments among blacks and Hispanics, with commitments of black defendants down 51% and commitments among Hispanic defendants down 37%.⁷⁷

Tracking these reductions, the number of inmates under DOCCS' custody has also significantly decreased. The total inmate population in New York has declined by over 16,000 since 1996, largely as a result of lower incarceration rates for drug offenders. Indeed, while the number of non-drug offenders has remained consistent, over the same time period, the number of incarcerated drug offenders has decreased by 73%.⁷⁸

Similarly, admissions to drug courts have doubled since 2008.⁷⁹ The increase has been most significant in upstate counties, which may be attributable to a reduction in felony drug arrests.⁸⁰ More importantly, however, drug courts appear to be producing positive outcomes by reducing recidivism. The DCJS study compared drug court participants in 2010 to offenders sentenced to prison in 2008 and found that "drug court participants had significantly lower recidivism rates than similarly situated offenders who were sentenced to prison."⁸¹ Based on these results, the DCJS concluded that "drug court could be a safe and cost-effective option for high-risk offenders facing prison sentences."⁸²

With recidivism reduction being a central goal of the public health model, results such as these are critical measures of the DLR's success and similar reforms in other states. Thus, the initial data suggest that the DLR's public health model is working and validates further departure from the Rockefeller drug laws.⁸³ New York, along with a few other states, has led the charge in reforming antiquated and ineffective drug laws. This leadership is reflected by numerous states' passage of similar measures since 2009.

Reformation of sentencing laws is one of the most prevalent reform measures. For example, in 2010, South Carolina eliminated mandatory minimum sentences for certain first-time offenders.⁸⁴ In 2011, Arkansas, Delaware, and Ohio made similar sentencing reforms, although they reduced, but did not eliminate, mandatory minimums.⁸⁵ Similarly, in 2012, Georgia, Massachusetts, Missouri, and Oklahoma also reduced their mandatory minimums.⁸⁶ In 2013 alone, thirty-five states amended their sentencing or corrections laws.⁸⁷ As discussed below, sentencing reform

has resulted in a nationwide reduction in incarceration rates.

New York is also leading the nation in increasing judicial discretion over drug cases. Following the DLR, South Carolina, Hawaii, Pennsylvania, Georgia, Indiana, and Oregon each passed reforms designed to enhance judges' discretion to depart from minimum sentences and impose sentences of probation in lieu of incarceration.⁸⁸

Overall, the public health model is becoming a national phenomenon. Since 2009, at least fourteen other states have expanded access to drug courts⁸⁹ and four states have allowed for sealing or expunging drug convictions.⁹⁰ Nationally, incarceration rates are also on the decline. This is attributable, in part, to a decrease in incarceration rates for drug offenses. For example, new prison commitments for drug crimes excluding possession are down by 19% between 2006 and 2011.⁹¹ Over the same period, commitments for drug possession have decreased by 27%.⁹² While more data is needed to assess national recidivism rates, these reductions represent significant, positive trends.

New York's drug policy has vastly improved since the Rockefeller drug laws of the 1970s. Through research and education, policy-makers have recognized that mass incarceration is, at best, an ineffective palliative, and at worst, a perpetuation of the underlying problem. While the Rockefeller laws were a misstep, recent reforms, including the DLR, have made New York a national leader in drug policy and reform.

Despite these recent successes, there is still progress to be made. For example, New York continues to lead the nation in arrests for simple marijuana possession.⁹³ This is due, in part, to a provision in the law that turns a violation for possession into a misdemeanor when the drug is displayed in "public view," even as the result of a police officer's request.⁹⁴

In addition, there are waiting periods ranging from weeks to months for access to many treatment providers.⁹⁵ "Recent studies suggest that defendants must be placed into treatment within 30 days and stay a minimum of 90 days in order to successfully combat their addiction."⁹⁶ Compounding this problem, funding for treatment programs has been insufficient to meet demands.⁹⁷ Clearly, in order for the DLR's reforms to succeed, policy-makers must adequately fund treatment programs and other aspects of the criminal justice system. This may require a shifting of priorities, but reduced incarceration and recidivism rates may ultimately pay greater dividends than the DLR's up-front costs. As with many public policy goals, adequate funding may make or break these initiatives.

While there are still improvements to be made, New York's drug policy has evolved significantly and effectively since the Rockefeller Drug Laws of the 1970s. As DCJS's

recent data suggest, the DLR has launched a successful public health solution to fight New York's drug problem at its roots, through treatment, rehabilitation, and reintegration. States across the nation have since followed New York's example. As a national leader in this new approach to drug policy, it is incumbent on the state and its leaders to continue to nurture its policy, dedicate resources to its success, and to self-reflect on how it may continue to be improved.

Endnotes

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4. Rockefeller Testimony at Joint Hearing, *supra* note 2, at 1260.
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6. *Id.* at 1261.
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21. NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 8, at 5.
22. 1973 N.Y. Laws 277.
23. See 1976 N.Y. Laws 480.
24. 1979 N.Y. Laws 410; see also Gov. Hugh L. Carey, Approval Memorandum, 1979 N.Y. Sess. Laws 1799 (McKinney).
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26. 1979 N.Y. Laws 410; see also Gov. Hugh L. Carey, Approval Memorandum, 1979 N.Y. Sess. Laws 1799 (McKinney).
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Evidence-Based Public Safety Management: The Diffusion of Compstat

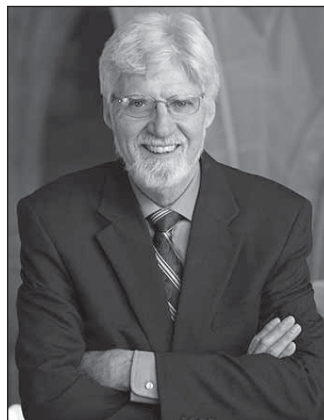
By Dennis C. Smith and William Bratton

This is a brief report on a relatively unstudied aspect of the story of the diffusion of a public management innovation called Compstat: its adoption beyond policing by other public safety agencies. Compstat began¹ in the Police Department of New York City (NYPD) in 1994 and, over the past twenty years, has been widely adopted by many police departments and most of the larger police departments in America. The creation of Compstat in the NYPD and its rapid diffusion to other police agencies is the subject of an extensive body of work, some of it by practitioners who participated in its creation² or its adoption in other cities,³ or by police scholars.⁴ Since Compstat is a management approach that overlays chosen models of public safety production, the literature on the origins of the reform called Compstat as developed by William Bratton in his first term as commissioner of the NYPD includes problem solving policing, community policing, most notably “broken windows policing.”⁵ Tracing the Compstat introduced in New York City by Commissioner Bratton to its true origin would in fact take one back to Sir Robert Peel’s nine principles of policing. All the principles can be found operating in NYPD’s Compstat, but most especially the first and last:

Peelian Principle 1—“*The basic mission for which the police exist is to prevent crime and disorder.*”

Peelian Principle 9—“*The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.*”

Taken together these two principles capture the central distinguishing idea behind Compstat: Mission matters, and mission is not measured fundamentally by the activities that are aimed at achieving it, but by achieving the values specified in the mission. In all the attention to Compstat’s focus on timely measures and the use of those measures to manage NYPD a more fundamental change is often overlooked: the shift in mission from responding to crime to preventing it. In 1988, as the City approached its peak in violent crime, the Mayor’s Management Report, which for more than a decade had been presenting performance data for each City agency, stated the mission of NYPD as follows:



Dennis C. Smith

The Police Department protects lives and property, responds to emergency calls, especially crimes in progress, investigates reported crimes, apprehends violators, and addresses conditions that affect the quality of life in the City. The Department also plays a vital service role in responding promptly to emergencies and disasters; keeping order at public events, demonstrations, and civil disturbances, intervening in family and public disputes; referring people in distress to appropriate social service agencies, and *instructing the public in effective crime prevention* (italics added).⁶



William Bratton

This statement of mission captures clearly a reactive rather than proactive approach to policing, with only the public engaged in prevention of crime, not the police.

By 1993, the expanded statement of mission presented by NYPD in the Mayor’s Management Report begins with the same language as the 1988 report but in the ninth line of twelve, clarifies that it “fights crime both by preventing it, and by aggressively pursuing violators of the law,” but drops “instructing the public in effective crime prevention.”⁷ Preventing crime had been added to the mission but was still not front and central.

New York City’s Compstat: Origin and Diffusion in Policing

Preventing crime became the central focus of policing New York under William Bratton. NYPD under Commissioner Bratton announced in early 1994 a commitment to reduce crime by ten percent, a statement that flew directly in the face of conventional wisdom. Leading police scholars, James Q. Wilson in 1966 and David Bayley in 1994, authoritatively claimed that there is “no known technology” available to police for reducing crime or, as Bayley put it, the idea that the police can reduce crime is a “myth.” Both viewed the only possible role of the police was to respond to crime. Not surprisingly, when NYC crime declined twelve percent in 1994 and 17 percent in

1995 it did not go unnoticed. In January of 1996, *Time Magazine's* cover featured Commissioner Bratton with the celebratory headline, *Finally, We Are Winning the War Against Crime. Here's Why.*⁸

It is reasonable to assume that police leaders all over America, with or without the attention of their political bosses, realized that the achievement in reducing crime in New York would call into question the performance of their respective departments. The dramatic decline of crime in New York, in the face of high and rising crime in other big cities, went far to dispel the myth that the police are powerless to prevent crime. With few if any alternative models of successful policing available, police leaders flocked to New York to examine Compstat.⁹ As a National Institute for Justice-funded study by David Weisburd and his colleagues reported, Compstat was one of the most rapidly adopted public administration reforms in American history.¹⁰ As early as 1999, when a national survey was conducted by Weisburd, et al., 60% of police departments with 500 or more officers claimed that they had implemented a Compstat-type management system.¹¹

The Weisburd, et al. national study recognized that Compstat is a management reform that has a number of moving parts. It identified six features of Compstat and characterized the degree to which these features were adopted as measuring the "dosage," which is a very appropriate tool in an evaluation study. The features included in their measure of dosage were the following:

Did the department:

- Set specific objectives in terms that can be precisely measured?¹²
- Hold regularly scheduled meetings with district commanders to review progress toward objectives?
- Hold middle managers responsible for understanding crime patterns and initiating plans to deal with them?
- Give middle managers control over more resources to accomplish objectives?
- Use data to assess progress toward objectives?
- Develop, modify, or discard problem-solving strategies based on what the data show?

From the existing evidence, both from studies and from reports from officials who have assumed leadership positions in departments that reportedly were using Compstat, the most likely missing element in the dose of the remedy prescribed was holding managers accountable for crime analysis and the development of crime-reduction strategies. As will be seen in our exploration of the adoption of Compstat-like management in other public safety agencies, reluctance of leaders to impose, or resistance within the ranks to the pressure of, accountability often resulted in a less demanding version, or even

termination of Compstat meetings in agencies that had used them.

In the Weisburd, et al. national study of the diffusion of Compstat this dosage measure was not used to ascertain the relationship of the dosage applied to crime and disorder reduction. Its focus instead was on exploring the organizational correlates of adoption (size of department, region, familiarity with the NYPD model, etc.) rather than exploring the *consequences for public safety* of its adoption. Consequently, in the absence of a systematic national study of the relationship between the adoption of Compstat and crime reduction, we are left with a set of case studies.

Before turning to case studies it is worth noting that the rapid diffusion of Compstat did not include most cities in New York State. During the first decade of Compstat in New York City, police departments in many of the other cities in New York State did not adopt Compstat, and in most cases crime in those cities continued to rise. In 2004 Governor Pataki launched "Operation Impact,"¹³ a funding program designed to encourage evidenced based, multiagency and jurisdiction collaboration in crime fighting in the 17 counties with the highest crime. Most of the funding was intended to modernize crime reporting and analysis and to provide public safety officials with up-to-date crime statistics. As late as 2003, many of the agencies had little or no staff trained or equipped to provide up-to-date crime statistics or analysis of that data.

A study completed three years after the State's Operation Impact began found that jurisdictions had added analytic staff and capacity but were not using the data to manage.¹⁴ For a variety of reasons, mostly related to City or departmental politics, the kind of transparency and accountability involved in adopting the elements of Compstat elaborated on by Weisburd and his colleagues were resisted in most upstate departments. There has been some movement in recent years. Schenectady, which was funded by Operation Impact from the outset, only adopted Compstat in 2010, sixteen years after New York City.¹⁵ Syracuse also now has a functioning Compstat system.

The reluctance to adopt Compstat is not the result of less concern about crime in upstate cities. Using data from the Division of Criminal Justice Services, the *Times Union* reported¹⁶ shortly after Compstat was adopted in Schenectady that it was a leader in crime rates in the State:

The data showed that in 2011, Schenectady County had the state's highest rate of index crimes, which cover murders, rapes, robberies, aggravated assaults, burglaries, larcenies and stolen cars.

In Schenectady County, the rate of index crimes per 100,000 residents was 3,509.2. Albany County was second (3,458.1). Rensselaer stood eighth (2,923).

To put that in perspective, all three local counties showed higher crime rates than the Bronx (2,524.9), Brooklyn (2,345.6), Queens (1,779) and Staten Island (1,444.4). Meanwhile, Albany and Schenectady counties displayed higher rates than Manhattan (3,192.6), giving those two counties higher rates than every borough in New York City, which for decades was as infamous for crime as it is famous for Yankee baseball.¹⁷

While crime decline in New York City began in the early 1990s with community policing during the tenures of Commissioners Lee Brown and Raymond Kelly and the adoption of a community policing model, its decline accelerated dramatically with the introduction of Compstat in 1994. Over the succeeding twenty years the City achieved and sustained significantly greater levels of crime decline than the national average.¹⁸

Compstat has been a constant in NYPD since 1994, but it has evolved. A major step in its evolution occurred when Raymond Kelly returned as Police Commissioner in 2003 and introduced “hot spot policing” with a program called Operation Impact. Compstat continued largely as before, but, based on analysis of crimes, small areas within precincts, which sometimes were the locus of 30% or 40% of all the violent crime, were selected as Impact Zones, received concentrated, specialized police deployments, and were carefully monitored. In his book *The City That Became Safe: New York’s Lesson for Urban Crime and Its Control*, criminologist Frank Zimring credited the hot spots policing version of Compstat as being especially effective. Crime consistently declined in New York during through 2010, a twenty-year run, and showed only minor increases through 2013 driven largely by a redefinition of assault. Crime in New York City was down 4.3% in the Fall of 2014, with homicide falling below the historic low of 335 last year. Homicide was down 85% since 1990. This downward trend is in contrast to increases in many other cities.¹⁹

The evolution of Compstat in NYPD continues in the second Bratton administration, with the Deputy Commissioner for Operations, Dermot Shea, who organizes the Compstat meetings,²⁰ using new technologies for data mining and pattern identification to refine even further evidence-based learning about crime patterns and the effectiveness of crime reduction strategies. The administration has introduced the periodic use of crime problems rather than area-based (precinct, impact zone)-focused Compstat sessions, where all officials, regardless of bureau or area of assignment, who have expertise relevant to a selected crime problem are at the podium for the strategy review.

A second major demonstration of Compstat’s efficacy is Los Angeles, where William Bratton served as Chief from 2002 to 2009.²¹ Chief Bratton assumed leadership of

LAPD at a time of rising crime and gang violence, and police scandal, with the department operating under a court-appointed federal monitor. After developing and using “Compstat Plus” in LAPD,²² when Bratton left in 2009, the federal monitor had been removed and Los Angeles had become the second safest big city in America, after New York.

The other major evidence of the effectiveness of Compstat was the pattern of successful crime reduction in cities that imported the New York approach by recruiting NYPD officials to lead their police: Baltimore under Edward Norris, Newark and now Chicago under NYPD veteran Garry McCarthy, White Plains and Indianapolis, led by Frank Straub,²³ Philadelphia and Miami under former NYPD First Deputy Commissioner John Timoney, Ann Arbor, Michigan and Aurora, Colorado under Daniel Oates, Yonkers, New York, led by Ed Hartnett, among others, all recorded significant crime declines under these veterans of NYPD.

The most comprehensive recent assessment of the diffusion of Compstat in American policing is a 2013 Report of the Police Executive Research Forum (PERF), *Compstat: Its Origins, Evolution and Future in Law Enforcement Agencies*. In the Foreword to the report, summing up the findings from a survey of 166 agencies, an executive session of law enforcement officials from all levels of government and police management scholars, and field visits to twenty agencies, the Director of the Bureau of Justice Assistance, Denise O’Donnell, and the Executive Director of PERF, Chuck Wexler, observe: “Compstat has now become the norm in most major police departments.” They assert that “no policing innovation developed by a local agency has been more transformative than Compstat.”²⁴ Although not part of the PERF study, the report claims that the “key principle of Compstat—gathering and analyzing data to produce solutions—is so universal it has been adopted by other government agencies that have no connection to policing.”²⁵ It is to the diffusion of Compstat beyond policing that we now turn.

Compstat in the Criminal Justice System: The Department of Correction in New York City

Perhaps the fastest adoption of NYPD innovation in management occurred in the Department of Corrections and in New York City. The crime wave confronting NYPD in the early 1990s washed over all the other components of the criminal justice system. The five offices of the District Attorneys and the Courts serving the City processed hundreds of thousands of arrests each year, and the City’s Department of Correction housed those arrested. In 1994, the year Compstat began, the police made almost 150,000 felony arrests and almost 200,000 misdemeanor arrests. The ranks of those supervised by Probation officers were also swollen by the crime wave in the City; their numbers approached 100,000 under supervision.

The New York City Department of Correction (DOC), under Commissioner Michael Jacobsen, soon after the success of Compstat at NYPD was observable, adopted a similar approach to managing that agency. At Corrections the name was not Compstat but TEAMS (Total Efficiency Accountability Management System). The Commissioner of DOC, who previously supervised the NYPD and other criminal justice agency budgets as a senior budget official, appreciated the changes in management made possible by Compstat. He believed that the DOC needed to base its actions on accurate and timely information, aggregated at a level that allowed managers to compare the performance of units, and to observe patterns. One example was the recognition that to bring violence under control it was necessary to understand fully the gang structure among the inmate populations in the jail. To do that, DOC had to create a gang intelligence database, which included a careful documentation of the symbols and practices of gangs and an analytical capacity to interpret it. In a clear demonstration of the principle that knowledge is power, this gang intelligence database enables DOC to keep gang members disbursed, to predict possible patterns of gang violence escalation when there is a gang-related incident, and to become an active participant in the anti-gang law enforcement efforts in the community outside the jails.

The TEAMS approach also led to the analysis of reports of contraband confiscated from jail population visitors to spot spikes in dangerous materials brought by visitors into specific jail wards. This became a useful early warning system of escalating tensions in the various DOC facilities.

Using TEAMS, the DOC has reduced violence in the jails. Slashings, one of the most violent offenses, were reduced from about 1,000 per year before TEAMS to an annual average below 50. NYC DOC, which used to have one of the highest violence rates in the country, had one of the lowest by 1997. A comparable level of safety was maintained through most of the twelve years of the Bloomberg administration. In the Bloomberg Administration, DOC Commissioner Martin Horn used TEAMS to manage all aspect of jail operations, not just prisoner safety. It was used to improve the education and health services provided and the physical conditions of jails. Management of overtime benefited from timely intelligence. Before the adoption of TEAMS, overtime was captured in monthly reports. If spikes in overtime are only seen a month after they occur, it is too late to diagnose the cause and, by the end of the month, the money is spent. By tracking overtime daily, spikes could be spotted and solutions sought—and often found—in time to prevent the accumulation of avoidable overtime.²⁶

In a paper describing his department's use of evidence-based management, Martin Horn credits the Compstat approach adopted by DOC with significantly improving jail administration but he also provides a cautionary tale about the need for vigilance and continuous

adaptation.²⁷ By the end of his tenure as commissioner, prisoners and corrections officers found ways around the scheme of safety measurement long in use that allowed an unmeasured form of violence to escape the monitoring and reporting system, which lessened the control of violence and officers' accountability. The weakness of the internal processes were compounded by one of the remaining silos in City government, the gap between operating agencies and the City's Law Department that receives and settles cases involving inmates who claimed that they were victims of the unmeasured violence. The City had no procedure for the Law Department to alert the Department of Correction of an emerging pattern that finally came to light only when a youth in custody died as consequence of a previously untracked form of assault on inmates.²⁸

The Commissioner of Correction who succeeded Horn did not regularly participate in TEAMS sessions as Commissioner Horn and its originator, Michael Jacobson, had done. By the end of the Bloomberg administration TEAMS was no longer relied upon in the management of the jails as it had been for the preceding twenty years. As noted earlier, resistance in the ranks—and reluctance on the part of leadership to demand the level of accountability entailed in regular, systematic Compstat-like review—have been a major reasons for not adopting it in the first instance, or weakening or abandoning it over time.

The DOC is now mired in scandal, with multiple investigations focused on the previous administration's record of controlling violence in progress. The *New York Times* reported in August 2014, "The federal government said on Monday that the New York City Department of Correction had systematically violated the civil rights of male teenagers at Rikers Island by failing to protect them from the rampant use of unnecessary and excessive force by correction officers. The office of Preet Bharara, the United States attorney in Manhattan, released its findings in this 79-page report addressed to Mayor Bill de Blasio and two other senior city officials."²⁹

A recent article in the *New York Times* revealed that part of the problems alleged in the federal prosecutor's report can be traced to a breakdown in the system of management on which TEAMS depends.³⁰ The *Times* headline *Report Found Distorted Data on Jail Fights at Rikers Island* understates the problem that has been discovered. In 2011 new leaders of the juvenile detention facility at Rikers began to report an extraordinary turnaround in troubling youth violence statistics. Over a six-month period, fights among inmates declined 66%, and this achievement resulted in the promotion of the warden and deputy warden on whose watch these improvements were recorded. An internal investigation by Correction Department auditors raised serious questions about the performance reported, but even more specifically faulted the management practices attending their submission for review. Basically, the original internal report, which was not fully

shared with federal prosecutor until discovered by the *Times*, found a fundamental breakdown in the system of evidence-based management in use at Rikers for almost two decades. According to the *Times*, the auditor's report found that

[Warden] Clemons and Deputy Warden Gumusdere failed to appropriately supervise staff, review their monthly statistics with a critical eye, establish internal controls for the production of accurate data and that they abdicated responsibility for the inaccurate statistics reported by the jail.

Therefore, there is not a preponderance of the evidence to prove that either officer committed misconduct by deliberately underreporting data, misleading the investigation, or providing false official statements. Nevertheless, their statements, the statements of their subordinate staff, and those of jail managers who both preceded and followed their administration, all point to their complete abdication of responsibility for the production of critical information that they both knew was used for internal performance measurement (inmate fights is a primary indicator used at monthly TEAMS meetings) and for publicly reported statistics on the performance of the department. Relying on the performance data for which they were responsible, the department publicly commended both Assistant Chief Clemons and Deputy Warden Gumusdere for their contribution to reducing violence at RNDK during the time they managed the jail, a reduction based upon the precipitous decline in reported inmate-on-inmate fights.³¹

Under then Commissioner Dora Shiro these officials were promoted, not penalized, for their managerial performance.³²

There has been no study of agency practices to date that has examined whether discontinuing reliance on TEAMS to monitor performance and maintain accountability of managers contributed to the problems that have been alleged, although this seems a plausible implication.

We found no systematic study of the use of Compstat-like management in corrections departments, jails or prisons, but both California and Georgia report that they have adopted management systems modeled on Compstat. The California Department of Corrections specifically acknowledges patterning its system on the Compstat model in LAPD under Chief Bratton. Neither the Georgia nor the

California websites describing their systems report how adoption has affected performance.

Compstating Probation

At the New York City Department of Probation the performance management system modeled on Compstat was named STARS (Statistical Tracking, Analysis and Reporting System). A Public Safety Policy Brief of the Pew Charitable Trust, *You Get What You Measure: Compstat for Community Corrections*, in 2007 reported

A growing number of community supervision agencies also are employing new strategies to ensure these programs and practices are implemented swiftly and grounded in solid research about what works. Many of the strategies try to emulate the public sector's premier model of measuring and managing for results—the Compstat program of the New York City Police Department (NYPD).³³

Pew singled out New York City Probation as a model:

The New York City Department of Probation was the first community corrections agency to develop a version of Compstat—its STARS (Statistical Tracking, Analysis and Reporting System) program launched in 2001. Just as the NYPD tracks the commission of crime and evaluates the effectiveness of individual commanders in reducing it, the probation department tracks the commission of crimes by people on probation, and in monthly face-to-face meetings, reviews top managers' efforts to move the numbers in the right direction. An evaluation of STARS is underway, but over the last three years, arrests of probationers have dropped by 9.5 percent.³⁴

According to the Pew report, Georgia, Maryland and the District of Columbia had adopted performance management systems in community correction modeled on Compstat.³⁵

During the administration of Vincent Schiraldi as Commissioner of Probation in the final term of the Bloomberg administration, STARS was adapted to include new outcome priorities, and some change in style. While Probation before Schiraldi focused on and achieved reduction in recidivism, under his leadership new emphasis was placed on increasing early release. Using an evidence-based risk assessment tool the agency was able to increase the percent of the caseload achieving early release from 3 to 19, without increasing recidivism. This later claim of performance depends on the agency's claim, plausible but not empirically verified, that a slight

rise in recorded recidivism is an artifact of the change in the composition of the caseload resulting from the early release of lower risk probationers.

The Bloomberg administration prided itself on breaking down silos that denied City government the synergies made possible by sharing resources and information. The Department of Probation under Commissioner Schiraldi was able to use its ability to analyze its caseload in a way that assisted the Department of Health and Mental Hygiene to identify persons with health conditions that made them at high risk of hospitalization and expensive treatment in the City health system. By targeting those at greatest risk, Probation officers were able to guide more of their probationers into the insurance programs provided by the Affordable Care Act, with potentially great savings to the City.

In terms of style, Commissioner Schiraldi attempted to achieve what, in his view, was a kinder, gentler pattern of exchange in STARS session, with more emphasis on successes, presenting awards for high performance at every meeting of STARS. Even with these adjustments in the pressure to perform, when a new quality assurance team recommended at the end of his administration that STARS meeting be halted while it developed a new performance management approach, he agreed with the recommendation. How this has affected the Department's performance has not yet been determined.

Prosecution: A New Frontier of Evidence-Based Public Safety Management

When Kamala Harris was the District Attorney of San Francisco she became interested in Compstat in Los Angeles and its potential use in the management of her office. Drawing on conversations with both authors, Harris wrote a book entitled *Smart on Crime* in which she touted at length the achievements of Compstat in New York and Los Angeles, and called for its broad adoption in the criminal justice system. Not long after publishing her book in 2009, she ran for and won the Office of Attorney General of California. It fell to her successor as District Attorney of San Francisco, George Gascón, whose career included Chief of Operations under William Bratton at LAPD, and Chief of Police in Mesa, Arizona and San Francisco, to introduce Compstat in prosecution in that office.

As reported in the *Examiner*,³⁶

District Attorney George Gascón says the 130 attorneys in his office lack the technology to effectively track and analyze the more than 12,000 cases they handled last year, leaving them to navigate blindly while deciding which cases to prosecute and when.

Gascón, who served as the police chief in San Francisco from August 2009 to Janu-

ary 2011, wants to take a system that analyzes crime data and use a version of it in his office to analyze trends in criminal cases. Such a system would be the first in the nation, Gascón said.

Gascón's claim of being the "first in the nation" District Attorney's office to bring a Compstat approach to prosecution may be challenged by New York County District Attorney Cyrus Vance. Shortly after assuming his post as District Attorney of Manhattan, Cy Vance created a Crime Strategies Unit (CSU) to develop and implement an Intelligence Driven Prosecution (IDP) model.³⁷ The District Attorney specifically credits NYPD as the inspiration for IDP:

Since 1990, Manhattan, like the rest of the city, has seen a dramatic reduction in crime, with

index crimes falling more than 80 percent and murders in the borough down by 86 percent (503 in 1990 vs. 70 in 2010). The New York City Police Department, working with its law enforcement partners, has led the way in effectively reducing crime by employing innovative strategies, concentrating on ground-breaking ideas and resources, and focusing on what were once considered intractable crime problems.³⁸

Like Compstat at NYPD, the DA's office is explicit about its mission: "Intelligence Driven Prosecution focuses the collective resources of a prosecutor's office on one goal: reducing crime, particularly violent crime, through the most effective and innovative law enforcement and community partnerships."³⁹ As stated in a report on IDP produced by the DA's office for a Symposium on Intelligence Driven Prosecution at John Jay College in New York in June, 2014, "While police departments have the primary responsibility for responding to and reducing crime, the actions taken by a prosecutor post-arrest can multiply the positive effects of an arrest through aggressive and appropriate prosecution, or dilute the effects by failing to recognize and respond to the significance of a particular defendant's role in criminal activity."⁴⁰

The report explains:

The foundation of the success of the IDP model in Manhattan has been the close partnership the District Attorney's Office has fostered with the New York City Police Department (NYPD), other law enforcement agencies, and the communities we serve. To ensure close coordination with NYPD, we divided Manhattan's 22 precincts into five geographic zones and assigned a senior prosecutor in CSU to

focus on and understand criminal activity in each area.⁴¹

Another foundation of intelligence-driven prosecution is “big data” and lawyers learning, as NYPD has, to mine the extraordinary mountain of data available in their own case files and administrative records, and recently on the Internet as criminals have taken to bragging on Facebook and other social media, and communicating on cell phones. Armed with subpoenas, the District Attorney’s office has developed the capacity to find evidence that aids investigation and criminal prosecution. It has used real time arrest posting to create an Arrest Alert System⁴² so that persons of interest who have encounters with the police anywhere in the City are vetted for their larger significance in the crime that is occurring. As Heather McDonald reported in an article about Intelligence Driven Prosecution,

The arrest-alert system is also based on the theory that a small number of individuals commit a disproportionate amount of crime. “It’s not so much that there are crime hot spots as hot people,” says Lauren Baraldi, a prosecutor in the Philadelphia district attorney’s office, which is seeking to replicate Manhattan’s Crime Strategies Unit. Incapacitate those “crime drivers,” in Manhattan D.A. parlance, and you will produce an outsize effect on public safety, the thinking goes.⁴³

The McDonald report elaborates:

A key element of CSU’s mandate is to make effective use of the vast amounts of information gleaned from thousands of cases prosecuted each year by the Office. Previously, the information acquired through our investigations and prosecutions of street crime was not centrally organized, or analyzed. CSU is finding innovative ways to make this information available throughout the Office, when and where it is needed. Rather than information lost amid thousands of legal pads in the offices of hundreds of Assistant District Attorneys (ADAs), CSU gathers this information and converts it into usable criminal intelligence in the form of data maps, searchable data bases and meaningful arrest alerts. These efforts allow CSU to uncover links between cases that might otherwise go undetected.

There has been no systematic evaluation to date of the success of IDP, and isolating the contribution of “smart” prosecution practices will be inherently challenging, but there have already been a number of major cases involving gangs that both NYPD and the DA’s Office say would

not have been possible if the two law enforcement agencies had not been working in synchrony as they are now in Manhattan.⁴⁴ The District Attorneys of Brooklyn and Staten Island are working with Manhattan to design their own Crime Strategies Units.

At the state level, the pioneering adaptor of Intelligence Driven Prosecution is the state of Delaware.⁴⁵ The State Prosecutor of Delaware is appointed by the Attorney General and has responsibility for prosecutions from misdemeanors to murder statewide. In an interview, Kathleen Jennings, the State Prosecutor since 2011, said her office has studied the Manhattan DA’s Office’s IDP approach and, to the extent possible, has copied it for use in Delaware. Prior to this innovation prosecutors followed the longstanding practice of focusing on individual cases with little or no consideration of whether the case was part of any larger pattern of criminal activity. She is particularly impressed by the impact of the creation of an Arrest Alert System patterned after Manhattan’s, and the way it enables prosecutors in all three Delaware counties to see each arrest in a larger context and use that information in developing prosecution strategy. As in New York, this change in prosecution practice has made the Delaware Prosecutor’s Office invest in information technology and crime mapping capacity on which to base its operation. Jennings acknowledged that the police departments in Delaware with which she works are not NYPD, and they are only now adapting to be more in sync with the evidence-driven operation of State prosecutors.

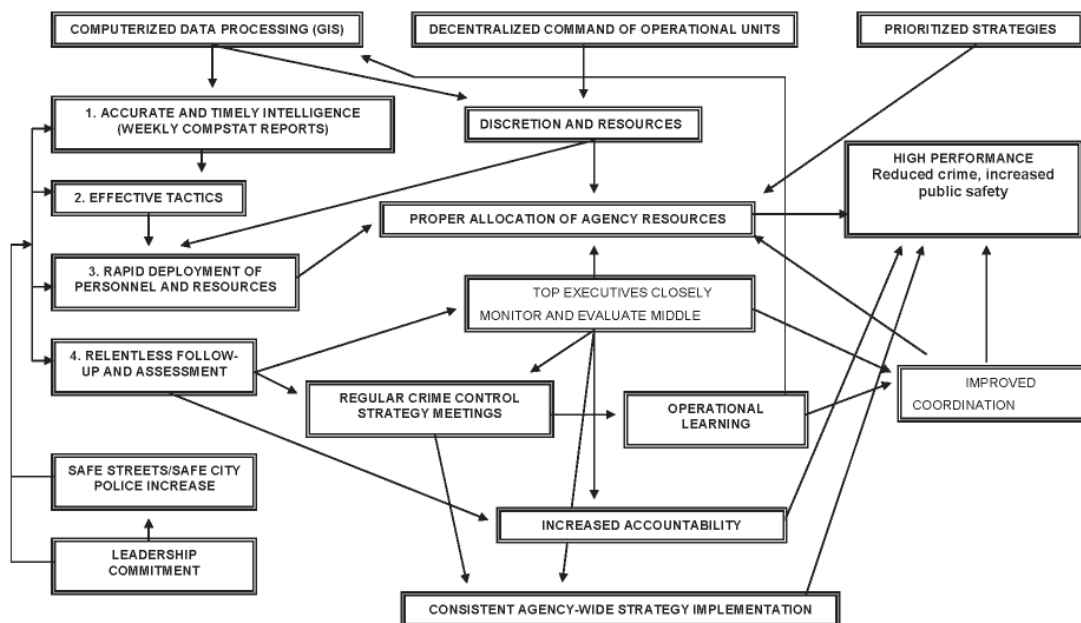
Conclusion

When we wrote our account of the development of Compstat in NYPD, which we characterized as a “revolution in police management,” little was known beyond anecdotes about the diffusion of Compstat in American policing. There had been a steady stream of police officials attending and observing Compstat sessions, but it was unclear at that time how widely and how accurately the model had been adopted. With the Weisburd, et al. studies, and the Police Executive Research Forum study, we know now a lot more about its rapid diffusion, and some of the variations in the practices adopted. We still know much less than would be desirable about the impact of the adoption of Compstat on crime. Anecdotal evidence has mounted to be sure, validating its claim, but as Frank Zimring noted in *The City That Became Safe* there has been no rigorous, systematic study of the magnitude of its contribution to crime reduction.⁴⁶

In our 2001 presentation of the elements of Compstat we offered a logic model that included more explanatory factors than the four traditionally associated with the reform: Accurate and Timely Intelligence, Effective Tactics, Rapid Deployment of Personnel and Resources, and Relentless Follow-up and Assessment.

Unstated in those four celebrated principles of Compstat, devised by Deputy Commissioner for Crime Strategies Jack Maple, is the most fundamental foundation of Compstat, a rejection of the widely accepted idea that the police cannot control crime. Compstat is a model of crime reduction, not crime response.⁴⁷ Based on the New York experience, where what became Compstat model was developed organically, not dropped on the Department full blown,⁴⁸ we acknowledged a number of key elements of the reform that together produced the spectacular crime reductions. See model below.

THE NYPD COMPSTAT MODEL OF PERFORMANCE MANAGEMENT ENVIRONMENT



The reform could not have occurred without leadership, both at the department and city level. Crime was considered a crisis in the city when Compstat was launched, and a time of crisis does not always free public managers to “experiment.” Both Commissioner Bratton and Mayor Giuliani embraced the unconventional idea that police can and should prevent crime, not just respond to it. The Commissioner had to persuade the leaders of the most respected police department in America that the approach to policing it had been using for years was flawed and needed to be replaced with a much more demanding model of crime fighting, requiring not only new ideas but significantly new skills. So leadership matters.⁴⁹ Resources also matter.

We recognized that Safe Streets, Safe City legislation resulting in an expanded police department roughly coincident with the new administration, provided some flexibility to deploy 4,000 additional police personnel in new ways. Another resource, made available by the privately funded New York City Police Foundation, was the ability to bring in experienced management consultants to assess

strengths and weaknesses, and assist in the design of department reforms. Another use of private funding was the acquisition of the computer capacity essential to analyze crime data at the precinct level. Management reorganization was another element that was key to the reform. Commanders in the city’s then 75 precincts had to be converted from officials who had little direct control of their 911-call dispatched patrol cars and little accountability for crime in their precinct to actual executives responsible for the successful analysis of crime patterns in the area under their command, and developing, leading and evaluating

strategies for addressing those crime patterns. Ultimately they also had to present their analyses, plans and results to the Department at Compstat meetings. This represents no small change in the job description of a precinct commander, so decentralization of command responsibility and accountability is also a key element of the New York model. While relentless follow-up and assessment was part of Maple’s original vision, the idea of assembling weekly several hundred of the Department’s leaders to review and learn about crime patterns in the city and explore together strategies for addressing them also

emerged over time as ideas of how to manage the new system of policing developed.

We call attention to this elaboration of the elements of the Compstat model because we believe that they help explain the variable ways different public safety agencies and organizations have responded to Compstat. Some organizations have been led by officials who did not accept the idea that they could have an impact on crime and thus be accountable for crime in their communities. Some lacked the resources, but even the availability of resources for acquiring information technology and hiring analysts did not assure the complete embrace of the model, as the experience with New York State’s Operation Impact demonstrates. Departments collected and reported crime in a more timely fashion but did not automatically use the available data and analysis to manage. Absent leadership commitment to the demands of the model, the reform was not fully implemented, and in the case of many New York cities, crime did not decline. Similarly, when changes in New York City departments of Correction and Probation

brought in leaders who found the demands of Compstat accountability too onerous, the fully developed systems in place (TEAMS and STARS) were less utilized or dismantled.

The demands of the model for collecting, analyzing and using quantitative data also may explain the long delay in prosecutors joining the Compstat parade. Lawyers are not trained in data analysis. They are trained to analyze law cases and to apply their analysis as cases arise in their practice. Even more than the officer on the beat, lawyers mostly handle cases and have traditionally little reason to place those cases in any larger context. The perception of high performance of a District Attorney's office, to the extent that it has been measured, has largely been established by advertising the success of high profile prosecutions. When statistics were used in reporting performance, the result reported was a tally of convictions without tracking the extent to which convictions were for the original crime charged, or as a product of the nearly ubiquitous plea bargaining for crimes of far less seriousness. The idea of assessing how patterns of plea bargains impacted on crime patterns was basically unknown, except in the case of reoffenders whose serious crime might be viewed retrospectively in the press as the result of a previous conviction that was "too light." But that was a case, not a pattern.

Therefore, the introduction of serious crime analysis and its use in the offices of District Attorneys Vance and Gascon, and in Philadelphia and Delaware prosecutors' offices represents a potentially significant breakthrough in public safety management in America. Understanding this latest diffusion of Compstat and its impact will warrant rigorous evaluation.

Endnotes

1. The "beginning" of any innovation is almost always debated. Clearly many of the management ideas that are integral to Compstat were not invented by NYPD. Indeed, important elements of the reform were used by William Bratton and Jack Maple in the early 1990s to bring down crime in the then-separate NYC Transit Police. What is not in dispute is that the name "Compstat" (the original MS DOS file name—a truncation of "comparative statistics"), applied to the management of a city police department, was born at NYPD in 1994. It is also clear that many agencies that have adopted or adapted Compstat approach to management explicitly acknowledge their debt to NYPD Compstat.
2. WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* (1998).
3. David Weisburd, et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 *Criminology & Public Policy* 421-455 (2003); James J. Willis, et al., *Making Sense of Compstat: A Theory-based Analysis of Organizational Change in Three Police Departments*, 41 *Law & Society Review* 147 (2007).
4. Mark H. Moore & Anthony A. Braga, *Measuring and Improving Police Performance: The Lessons of Compstat and Its Progeny*, 26 *Policing: An International Journal of Police Strategies & Management* 439 (2003); Dennis C. Smith & William J. Bratton, *Performance Management in New York City: Compstat and the Revolution in Police Management*, *QUICKER BETTER CHEAPER? MANAGING PERFORMANCE IN AMERICAN GOVERNMENT*, 453-482 (Dall W. Forsythe, ed., 2001); ELI SILVERMAN, *NYPD BATTLES CRIME: INNOVATION STRATEGIES IN POLICING* (2001).
5. George L. Kelling & James Q. Wilson, *Broken windows: The police and neighborhood safety*, *The Atlantic* (1982).
6. New York City Mayor's Management Report 1988.
7. New York City Mayor's Management Report, September, 1993.
8. Many observers credit this celebration of Bratton as the architect of crime decline in New York as the reason for his falling out of favor with his "crime fighter" boss, Mayor Rudy Giuliani, and his departure from NYPD relatively shortly after it appeared. This celebratory cover of *Time* contrasts starkly with a cover that appeared just six years earlier with the headline *The Rotting Big Apple* across an artist's image of the City as the scene of crime and mayhem.
9. David Weisburd, et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 *Criminology & Public Policy* 421-455 (2003).
10. The authors supported their anecdotal evidence of rapid diffusion of Compstat after 1996 with an analytic model of typical patterns of diffusion of innovations, and found the rate of Compstat's pattern ran well ahead of the norm. Their choice of 1996 as the origin point in the analysis is interesting because it corresponds to a 1996 conference on Compstat hosted by NYPD, and widely attended by police leaders, occasioned by the Department's receipt of the Harvard Innovation in Government Award.
11. A related early example of the diffusion of Compstat is Baltimore, where at the end of the 1990s an NYPD veteran, Edward Norris, brought Compstat to the police department and then assisted Mayor Martin O'Malley to create CitiStat, which applied a Compstat management system to other city agencies. Robert D. Behn, *What All Mayors Would Like to Know About Baltimore's CitiStat Performance Strategy* (IBM Center for the Business of Government 2007).
12. Weisburd, et al. put, in our view, greater emphasis on setting a specific target for crime reduction, following Commissioner Bratton's 10% reduction commitment in 1994, than is consistent with the practice in New York. While relentless commitment to crime reduction and systematic measurement of crime are a constant feature of NYPD Compstat, a specific target was only announced once, in 1994.
13. See Worden on NYS Operation Impact. In 2002 NYPD launched its "hot spot policing" program which it called "Operation Impact." See also Smith and Purtell, Press Release, New York University 2007, which characterized this program as "Compstat on steroids" for an assessment of its effectiveness in reducing crime.
14. SUNY Professor Robert E. Worden of the The John Finn Institute for Public Safety has tracked the management practices of many upstate police departments, and has written a number of reports on the implementation of NYS Operation Impact.
15. Each jurisdiction adopting Compstat adapts it. Schenectady, according to Chief Brian Kilcullen, holds Compstat meeting monthly, not weekly, and compares 2014 reports to a five year average of crime in each category, not this week, month, year to the same week, and month last year, as is the practice in New York. Schenectady has been experimenting, in a research collaboration focusing on its practices. The Finn Institute has regularly provided police managers with survey feedback on police encounters with citizens as an additional measure of police performance. See, e.g., Robert E. Worden & Sarah McClellan, *Assessing Police Performance in Citizen Encounters: Police Legitimacy and Management Accountability* (Report to the National Institute of Justice, 2014).
16. Robert Gavin, *Capital Region counties topped lists for NY's highest crime rates in 2011*, *Times Union*, May 30, 2012.
17. *Id.*

18. Frank Zimring, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSON FOR URBAN CRIME AND ITS CONTROL* (2012).
19. See Chief Concerns: A Gathering Storm- Violent Crime in America (Police Executive Research Forum 2006).
20. Compstat meetings are a team production at NYPD with the Chief of Department, Joseph Banks, joining in leading the meetings, and the office of the Deputy Commissioner of Management Analysis and Planning, led by William Andrews, providing data analytic support.
21. William J. Bratton and Sean W. Malinowski, *Police Performance Management in Practice: Taking COMPSTAT to the Next Level*, 2 Policing 259-265 (2008).
22. In an interview, former LAPD official and now DA of San Francisco, George Gascon, said the major difference between Compstat in New York and Compstat Plus was the investment in analyzing the variations in success of different commanders and their crime reduction strategies, and helping all improve.
23. See PAUL O'CONNELL & FRANK STRAUB, *PERFORMANCE BASED MANAGEMENT OF POLICE ORGANIZATIONS* (2007). Straub, as public safety director, brought Compstat management to both police and fire departments in White Plains and Indianapolis.
24. *Compstat: Its Origins, Evolution and Future in Law Enforcement Agencies* vii (Police Executive Research Forum 2013).
25. *Id.*
26. "Success in reducing overtime is hard to measure given the strategic use of overtime as an alternative to staffing increases. Unlike increases in crime or jail violence, which are relatively easy to interpret, any trend analysis overtime expenditure requires more analysis to assess."
27. Martin Horn, "Practitioner Reflections on the Use of Performance Management in Correctional Facilities; or: 'You can never find a princess when you need one.'" A paper presented at Fall Research Conference of the Association for Policy Analysis and Management Washington, D.C. on November 6, 2009.
28. *Id.*
29. Benjamin Weiser & Michael Schwartz, U.S. Inquiry Finds a 'Culture of Violence' Against Teenage Inmates at Rikers Island, N.Y. Times, August 4, 2014, available at http://www.nytimes.com/2014/08/05/nyregion/us-attorneys-office-reveals-civil-rights-investigation-at-rikers-island.html?_r=0.
30. Michael Winerip, et al., Report Found Distorted Data on Jail Fights at Rikers Island, N.Y. Times, September 2, 2014, available at <http://www.nytimes.com/2014/09/22/nyregion/report-twisted-data-on-fights-in-a-rikers-jail.html>.
31. *Id.*
32. As the *Times* reports, Commissioner Shiro defended her action, saying the internal report did not find any conclusive evidence of falsification of data by these wardens, only an admitted incapacity to analyze performance data, and a lack of attention to them. *Id.* This, on its face, appears to state a disvaluing of the Compstat model of accountable management.
33. Public Safety Policy Brief: You Get What You Measure: Compstat for Community Corrections 1 (Pew Charitable Trust 2007).
34. *Id.* at 6.
35. *Id.*
36. Mike Aldex, *Gascon Working to Bring Compstat to DA's Office*, The Examiner, November 4, 2012, available at <http://www.sfoxaminer.com/sanfrancisco/gascn-working-to-bring-compstat-to-das-office/Content?oid=2318113>.
37. Governing magazine has high hopes for District Attorney Cy Vance's Intelligence Driven Prosecution: "Since taking office, Vance has focused on what he calls 'intelligence-driven prosecution.' The centerpiece of his initiative is a special crime strategies unit that works with police and community leaders to target crime hot spots. If it succeeds, Vance may well do for prosecutors what former New York City Police Commissioner William Bratton did for policing—move the focus from process and individual cases to results and lower crime." John Buntin, *Driving Prosecution With Intelligence*, Governing, November, 2010.
38. The New York County District Attorney's Office, Intelligence-Driven Prosecution/Crime Strategies Unit, <http://manhattanda.org/es/node/120> (last visited Nov. 6, 2014).
39. New York County District Attorney's Office, Annual Report: Highlights from 2013 at 2.
40. *Id.*
41. *Id.*
42. New York County District Attorney's Office, "Intelligence Driven Prosecution: The Arrest Alert System," <http://www.apainc.org/html/Manhattan%20Arrest%20Alert%20Implementation%20Guide.pdf>.
43. Heather Mac Donald, *Prosecution Gets Smart: Intelligence-driven crime-fighting comes to the D.A.'s office*, City Journal (Summer 2014). McDonald also reports Philadelphia is following suit as well. "We stole your arrest-alert system—though we only have the junior varsity version," says Baraldi. "Nevertheless, our involvement in intelligence gathering has opened up valuable collaboration with other law enforcement players." *Id.*
44. James C. McKinley, Jr., *In Unusual Collaboration, Police and Prosecutors Team Up to Reduce Crime*, N.Y. Times, June 4, 2014, available at <http://www.nytimes.com/2014/06/05/nyregion/in-unusually-close-partnership-police-dept-and-district-attorney-team-up-to-reduce-crime.html>. One study by a respected criminologist who is not a police scholar, David Greenberg, challenged the claim that Compstat explained the crime decline in New York City in the 1990s, but his analysis used arrests as the measure of police activity to test his hypotheses, when the proactive, crime prevention orientation of Compstat produced, by design, a steady reduction of arrests in the period he studied. If a crime is prevented, there is no arrest. One can safely discount his conclusion based on his misunderstanding of the significant change in police practice that Compstat involves. David Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 Justice Quarterly 154 (2014).
45. Interview with State Prosecutor, Kathleen Jennings, September 5, 2014.
46. FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (Studies in Crime and Public Policy) (2011).
47. After leaving NYPD Maple was a consultant to a number of police departments, most notably New Orleans, which was in the midst of a crime wave. A 1994 *60 Minutes* segment charged that New Orleans, with a homicide rate five times higher than New York City, was "the number 1 city in the nation for police brutality and corruption." Maple implemented COMPSTAT in New Orleans. In 1996, crime statistics in New Orleans went down 22 percent in nine months and kept going down for four-and-a-half years. In late 1997, Ed Bradley returned to New Orleans for another *60 Minutes* special. He did a glowing report, reporting that with COMPSTAT in New Orleans, it is becoming one of the safest cities in America. JACK MAPLE & CHRIS MITCHELL, *THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS* (1999).
48. This was the observation of NYPD Deputy Commissioner Michael J. Farrell, who directed the Office of Management Analysis and Planning during the first Bratton Administration and returned as Deputy Commissioner for Strategic Initiatives in the second Kelly Administration, *Compstat, Its Origins, Evolution, and Future in Law Enforcement Agencies* 5 (Bureau of Justice Assistance, and Police Executive Research Forum 2013).
49. Robert D. Behn has made the need for leadership commitment to performance accountability central to his analysis of evidence based management. In his discussion of "the essential role of

the leadership team" he concludes, "Underlying the successes (and the failures) in improving performance is the behavior of a leadership team." THE PERFORMANCE STAT POTENTIAL: A LEADERSHIP STRATEGY FOR PRODUCING RESULTS 286 (2014).

Dennis C. Smith, Associate Professor of Public Policy, earned his Ph.D. in political science from Indiana University. In January, 2006, he was also appointed Professor in Residence in the New York State Assembly Internship Program. He teaches policy formation and program evaluation, Performance Management, Comparative Federalism, and the International Capstone. Professor Smith has conducted research on the performance management of public and nonprofit agencies, and has written on the problems of measuring the success of reforms in public sector organizations. Professor Smith's work has been published in several journals, including *Public Administration Review*, *Urban Affairs Quarterly*, *Public Administration and Development*, and *City Journal*. His early work on cutback management in policing appeared in Charles Brecher and Raymond Horton, ed., *Setting Municipal Priorities-1981*, and his analysis of Compstat, written with former NYPD Commissioner William Bratton, appeared in Forsythe, ed., *Quicker, Better, Cheaper? Managing Performance in American Government (2001)*. His "Managing CIVPOL: The Potential of Performance Management in International Public Service" is a chapter in Dijkzeul and Beigbeder, ed., *Rethinking International Organizations: Pathology and Promise (2003)*. His Point Counter Point exchange with Berly Radin, entitled "Making Management Count: A Case for theory and evidenced based public management" appeared in the *Journal of Policy Analysis and Management*, Summer, 2009. He directed the Program in Public Administration for nine years and served two years as Associate Dean. He is a member of the editorial board of *The Journal of Comparative Policy Analysis*.

William J. Bratton has been appointed the 42nd police commissioner of the City of New York by Mayor Bill de Blasio; it is the second time he has held the post. Police Commissioner Bratton established an international reputation for re-engineering police departments and fighting crime in the 1990s. As Chief of the New York City Transit Police, Boston Police Commissioner, and in his first term as New York City Police Commissioner, he revitalized morale and cut crime in all three posts, achieving the largest crime declines in New York City's history. At the NYPD in 1994 and 1995, he led the development of Compstat, the internationally acclaimed command accountability system now in use by police departments nationwide. As Los Angeles Police Chief from 2002 to 2009 and in a city known for its entrenched gang culture and youth violence, he brought crime to historically low levels, greatly improved race relations, and reached out to young people with a range of innovative police programs. He is the only person ever to lead the police agencies of the nation's two largest cities.

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Alternatives to Incarceration: The New York Story

By Greg Berman and Robert V. Wolf

Introduction

The misuse of incarceration in the United States is increasingly the subject of national concern.¹ Partially as a result of scrutiny from academics, advocates, policymakers, and politicians, incarceration rates have finally begun to inch downward after three decades marked by significant increases; in fact, 2013 “marked the fourth consecutive year of decline in the correctional population.”²

A closer look reveals that much of this recent reduction has been driven by a handful of states, among them New York.³ New York reduced its prison population by 26 percent between 1999 and 2012.⁴ This reflects a decline from 72,896 to 54,073 inmates.⁵

Even as New York’s jail and prison rolls have gone down, so too has crime, declining by 69 percent over two decades.⁶ The transformation in New York City in particular has been remarkable. New York City had only 330 murders in 2013—the lowest number on record in modern times.⁷

“[New York’s] success is neither accident nor coincidence: it’s the product of a coordinated focus across our entire criminal justice system,” said New York City Mayor Michael Bloomberg in 2013.⁸

U.S. Attorney General Eric Holder, taking note of the New York phenomenon, said, “New York has been a leader...diverting some non-violent offenders into drug court programs and away from prison, and extending early release to other non-violent offenders who participate in treatment programs. And while national prison populations have consistently increased, in New York the state prison population has dropped steadily in the past decade.”⁹

The crime reductions in New York City have been the subject of numerous opinion pieces and books (the most persuasive of which is Franklin Zimring’s *The City That Became Safe: New York’s Lessons for Urban Crime and Its Control*),¹⁰ but the reductions in incarceration have been less thoroughly analyzed. This essay takes a deeper look at one particular piece of the puzzle: New York’s vibrant network of alternative-to-incarceration programs.

New York has a long history of investing in community-based alternatives to jail and prison, including the

founding of the country’s first pretrial release program in 1961.¹¹ Since then, an array of government agencies, in concert with non-profit organizations such as the Center for Employment Opportunities, Center for Alternative Sentencing and Employment Services, Vera Institute of Justice, Criminal Justice Agency, Center for Community Alternatives, Osborne Association, Women’s Prison Association, Fortune Society, Center for Court Innovation, and others, have worked to expand the availability of both pre-trial and post-adjudication alternatives to incarceration.¹²

Unlike some other states, which have engaged in substantial analysis, sentencing reform, and legislative change designed to reduce correctional spending (often under the banner of “justice reinvestment”), New York’s investment in alternatives to incarceration has not been the product of a concerted initiative on the part of the governor or Legislature. The Vera Institute of Justice notes that New York has “experienced significant drops in prison population without undertaking major legislative changes to achieve this.”¹³

This is not to say that Albany has played no role; however, at several key points, legislation has helped to support and expand alternative programs. For example, the state’s 1984 Classification/Alternatives to Incarceration Act provided funds for programs that divert convicted offenders from jail terms of at least 180 days.¹⁴ The state legislature gave alternative-to-incarceration programs further support in 1996 by amending the Penal Code to give judges more flexibility in probation sentencing. The language, which specifically mentioned reducing incarceration as a goal, read: “the court may...require that the defendant comply with any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant.”¹⁵ And in 2009, after decades of effort, a bipartisan initiative succeeded in reforming the Rockefeller drug laws, enhancing the discretion of New York judges to send felony-level offenders to treatment instead of lengthy prison sentences.¹⁶

A 2012 study by researchers at the Center for Court Innovation and NPC Research found that during the first year following the repeal of the Rockefeller drug laws, courts in New York State sent nearly 1,400 more drug-



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addicted offenders to treatment—an increase of 77 percent from the year before.¹⁷ The increase in treatment referrals saved taxpayers \$5,144 per offender—savings that resulted primarily from a drop in re-offending and from the fact that community-based drug treatment is less costly than the sentences that treatment participants would otherwise have received.¹⁸

Today, the New York State Division of Probation and Correctional Alternatives funds approximately 165 alternative-to-incarceration programs.¹⁹ And, under the leadership of Chief Judges Judith S. Kaye and Jonathan Lippman, dozens of drug courts, mental health courts, and community courts have been created by the New York state court system to link offenders to social services and community restitution in lieu of incarceration.

While any given program deals with a limited number of participants, taken together, New York's alternatives to incarceration work with thousands of defendants each year. Over time, the numbers begin to add up. According to Michael P. Jacobson and Martha King, "[t]he prison disposition rate [in New York] dropped because courts used 'conditional discharge,' diversion and alternative sentencing programs more frequently."²⁰ This helps explain why only 15 percent of defendants in New York City were sent to prison in 2008, a decline from about 22 percent in 1994.²¹

The New York Approach

New York's alternative-to-incarceration programs have evolved organically, adapting to local needs, new research, and a changing policy landscape. New York has sought to be as inclusive as possible in its experimentation with incarceration alternatives. It has developed programs for people of all ages, including teens, misdemeanants, defendants with substance abuse problems and mental illness, and people in both high-density urban settings as well as suburban and rural settings.

New York has increased the diversity of its programming by collaborating with non-governmental providers. In New York City, a significant number of alternative-to-incarceration programs are operated by non-profit organizations funded through the Mayor's Office of Criminal Justice and the New York City Council.²²

In recent years, many of these agencies have sought to implement evidence-based, research-supported practices.²³ This includes using validated screening tools to identify high-risk offenders.²⁴ The latest research suggests that there needs to be a continuum of non-incarcerative interventions for offenders, with the most intensive options reserved for populations that are both high-risk and high-need.²⁵

New York has also invested in research and evaluation to document the work of pilot programs. For instance, at the same time it expanded drug courts to accommodate an influx of participants following the repeal of the Rockefeller drug laws, the state invested in a

comprehensive evaluation (using funds from the American Recovery and Reinvestment Act of 2009) to measure impacts and outcomes.²⁶

Local mayors have played a significant role in expanding alternatives to incarceration, particularly in New York City, which because of its size drives so much of what happens in the criminal justice system statewide.

The judiciary has also played a key role. The judicial branch has led multiple efforts, including the building of community-based courts—such as the Red Hook and Brownsville Community Justice Centers—that steer appropriate defendants into services rather than jail, as well as initiatives housed in conventional courtrooms, such as the Human Trafficking Initiative, Adolescent Diversion Program, and Brooklyn Justice Initiatives.²⁷

One of the wrinkles that has aided the judiciary's increased use of alternative sanctions has been the creation of new positions in many courtrooms: "resource coordinators" help judges, prosecutors and defense attorneys make informed decisions about alternative sentencing options. Judges are not required by legislation or sentencing guidelines to use alternative programs, but with the aid of resource coordinators, who build and maintain relationships with community-based providers and help match offenders with appropriate services, they are doing just that. The resource coordinators also hold service providers accountable by conducting site visits and monitoring how they carry out court mandates.

New Developments

New York continues to experiment with alternative-to-incarceration programs, many of them driven by the judicial branch. Recent initiatives that the Center for Court Innovation has participated in developing include:

Adolescent Diversion Program

In 2012, New York Chief Judge Jonathan Lippman established the Adolescent Diversion Program in nine pilot sites.²⁸

The program was created to reform New York's approach to 16- and 17-year-olds, who are currently treated as adults, even for non-violent offenses such as possession of controlled substances, petty larceny, fare evasion, trespass, graffiti, and criminal mischief.²⁹ The initiative assigns the cases of 16- and 17-year-olds to judges in Criminal Court who have received special training and have access to an expanded array of dispositional options.³⁰ The goal is to remove the threat of incarceration and replace it with a more age-appropriate approach that combines social services and monitoring in a community-based setting.³¹

The initiative was led by the court system but requires "close collaboration with prosecutors, defense attorneys, probation departments, service providers and law enforcement," Lippman explained.³²

A recent study compared participants in the Diversion Program with a matched group of non-participants, finding that the Diversion Program reduced the use of jail without increasing the likelihood of re-arrest.³³ Indeed the Adolescent Diversion Program sites reduced felony re-offending, although results were not consistent across the board.³⁴ The study found that high-risk offenders benefited the most from being diverted to services.³⁵

Human Trafficking

In September 2013, Chief Judge Lippman launched a statewide Human Trafficking Intervention Initiative.³⁶ Building on pilot programs in Queens, Midtown Manhattan, and Nassau County that connect those arrested for prostitution to counseling and social services in lieu of jail, the initiative tries to help defendants avoid a criminal record.³⁷

Given the high rates of violence and the overlap between prostitution and sex trafficking, this initiative is essentially an effort to recognize that people arrested for prostitution are victims too.³⁸ By linking victims and potential victims of trafficking and violence with specialized services rather than sending them to jail, the justice system can potentially help people connect to resources, address their underlying needs, and make long-term changes in their lives.

It is too soon to evaluate the impact of the program, but during its first year, hundreds of people linked to services through the program have continued to work with specialized staff after the completion of their mandate—a positive outcome.

Brooklyn Justice Initiatives

In his 2013 State of the Judiciary address, Chief Judge Lippman highlighted the need for bail reform in New York. Among other ideas, the chief judge sought to develop a supervised release program that would reduce reliance on pre-trial detention for misdemeanor defendants, minimizing the negative impact of detention on individual lives while enhancing the justice system's fairness. Brooklyn Justice Initiatives seeks to fulfill this mandate, ensuring misdemeanor defendants return to court by replacing detention with vigorous monitoring and links to voluntary services.

Brooklyn Justice Initiatives promotes compliance with release conditions through an automated appointment reminder system that sends customized messages to participants via text message and voicemail. Consistent with procedural justice research, staff craft all notification messages to include language that is easy to understand and respectful.

Brooklyn Justice Initiatives also provides judges in Kings County Criminal Court with a broad range of alternative sentencing options, including short-term social services, community restitution, and more intensive, longer-term clinical interventions. The goal is to reduce

the use of incarceration specifically for adolescent and young-adult offenders ages 16 to 21 living or arrested in the Brownsville or Red Hook neighborhoods.

Short-term services include psycho-educational groups, crafted to address the clinical and developmental needs of the young-adult population, and individual case management sessions. Group sessions cover a variety of topics, including anger management, decision-making, substance use, goal-setting, and employment skills. Services are provided onsite at Brooklyn Justice Initiatives, [as well as in community settings]. All services are rigorously monitored to ensure compliance.³⁹

Brownsville Community Justice Center

Currently in development, the Brownsville Community Justice Center will seek to reduce crime and the use of jail while improving public trust in justice.⁴⁰ It will be located in one of the most violent neighborhoods in New York City, a Brooklyn neighborhood that has been largely untouched by the public safety gains of the past generation.

The Brownsville Justice Center will experiment with multiple approaches to preventing incarceration.⁴¹ It will have a special focus on young people, building “multiple off-ramps” for those who come into contact with the justice system at nearly any stage of the justice process, from arrest to prosecution to sentencing to aftercare following a stint in custody.⁴² By offering educational, occupational, social, and health services, the Justice Center will seek to help young people “become law-abiding members of society.”⁴³

When fully operational, the Justice Center will be an official branch of the New York State Court System, with a full-time judge who will have a broad array of community-based sanctions at his or her disposal, including community service, drug treatment, job training, and counseling.⁴⁴ The idea is to link individuals to the services and supports they need to avoid becoming recidivists.⁴⁵

The Brownsville project is currently going through the city's land use review process, which requires approval by the local community board, the borough president, the city planning commission, and the city council. If approved, construction should begin in 2015.

Conclusion

There is more still to come in terms of alternatives to incarceration in New York. In 2014, Governor Andrew Cuomo created a statewide commission to examine whether to raise the age of criminal responsibility in New York from 16 to 18.⁴⁶ The commission has not yet come back with its findings, but it is likely to highlight the need for more programs to serve adolescents who find themselves enmeshed in the justice system.

Also in 2014, New York City Mayor Bill de Blasio announced the creation of a Task Force on Behavioral

Health and the Criminal Justice System that will develop a strategic plan to improve the way the city's criminal justice system addresses the needs of individuals with behavioral and mental health issues.⁴⁷ Given that one of the goals of the task force is to reduce the population housed on Rikers Island, recommendations are likely to include more alternative-to-incarceration programs. In addition, the City of New York has also implemented a citywide initiative that created court-based intervention teams in each borough with an eye toward providing alternatives to incarceration for mentally ill defendants.

Alternative-to-incarceration programs are likely to play an ever larger role in New York and around the country as research documenting their effectiveness continues to emerge showing that alternatives to incarceration can meet all the classic goals of criminal sentencing: incapacitation, deterrence, retribution, and rehabilitation.⁴⁸ These findings support the claims of criminologists Todd R. Clear and James Austin that "an aggressive program to reduce prison populations can proceed without a substantial negative impact on public safety."⁴⁹

Over the past generation, New York's alternative-to-incarceration programs have been able to test new ideas, figure out what works, and spread best practices. For states in search of a more effective approach to criminal justice that lowers costs and places fewer men and women behind bars without sacrificing public safety, the New York approach is one worth replicating.

Endnotes

1. The United States, population 315 million, is actually tied with the Seychelles, population 88,850, for the world's incarceration rate at 707 per 100,000 people, according to the International Centre for Prisoner Studies. See *Highest to Lowest—Prison Population Rates*, INT'L CENTRE FOR PRISON STUDIES, available at http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All; Andrew Cohen & Oliver Roeder, *Way Too Early to Declare Victory in War Against Mass Incarceration*, Brennan Ctr. for Justice (May 21, 2014), <http://www.brennancenter.org/analysis/way-too-early-declare-victory-war-against-mass-incarceration>.
2. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>; Cohen & Roeder, *supra* note 1.
3. Cohen & Roeder, *supra* note 1.
4. MARC MAUER AND NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1 (2014), available at http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf.
5. *Id.* at 3.
6. MICHAEL P. JACOBSON AND MARTHA W. KING, A MAYORAL AGENDA FOR JUSTICE AND SAFETY IN NEW YORK CITY 3 (2013), available at <http://www.21cforall.org/content/mayoral-agenda-justice-and-safety-new-york-city>.
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8. See Mayor Bloomberg Announces New York City's Incarceration Rate Hits New All-Time Low, NYC.GOV (Dec. 26, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/434-13/mayor-bloomberg-new-york-city-s-incarceration-rate-hits-new-all-time-low#/0>.
9. Att'y Gen. Eric Holder, Remarks at the 2009 ABA Convention (Aug. 20, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>.
10. Oxford University Press, 2011.
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NYC FUSE Reentry Housing: A Scalable, Data-Driven Solution for a “Wicked Issue”

By Martin F. Horn and Ryan J. Moser

On February 15, 2014, Jerome Murdough died on Rikers Island while in the custody of the New York City Department of Correction. He “baked to death” in a cell where the temperature exceeded 100 degrees.¹ Murdough was 56 years old, a former United States Marine who had been arrested for the misdemeanor crime of Criminal Trespass after he was found sleeping in a stairwell of a New York City Housing Authority project.²



Martin F. Horn

Murdough had been arrested eleven times previously for trespassing, drinking in a public place and minor drug offenses.³ He had no history of violent behavior but had been previously diagnosed with a mental illness and had been prescribed anti-psychotic and anti-seizure medications.⁴ Nonetheless, he was not taken to a psychiatric hospital nor was his case brought to one of New York City’s mental health courts for adjudication of his criminal conduct.⁵ Instead, for want of \$2,500 bail he went to jail and remained there a week until his death.⁶ His death brought to the forefront the acute problem facing New York City, the other counties in New York and jails throughout the country: the sometimes fatal intersection of mental illness, homelessness and imprisonment. His death is a good example of what has been termed a “wicked issue” that, according to our colleague Nick Freudenberg at Hunter College, “is a social problem in which the various stakeholders can barely agree on what the definition of the problem should be, let alone on what the solution is.”⁷

This wasn’t a new problem; as recently as March 2011 New York City Mayor Michael Bloomberg established a task force of City agency heads to develop and implement strategies to improve the City’s response to people with mental illness involved with the criminal justice system.⁸ Throughout the state, as prison and jail populations have dropped, the concentration of the mentally ill remaining in prisons and jails has nonetheless increased.⁹ Often, theirs are the most difficult cases for the courts to adjudicate. And their complex constellations of problems—homelessness, mental illness and court involvement—implicate multiple agencies, crossing jurisdictional boundaries in ways current systems were never intended to address. Even more recently, on June 2, 2014, New York City Mayor Bill de Blasio created a similar task force to provide him with a plan by September 2014 to reduce the

rate of incarceration among New Yorkers with mental illness.¹⁰

But, in the beginning, as early as January 2003, Martin Horn, recently appointed Commissioner of the New York City Department of Correction (DOC), and Linda Gibbs, Commissioner of the New York City Department of Homeless Services (DHS), found themselves sharing an elevator in the building where both their offices were located. During that elevator ride they discovered that they shared a problem and a challenge. Out of that elevator ride came the beginning of a shared solution and a unique experience in breaking out of the “silos” that so often characterize government bureaucracies.



Ryan J. Moser

Each had been appointed by Mayor Michael Bloomberg, who in his first years in office was facing large budget deficits and was asking his City agencies to “do more with less.” Gibbs had been charged to address the tremendous drain on city resources caused by the demand for housing with more than 8,000 single adult homeless persons residing in the City’s shelters and a Mayoral five year plan to reduce homelessness by two thirds released in June of 2004.¹¹ Horn was similarly working on reducing the cost of incarceration without compromising the safety and security of the City’s jails.

As they spoke that day they realized that the populations they were working with were the same. Independently their research had uncovered the fact that large numbers of their “clients” had at one time or another been “clients” of the other. They began to suspect that there were a core number of people who continuously circulated between their two institutional systems. Out of that elevator ride came agreement to work together to quantify and identify the people who were driving so much demand for these costly city services.

“A data match revealed that thirty percent of individuals found in a DHS adult facility had at least one DOC admission whereas nearly 90% of individuals matched were in shelter after leaving the DOC, with around half entering a shelter within two months.”¹² Whether jail led to homelessness or homelessness led to jail seemed irrelevant. It quickly became apparent that they needed each other to solve their shared problem.

By February 14, 2003 the two had convened

an “Advisory Breakfast” of experts in government and in the field of housing and homelessness assistance to discuss ways to prevent the entry of formerly incarcerated persons into the shelter system. At this meeting, which was attended by City and State officials, as well as a few leaders and experts in the field of criminal justice and homelessness, debate arose quickly regarding whether or not homelessness could be prevented by either improving Corrections-based programming (i.e. improved discharge planning) or the development of new community-based programs. From this discussion, it was evident that neither solution was solely capable of addressing the problem, and that finding a solution demanded further deliberation, if not indeed collaboration.¹³

Gibbs and Horn quickly saw that addressing the challenge would require the participation of multiple government agencies in addition to their own as well as participation by an array of private sector partners. Out of that initial “Advisory Breakfast,” where “buy-in” was obtained from several other significant city and state agencies (New York City Housing Authority, City Department of Housing Preservation and Development, City Human Resources Administration, State Office of Temporary and Disability Assistance) grew a plan to convene a “collaborative” effort of government and private sector partners to address the twin issues of shelter and “jailing.”

The purpose of this effort, which came to be known as the New York City Discharge Planning Collaborative, was “to assess the current state of affairs, take an inventory of available resources, and determine who does what best, allocating and taking responsibility.”¹⁴ Ultimately over forty city and state agencies and private sector organizations (including the Corporation for Supportive Housing, Palladia, Fortune Society, Osborne Association, Bowery Residents Committee, Common Ground, Legal Action Center, Women’s Prison Association, Samaritan, CASES, Center for Employment Opportunities, Bronx Defenders and others) participated in the effort.¹⁵

As part of their leadership and vision, Horn and Gibbs made a decision at the outset that...[became] central to the collaboration’s success: they laid down two explicit rules. Indeed, these rules help[ed] constitute the group’s sense of identity, as evidenced by the fact that they are constantly repeated by collaboration members.... The first of the commissioners’ explicit rules: in order to participate, each member had to contribute some-

thing concrete. The second: everybody who participates is there to work together on achievable goals, not to point fingers or to complain.¹⁶

In October 2006 the entire group agreed on the following mission statement:

We envision a City in which every person who is incarcerated or in shelter leaves better prepared to become a law-abiding, productive and healthy member of society. We envision a city that uses jails and shelters as a last resort and offers a wide range of other interventions. We seek a coordinated and comprehensive public-private partnership which offers people leaving jail and shelter viable pathways to housing and employment as well as services including, drug treatment and education.¹⁷

Early on, the group identified several cross-cutting issues that contributed to the flow of people into and out of jail and shelter. These included,

a) those that stemmed from individual characteristics or needs (“overwhelming lack of educational ability,” “existing medical problems such as HIV/AIDS, diabetes, hepatitis”); b) those that pointed to institutional practices within either jails or shelters (“lack of diversion programs before being imprisoned,” “those released touch numerous city agencies which do not connect with each other”); and c) those that pointed to the disjointed and fragmented nature of service delivery and agency functions (“lack of coordination,” “different departments have different population priorities”).¹⁸

Two specific issues among these were identified as serious barriers to successful reentry to the community following a jail or shelter stay: termination of Medicaid benefits upon incarceration and denial of access to public housing, including with relatives, and denial of rental assistance (Section 8)¹⁹ housing for persons convicted of crime.²⁰

Focusing on the housing issue, the collaborative began to assemble data in an effort to quantify and “map” the intersection of homelessness and jail. “This data analysis sought to locate the heaviest users of both systems [who] utilize the most resources and are the least stable, by sorting out individuals who had at least 3 episodes between DOC and DHS during the time period 2001-2002 where the individual also had to have entered DHS sometime following a DOC discharge.”²¹

Using this proxy definition, the data analysis identified 3,634 individuals who spent an average of 82 days in jail and 93 days in shelters over a two-year period—in other words, nearly 6 months worth of cycling between the institutions within a span of two years. The top 25% of these users were 909 individuals who each spent on average more than one year (397 days) out of the two-year period in both institutions! Case analyses revealed that many of these individuals cycled rapidly between jails and shelters, often staying little more than a few days at a time in either institution.²²

And, because this was a citywide problem transcending both DOC and DHS it required solutions outside both agencies; it presented an extraordinary opportunity to affect a population that neither agency is equipped to handle on its own, yet one that affects multiple systems.

Lack of access to safe and affordable housing was a common thread that united these agencies and drove the continued involvement with both jail and shelter. And, although it may seem counter-intuitive for a group identified by a data match with DHS, the people on the list were often not considered to be technically homeless because periods of incarceration are times when an individual is considered to be “housed” by the state. The same is true for other types of institutional care such as hospitalization and residential drug treatment, both areas which anecdotal evidence pointed to as a common occurrence for the group. The effect is the same for the shelter system as it is for corrections and public health, frequent users of corrections and jail hit every part of public crisis services. They are on everyone’s list but their complex involvement generally makes them a lower priority for each individual system.

This pattern had been identified in studies of shelter use in New York which identified the three types of homelessness: 80% of shelter stayers were termed transitional and characterized by short stays that would often resolve with limited or no assistance; 10% were termed chronic with long, often uninterrupted stays in the shelter system that spanned months or years that would likely require intensive intervention; and the third group was termed episodic, characterized by repeated stays of short to moderate length which seemed to indicate involvement in other systems and no clear picture of an appropriate intervention.²³

The frequent user data match in New York was one of the first opportunities to understand where “episodic” people were going between shelter stays. And it was a phenomenon that was beginning to gather national attention. At the same time that the Discharge Planning Collaboration was tackling this issue, Malcom Gladwell, later famous for his book *The Tipping Point*, wrote an

article called *Million-Dollar Murray*, highlighting the story of a police officer working with a man named Murray Barr, a veteran with severe addiction disorders bouncing between detox, jail and homelessness.²⁴ Murray’s cycle of crisis systems had racked up over a million dollars in public costs, much more than the cost of providing housing and services to help him live stably in the community.²⁵ Mr. Gladwell could have been writing about someone from the New York City frequent user list. A de-identified data match of the frequent user list with the Office of Alcoholism and Substance Abuse Services system revealed an average of 14 episodes of drug treatment, the majority of which were for crisis detox and DOC records showed that 20% of the population was identified as Brad H members,²⁶ a class action distinction for people identified with serious mental illness and requiring the city to provide people who have received mental health treatment or have taken medication for a mental health condition while in jail with discharge planning.²⁷

National research showed that the overlaps between corrections, health, and homelessness apparent in New York frequent users was anything but unique. A GAINS Center and Council of State Governments study showed that 16.9% of adults entering five jails suffered from serious mental illness, a rate three to six times of those in the general population.²⁸ A Bureau of Justice Statistics report found that inmates with mental health issues were twice as likely to have become homeless in the year before incarceration.²⁹ And Metraux and Cullhane documented that the already high rate of 10% of entering prison and jail were homeless in the months before incarceration doubled when looking only at inmates with mental illness.³⁰

The interplay of homelessness and criminal justice involvement after release was just as bleak. The Vera Institute found that people discharged from prison who then went to shelters were “seven times more likely to abscond from parole....”³¹ Similarly, “The Georgia Department of Corrections determined that, with each move after release from prison, a person’s likelihood of rearrest increased by 25 percent.”³²

As a counterpoint, evidence showing that supportive housing could have positive effects on public safety was beginning to emerge. The study of the New York, New York Supportive Housing Agreement showed that the number of criminal convictions for people placed into supportive housing decreased by 22% and days incarceration decreased by 73%, while both increased among the comparison group.³³ Fortunately, New York City had been creating supportive housing options like this—affordable housing paired with services to promote stability—for over a decade. The city had one of the most sophisticated and largest supportive housing inventories in the country. This provoked some foundational questions:

- What was preventing frequent users of jail and shelter from accessing supportive housing?

- Could supportive housing break the institutional circuit?
- Could a pilot be designed to test a supportive housing model tailored to this group?

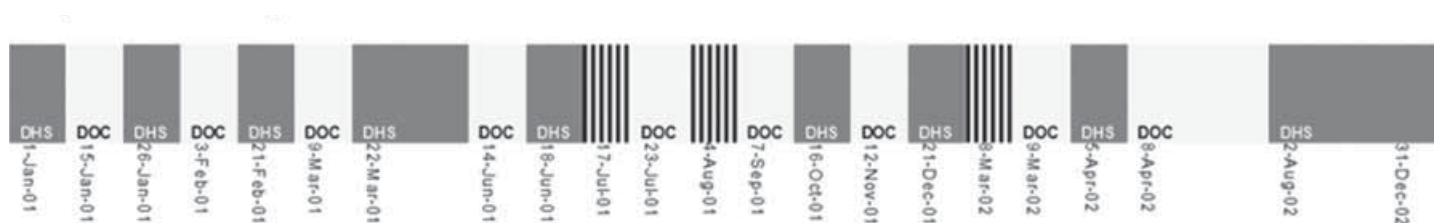
Developing the FUSE Model

The Discharge Planning Collaboration created a Frequent User Workgroup to find the answers. The frequent user workgroup began weekly meetings, research and planning to design an initiative.

Step 1: Review the Data

The Frequent User Workgroup went back to the data to identify a high priority population of jail and shelter users to target for a supportive housing intervention. The group believed that focusing in on people with repeat involvement in both systems would identify individuals who were highly unstable, had high service needs, and were using high levels of public services ineffectively. The group decided that eligibility would require a minimum of four shelter stays and four jail stays over the previous five years and known to both systems in the last 12 months. This produced a replenishing list of approximately 1,100–2,200 people that could be refreshed at six months.³⁴ For some, the pattern was chaotic with rapid churning and over a hundred stays in either system. The bar chart below was assembled by DHS and depicts a two-year timeline of one person from the list; the light gray represents time spent in jail, dark gray in shelter, and black and white as unknown to either system.³⁵

Frequent User Case Study



Step 2: Identify and Engage

The next task was to figure out how to locate the frequent users. The rapid cycle meant that, by the time a person was identified, they may have already left the system and moved to a new location. To solve this problem, DOC and DHS set up weekly data matches of the master list with the jail and shelter census to determine if someone was in care. The weekly

list would flag anyone found in either system along with the date he or she arrived and current location in shelter or jail. This provided multiple intercepts so that engagement could happen wherever the client was identified. Providers were dispatched to jails and shelters to begin identifying and screening people from the FUSE list, market the initiative, and confirm the housing needs.

Step 3: Develop the Model and Resources

The proposed supportive housing model was deceptively simple, affordable housing rental units set to 30% of a tenant's income linked with case management services to support housing stability. This was an accepted model in New York expected to be adaptable to this new initiative. However, assembling the resources was startlingly complex.

The foundation for supportive housing is rental support and the best prospect for rental subsidies locally was the New York City Housing Authority's (NYCHA) allocation of Section 8 Housing Choice Vouchers. NYCHA had previously agreed to set aside vouchers for special initiatives, but there was a problem: the people that needed the rental support were categorically ineligible for housing assistance based on their criminal justice records. And so Commissioners Horn and Gibbs made a visit to the Chairman of NYCHA with a bold request for 1,000 vouchers with a waiver for criminal justice exclusions. In exchange, the initiative would locate services funding to make

sure people were successful tenants. NYCHA's response was to dedicate 50 vouchers and agree to waive all criminal justice restrictions up to the level of violent felony to accommodate the program. Although the numbers were smaller than requested, the criminal justice accommodation was one of the first efforts in the country to reduce criminal justice barriers to public housing. Providers in the Dis-

charge Planning Collaboration were able to provide matching resources through service contracts for people with mental health, addiction or HIV/AIDS that could be used for frequent users that met their clinical focus.

The next stop was the NYC Department of Health and Mental Hygiene, where the Frequent User Workgroup identified supportive housing properties intended for people with serious persistent mental health diagnoses that were being newly developed or where vacancies could be set aside through turn-over. CSH then approached the service providers to convince them to participate in the pilot. It was a hard sell. Many agencies accustomed to providing supportive housing for people that were homeless with mental health and addiction issues were frightened by the criminal justice overlap. More than one agency said that the pilot wouldn't work because "*that population can't be housed.*" However, others saw similarities in the clients they currently served, and were willing to participate, pending additional service funding to assist with outreach and help people stabilize during a critical time period after moving into housing.

The workgroup approached philanthropy to fund this last critical gap in specialized services. The JEHT foundation, a national foundation that focused on criminal justice issues, responded to the request agreeing to provide \$6,500 per unit for services to outreach and provide stabilization supports. There was one catch, JEHT would provide the service enhancement only if the Office of Management and Budget (OMB) committed to continuing the program if it was shown to be effective. Horn and Gibbs were able to leverage that unprecedented agreement from OMB and were able to bring in John Jay College to conduct an evaluation for the pilot.

Step 4: Create an Acronym

As everyone knows, no pilot initiative can be officially launched without a good acronym, so the **Frequent User Service Enhancement (FUSE)** program was christened. Enough resources were identified to place 100 frequent users into permanent supportive housing. Nine housing and service providers agreed to partici-

pate in FUSE: Bowery Residents Committee; The Bridge, Brooklyn Community Housing and Services, Common Ground, Jericho Project, Palladia, and Women's Prison Association to provide supportive housing; and Samaritan Village would assist with outreach. These groundbreaking providers, along with intensive support from government, CSH, evaluators and philanthropy, undertook what would become a national model and one of the first examples of supportive housing dedicated to frequent users of public systems.

Delivery, Evaluation, and Replication

Implementing FUSE proved just as challenging as its design. DOC, DHS, and CSH participated in an interagency workgroup that met regularly for three years as the program was launched, tweaked, and evaluated. The interagency work group worked diligently to engage, refer and help stabilize FUSE tenants in housing over roughly a two-year window. There were significant bureaucratic obstacles to deal with, ranging from lack of identification to navigating the nation's slowest Section 8 application process. Organized in the model of a structured learning collaborative, the implementation workgroup was able to: bring in technical assistance for clinical and operational challenges; address criminal justice barriers to accessing benefits and services from city agencies; and jointly document, share and develop successful strategies and emerging best practices. Some of the key lessons learned included:

- *In-reach to jail and shelter*—Traditional supportive housing referral and application processes are driven by an applicant's ability to effectively participate in an often elaborate and lengthy process. FUSE clients were often difficult to find, non-compliant with program requirements and faced persistent barriers to housing. Actively recruiting and supporting the application process was essential. Multiple points of contact in shelter and jail were required to support applicants and build trust.
- *Low-threshold entry and an "anything it takes" service approach*—The complex and rapid churning through public systems make engaging people to prepare for housing both challenging and unproductive. By incorporating low-threshold services and harm-reduction strategies, providers can increase successful applications and better support housing retention and clinical engagement.
- *Technical assistance*—Training provided on criminal justice, mental health, addiction and low threshold services, cognitive behavioral therapy, and navigation of the criminal justice system as well as tech-

nical assistance to foster shared learning between stakeholders enabled service providers to deliver relevant and informed services.

- *Executive participation*—Involvement of decision makers from non-profit, intermediary, and public agencies throughout the implementation phase was essential to overcome barriers to housing do to overlapping resources and new processes inherent to the pilot design.

These and other process lessons were accompanied by an evaluation conducted by John Jay College, which used a “comparison group quasi-experimental design” to analyze administrative data and demonstrate the effectiveness of the program in promoting housing retention and reducing jail and shelter utilization. The evaluation looked at the twelve months following housing placement, and showed that 91% of FUSE tenants retained their housing, that jail utilization was reduced by 53%, and shelter utilization was reduced by 92%; and a cost analysis compiled by CSH used average daily rates for shelter and jail to show the economic impact of the program producing cost offsets of \$7,231 per participant in the same period, 69% greater offsets than the comparison group.³⁶

This promising data proved two points: 1) the assumptions that FUSE participants would be unable to maintain housing due to their significant barriers to stability were unfounded; and 2) the program was generating public spending reductions for jail and shelter. The Office of Management and Budget felt that further evaluation was needed to fully fund the program, but due to the promising nature of the results authorized additional city investment to fund a portion of a second round of FUSE. DOC and DHS were allowed to fund 50% of the service enhancements for a second round which was matched by re-granting funds from the Robert Wood Johnson Foundation through a national CSH reentry housing initiative.³⁷ The service enhancements were paired with additional housing vouchers from NYCHA and the Department of Housing Preservation and Development, along with supportive housing resources from the Department of Health and Mental Hygiene.

For the second round of the pilot, philanthropic funds from the Robert Wood Johnson Foundation, the Jacob and Valeria Langeloth Foundation, Open Societies Foundation and CSH were dedicated to fund a more robust evaluation. The research design included analysis of administrative data from DOC and DHS, as well as structured interviews with participants and a matched comparison group every six months over two years. Two new providers were brought on board, CAMBA and Pathways to Housing, and the second round was launched.

CSH was able to use the experience with NY FUSE to seed replication efforts nationally. CSH developed a blueprint for FUSE that lays out a systematic approach to developing a high utilizer initiative underpinned by

three pillars: 1) “data-driven problem-solving”; 2) “policy and systems reform”; and 3) “targeted housing and services.”³⁸ These pillars set a concrete process to help a community adapt the FUSE model to reflect local context, resources, and priorities. A few examples:

- Hennepin County (Minneapolis), Minnesota—Hennepin FUSE was an early FUSE replication seeded through CSH’s Returning Home Initiative with grant support from the Robert Wood Johnson Foundation. Hennepin FUSE targets high users of corrections, mental health services and homelessness for supportive housing in a low threshold model that prioritizes community integration.
- State of Connecticut—This initiative was directly spurred by a peer-to-peer visit to New York of public agency representatives from Connecticut’s behavioral health, corrections, and housing departments along with key community stakeholders from the homelessness and supportive housing sectors. The initiative is an adaptation that reflects Connecticut’s unified correctional systems and has created 120 units of FUSE housing fully funded by the State’s behavioral health system. Correctional funding is being considered for further expansion that would include participants with prison sentences in addition to the short stays that characterize Connecticut FUSE.
- Mecklenburg County (Charlotte), North Carolina—MeckFUSE, as the initiative calls itself, was funded through repurposing of existing county funds that were being used for a recidivism reduction program targeted to high utilizers that was underperforming. The county did a scan of reentry programs that were supported by evaluation and had strong outcomes in reducing recidivism for homeless individuals and decided on FUSE as the best fit for their needs. Over a one-year period, the county convened an interdisciplinary group to review data, create a priority population, develop a program model for supportive housing, and solicit for a service provider. Urban Ministry Center was selected as the provider in 2012 and the program’s housing is now fully leased. University of North Carolina Charlotte is conducting a full evaluation.
- Other cities, counties and states in California, Illinois, Colorado, Florida, Michigan, Nebraska, Rhode Island, Texas, Virginia, Washington DC, and Washington have implemented or are designing FUSE models to address this pressing need.

FUSE has impacted federal programs and priorities ranging from the Department of Justice’s Second Chance Act to the Corporation for National and Community Service. The model is also informing new and exciting efforts to pursue Social Impact Bonds and Pay for Success Contracts such as an initiative announced by Denver’s Mayor

Michael Hancock in June 2014 to develop an \$11 million annual program to provide supportive housing for 300 of the homeless frequent users of systems who cumulatively spend over 14,000 jail nights and visit detox facilities over 2,000 times in a year.³⁹

The Road Forward

Back in New York, Columbia University's more robust second phase FUSE evaluation was released in December 2013.⁴⁰ The larger research budget allowed for a much more rigorous look at the data and the data from structured interviews provided window into the lives of people eligible for the FUSE population. The researchers were beginning to understand how FUSE impacted health and other crisis systems, how housing was impacting people's quality of life and relationship with public services, and how that affected public spending. Columbia developed an exhaustive, four-hour structured interview protocol to generate a richer data set that was used to construct a regression model and bolster administrative data analysis.

Housing stability and its impacts on jail and shelter utilization were remarkably consistent with the previous evaluation by John Jay College but with a longer window.

The Columbia evaluation showed that after two years:

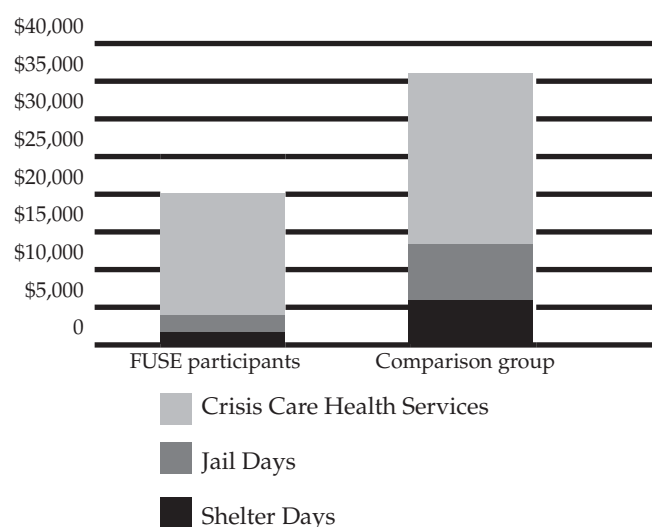
- *86% of tenants retained permanent housing;*
- *shelter costs had declined by 94%; and*
- *jail use had declined by 59% for the FUSE group.*⁴¹

The utilization of jail and shelter was also significantly lower for the FUSE group than the comparison group on both measures.⁴²

In addition, the evaluation showed positive impacts on addiction and mental health issues. FUSE participants spent less than half as many days in psychiatric inpatient care and as noted by the researchers, "[t]he FUSE II Program had a significant and positive effect on drug abuse outcomes. The percentage with any recent use of hard drugs (heroin, cocaine, crack, methamphetamine) is half as high as the comparison group and current alcohol or substance use disorder is one third less...than among comparison group members...."⁴³

Using the impacts of the program Ginny Shubert was able to conduct an econometric analysis that showed that FUSE generated an overall crisis care service cost offset of \$15,680 in lower per person spending for intervention group members, analyzing shelter, jail and limited public health data. "The \$15,680 per person annual 'savings'... more than offset the estimated \$14,624 annual public investment in 'wrap-around' supportive service and operation costs...used to stabilize intervention group members...."⁴⁴ This is depicted in the following chart reproduced from the Columbia evaluation.⁴⁵

Cost of Jail, Shelter, Crisis Care Services



McAllister and Yomogida employed a technique called trajectory analysis to look at how frequent users moved through systems over time in an attempt to describe what the institutional circuit looked like for people that were in FUSE housing as opposed to the comparison group.⁴⁶ This analysis drew a compelling final portrait for the evaluation, that the institutional involvement of people in FUSE supportive housing was markedly simpler and for the vast majority of participants, the phenomenon of churning between institutions was ended.⁴⁷ This, perhaps more than any other finding, demonstrated that the primary goal of FUSE to break the institutional circuit was attainable.

This study both validates the premise of the FUSE initiative and the goals of the Discharge Planning Collaboration. It is also part of a growing body of research demonstrating the efficacy of focusing on high-need, high-cost populations using data-driven identification and screening for supportive housing. Similar studies of a supportive housing program that targeted 100 chronically homeless people showed: a 76% reduction in the number of days spent in jail and an overall annualized cost offset of \$16,572 per person;⁴⁸ and an average of \$2,449 per person per month in cost reductions due to reduced jail bookings, days incarcerated, shelter, sobering center use, detoxification and treatment, emergency medical services and Medicaid for 75 people identified due to severe alcohol addiction and homelessness.⁴⁹ Recent work by the Economic Roundtable in Los Angeles through the 10th Decile Project has approached the challenge from the other end, analyzing a cohort of 2,907 street homeless individuals in Los Angeles to define the 10% that represent the highest cost to public services to develop a triage tool; people identified in the top ten percent were found to use over \$6,000 per month in public services.⁵⁰

Supportive housing is also being increasingly viewed as an essential tool for reducing Medicaid costs related to implementation of the Affordable Care Act. Work by

health economists such as John Billings who works to create algorithms that identify factors leading to high Medicaid utilization that can be used to target preventive services. His findings include evidence that disproportionately high rates of substance use, homelessness, and social isolation are prevalent in high-risk populations.⁵¹

This notion was clearly expressed in by the Department of Health in a journal article describing why New York is pursuing supportive housing as a part of Medicaid redesign.

The role of social determinants of health, and the business case for addressing them, is immediately clear when it comes to homelessness and housing. The 1.5 million Americans who experience homelessness in any given year face numerous health risks and are disproportionately represented among the highest users of costly hospital-based acute care. Placing people who are homeless in supportive housing—affordable housing paired with supportive services such as on-site case management and referrals to community-based services—can lead to improved health, reduced hospital use, and decreased health care costs, especially when frequent users of health services are targeted.⁵²

This otherwise very prescient article, often alongside the broader public health discourse, fails to include an analysis of the similarity of social determinants of health in homeless and criminal justice populations. Both populations show elevated illness and mortality rates; untreated chronic health conditions; interrupted access to health-care; lack of stable housing; high rates of trauma; lack of social and family supports; and large subsets of people of advanced age, many of whom are aging prematurely due to quality of life issues.

Thinking like this is driving New York State's Medicaid Redesign Team, which has now allocated hundreds of millions of dollars to creating housing options for high cost Medicaid populations. It is driving New York City's Mayor de Blasio as he embarks on an affordable housing plan calling for the creation and preservation of 200,000 affordable housing units in the five Boroughs and expansion of supportive housing as a centerpiece.⁵³ It is driving non-profit, private, philanthropic advocates as they launch the Campaign 4 NY/NY Housing, www.nynyc-ampaighn.org, a platform calling for the creation of 30,000 new supportive housing units in New York City. As momentum builds for a New York–New York IV supportive housing agreement and Medicaid Redesign continues to allocate new resources to supportive housing, it is of paramount importance to recognize these links.

As FUSE has shown, people who are receiving crisis services across many public agencies need to be intentionally engaged and that means not only understanding how their lack of housing impacts care, but also understanding how to address public safety needs. Criminal justice institutions and agencies need to be actively involved with identification and recruitment of frequent users with dedicated resources at their disposal. For New York to be effective in reaching its goals, it must address public health, public safety and housing with a coordinated response. As mentioned earlier, on June 2, 2014 Mayor de Blasio announced the creation of a Task Force on Behavioral Health and the Criminal Justice System that will develop a strategic, actionable plan to transform the city's criminal justice system, so that it addresses the needs of individuals with behavioral and mental health issues more appropriately and effectively. The task force will recommend and implement strategies to ensure proper diversion routes and treatment for people with mental illness or substance abuse within the criminal justice system, as well as before and after contact with the system.

It is time for the criminal justice sector to take note. The consequential discussions taking place now on new resource development for supportive housing are essential topics for public safety and justice advocates. Ten years ago, the jury was out. Today, thanks to initiatives like FUSE, we know that reentry supportive housing is a key solution for some of the most vulnerable residents of New York State. We know it saves public money and alleviates significant human suffering. There are rare moments in public policy when the right thing and the smart thing to do come together in the political discourse. We are faced with a new question. Can New York scale solutions to this problem or will it stay trapped in a hot cell with Jerome Murdough waiting? The pilots are finished. The research is in. It is time for New York to lead the nation again.

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Great Moments in New York Pro Bono History

By Henry M. Greenberg

New York is exceptional. The Empire State has led the way throughout its existence. In commerce, the arts, law, and politics—virtually every field of human endeavor—New Yorkers have blazed the trail, establishing a standard of excellence for the rest of the nation to follow. Solving America's problems first is New York's tradition and legacy.



As a consequence, historians lavish attention on New York. Library shelves groan under the weight of tomes about the State's storied past. But an important facet of our legal history remains unexplored—namely, the extraordinary contributions of the New York Bar to provide pro bono representation for the poor, the unpopular and the damned.

To be sure, a “justice gap” exists with respect to the accessibility of civil legal services. Too many indigent are unable to use the civil court system simply because they cannot afford legal representation. Chief Judge Jonathan Lippman has spoken eloquently on this subject. More, he has taken action to address it.¹

As a society, much remains to be done to secure the promise of equal justice under law. Even so, the richness, depth and achievements of past generations of New York lawyers in regard to pro bono are a story worth telling. So here I hope to shine a spotlight on stellar examples of New York lawyers representing clients with courage and creativity, and seeking no recompense but the satisfaction of a job well done.

A Few Key Questions

Let's begin by answering a few key questions. First, what does pro bono mean? The literal Latin translation is “for good,” short for pro bono publico or “for the public good.”² The meaning of the term has evolved over time. Historically, pro bono was used to describe what was in the public interest. Current usage—the donation of professional services without charge—dates back only to the 1950s.³

Who provides pro bono? Every segment of the legal profession does. Private attorneys, legal aid societies, public interest law firms, and bar associations represent clients on a pro bono basis. Even law students do now too.

Why do lawyers provide pro bono? It is their professional responsibility.⁴ As Arthur L. Liman, the legendary

New York litigator, once said: “[It] is a lawyer's privilege, one of the rewards of the profession.... For a lawyer, public service is as natural as breathing.”⁵

For how long have lawyers represented clients pro bono? The tradition goes back to practices in early Roman tribunals and the ecclesiastical courts of the Middle Ages. During the 13th and 14th century, in British and Scottish courts, judges would occasionally appoint attorneys and direct them to provide pro bono services.⁶ Indeed, the animating principle of pro bono—equal justice under law—is the cornerstone of Anglo-American jurisprudence. It sprung to life on June 15, 1215, at Runnymede, on the bank of the River Thames near Windsor, England, when King John signed the Magna Carta.⁷ That seminal work states, “To no one will we sell, to no one deny or delay right or justice.”⁸

When did New York attorneys start providing pro bono? Well, from the very beginning. When New York became a State in 1788 judges were already appointing lawyers to represent indigent clients.⁹ Titans of the bar like Alexander Hamilton—George Washington's aide-de-camp during the revolutionary war and America's first Secretary of the Treasury—represented poor people in criminal cases on a pro bono basis.¹⁰

1803: The Delaware John Murder Trial

By the turn of the 18th century, pro bono was well established in New York. But the most hallowed type of pro bono—representing an unpopular client without charge—took root in the 19th century in central New York in the city of Auburn, thanks to the example of two “attorneys for the damned”: Elijah Miller and William Henry Seward.

Miller and Seward had much in common. For one, they were related by marriage. Seward married Miller's daughter and the newlyweds moved into the Miller house, where they lived for decades.¹¹ They were also partners at Miller & Seward¹²—a small practice that, through mergers, grew into the venerable law firm known today as Cravath, Swaine & Moore.¹³ Another thing they had in common was courage.

Take, for example, the doings of Elijah Miller in 1803. He was 31 years old, a pioneer in the wilderness that was then Cayuga County, and relatively new to the practice of law.¹⁴ On December 12, in the town of Junius, a 60-year-old Native American named Delaware John accidentally killed his friend, Ezekiel Crane, a pioneer white settler.¹⁵ The shooting occurred when John was home in his cabin.¹⁶ He heard a stirring outside the cabin and believed it was an unwanted visitor named George Phadoc who had threatened to steal John's cabin.¹⁷ John picked up his rifle and fired a round at the front door in the direction of the

presumed Phadoc.¹⁸ But the person standing there was Crane, who was struck by the bullet and died a few days later.¹⁹

News of Crane's death spread quickly. A crowd gathered around John's cabin. He was disarmed, bound and imprisoned in a log jail.²⁰ On June 27, 1803, a grand jury indicted John for murder, making him the first Native American in New York to be so charged for the death of a white man.²¹

John was brought to court—illiterate, friendless, helpless. He asked if one of the attorney's present in the courtroom would defend him and pointed to Miller.²² Notwithstanding the public's disapproval, Miller took the case *pro bono*.²³

The trial was held in Aurora. The presiding judge was Ambrose Spencer, who later became Chief Justice of the New York State Supreme Court and a Congressman.²⁴ Miller argued that under the common law castle doctrine Delaware John had a right to defend himself in his home and did not have a premeditated intent to murder Ezekiel Crane.²⁵ He may have committed manslaughter, but certainly not murder, Miller argued. The prosecutor took the low road, appealing to a common prejudice of the day against Native Americans.²⁶ Crane's death, he asserted, "was perpetrated by a savage of the wilderness, whose rude cabin was not his castle."²⁷

Judge Spencer sided with the prosecution, found John guilty of murder and sentenced him to death by hanging.²⁸ Additionally, he ordered John's corpse be delivered to a surgeon for dissection.²⁹

Miller acted quickly to save his client's life. He traveled to Albany and appealed to the Governor to commute John's sentence to life imprisonment.³⁰ But the Governor refused to overturn the death sentence.³¹ On August 17, 1804, John was "hanged from a branch of a buttonwood tree" on the grounds of what is today Wells College, located on the eastern shore of Cayuga Lake. On his belt he carried a pipe and tobacco.³² The reason, John explained, was so he could "smoke the pipe of peace with [Ezekiel] Crane in the spirit world."³³

By defending Delaware John, Miller acted in the highest and best tradition of the legal profession. He also set a magnificent example for his son-in-law to follow³⁴ forty-three-years later in the William Freeman murder trial.

1846: The William Freeman Murder Trial

In 1846 the citizens of Auburn were stunned by a horrific massacre. The perpetrator was William Freeman, a young man of mixed African American and Native American descent, recently released from prison after serving a five-year sentence.³⁵ On March 12, Freeman entered a house a few miles outside Auburn with two knives and stabbed to death John Van Nest, his pregnant wife, his two-year-old daughter and his mother-in-law.³⁶

The brutal killings detonated an explosion of public outrage. After Freeman was captured and he confessed, a lynch mob nearly took his life as he was walked through the streets of Auburn to the county lock-up. No lawyer would represent him. The citizenry made clear anyone who defended Freeman would face violence themselves. At an initial court appearance, the judge asked "[w]ill anyone defend this man?"³⁷ In response "a death-like stillness pervaded the crowded room."³⁸

William Henry Seward had recently returned to his hometown of Auburn, following a successful tenure as a two-term Governor.³⁹ He was sensitive to public opinion and still politically ambitious. But he threw caution to the winds and agreed to represent Freeman. In a letter to a political patron, Seward wrote that his decision would "rain a storm of prejudice and passion which will try the fortitude of my friends—But I shall do my duty, I care not whether I am to be ever forgiven for it, or not."⁴⁰

Seward threw himself into the case and determined that Freeman's only chance was to raise the then novel insanity defense. His investigation uncovered a history of insanity in Freeman's family and that Freeman had been beaten in prison, leaving him deranged.⁴¹ During the course of Freeman's trial, Seward called five doctors who testified to Freeman's mental condition.⁴² In his twelve-hour summation, Seward implored the jury to ignore the color of Freeman's skin.⁴³ "He is still your brother and mine.... Hold him then to be a man."⁴⁴ Seward argued that his client's conduct was "unexplainable on any principle of sanity," and pleaded with the jury not to seek the death sentence. The jury was unmoved and returned a guilty verdict.⁴⁵

Seward had only begun to fight. He applied to the Governor for a pardon and when that was turned down, obtained a stay of execution from the State Supreme Court.⁴⁶ On appeal, Seward argued that the case was riddled with trial error and won a reversal of the conviction. But there was no retrial. Prison officials determined Freeman's mental condition deteriorated to the point that he was not competent to stand trial.⁴⁷

As things turned out, Seward's courageous defense was not only good for the professional soul, but also his career. He acquired a reputation "as a defender of the defenseless," which proved to be a vital asset.⁴⁸ A few years later he was elected to the United States Senate.⁴⁹ In 1860, he was the front runner for the Republican nomination for President, but a railroad lawyer from Illinois, Abraham Lincoln, bested him.⁵⁰ After Lincoln won the Presidency, he tapped Seward to be Secretary of State.⁵¹ Seward went on to become the President's indispensable ally, serving as his chief advisor on foreign and domestic matters during the Civil War.⁵²

1876: The Birth of the Legal Aid Movement

1876 was an exciting year. America celebrated its one-hundredth anniversary of independence. And the first le-

gal aid society in the nation was established in New York City.⁵³

The new society was founded by a German-American philanthropic group to provide assistance in civil matters and discourage the exploitation of the newly arrived immigrants. Initially, representation was offered exclusively to persons of German birth.⁵⁴ By 1890, however, the society expanded its services to all indigents and named itself The Legal Aid Society.⁵⁵

From humble beginnings, the legal aid movement found support in urban areas and gained momentum across the country. In 1919 there were forty legal aid societies and the number rose to seventy in 1947.⁵⁶ By 1965 virtually every major city in America had a legal aid program.⁵⁷ The establishment of the federal Legal Services Corporation in the 1970s ensured legal aid services in every state.⁵⁸

Today, legal aid societies face daunting and continuous challenges to obtain necessary funding. Nonetheless, they perform heroic and vitally important work.⁵⁹ To think, like so many great institutions in America, the legal aid movement began in New York.

1920: Charles Evans Hughes Stands Up to the Red Scare

In 1920, another great moment in New York pro bono history occurred, but the client was not a person. It was a cause—the defense of representative government.

On January 7, 1920, on the first day of the legislative session, the New York State Assembly suspended, pending “trial,” five Assemblymen who belonged to the Socialist Party. The Assemblymen were not charged with individual wrong-doing. The allegation was that the Socialist party to which each belonged constituted “a subversive and unpatriotic ‘membership organization’ committed to the violent overthrow of the government.”⁶⁰

The State and nation were then in the grip of the Red Scare of 1919-1920. A “monstrous social delirium” caused millions to imagine the state and nation were turning into Russia, where in 1917 an extreme faction of Socialists seized power and abolished all other political parties and factions.⁶¹ The public was overrun by a “reign of terror,” columnist Walter Lippman wrote, “in which honest thought is impossible, in which moderation is discountenanced, in which panic supplants reason.”⁶²

Thus, the day after the five Socialists were suspended virtually every respected figure in New York remained silent. “It took courage to stand up for one’s principles during the Red Scare. People who held unpopular points of view courted ruin. That no one of stature might challenge the Assembly seemed possible. But one of America’s most distinguished lawyers stepped forward to make his voice heard. He was Charles Evans Hughes.”⁶³

Hughes was a towering figure in American life in 1920. He was a leader in the Republican Party, having

been its unsuccessful candidate for President in 1916 against Woodrow Wilson. He was a former two-term New York Governor and Associate Justice of the United States Supreme Court. He was also being considered for high public office. (He went on to serve as United States Secretary of State and Chief Justice of the Supreme Court.)

Hughes was profoundly opposed to Socialism as a political philosophy. But he could not stand mute in the face of the threat to core principles of American government presented by the five Socialists’ suspension.⁶⁴

In an open letter to the Speaker of the Assembly, reported on the front page of newspapers throughout the state, Hughes wrote that “it is fundamentally opposed to the fundamental principles of our government, for a majority to undertake to deny representation to a minority through its representatives elected by ballots lawfully cast.”⁶⁵

Next, Hughes obtained the assistance of the organized Bar for his position. The Association of the Bar of the City of New York passed a resolution condemning the Assembly’s actions as “un-American.” The City Bar also appointed a committee headed by Hughes to appear before the Assembly’s Judiciary Committee at the five Socialists’ trial “to safeguard the principles of representative government.”⁶⁶

On January 20, 1920, Hughes and his City Bar colleagues traveled to Albany for the first day of the trial.⁶⁷ As soon as the gavel fell, Hughes stood up and approached the members of the Judiciary Committee. He announced that the City Bar was appearing “in the public interest” and “not...on behalf of the members of the Assembly under suspension, nor on behalf of the Socialist Party.”⁶⁸ The matter was “closely related to the security of the Republic” and the City Bar’s “sole desire” was that the Assembly applied fundamental principles of constitutional law and procedure and functioned in a manner that would commend its actions “to the judgment of the people of the State whose interests are here involved.”⁶⁹ Hughes demanded the Socialists “be restored to the privileges of their seats” because no question had been raised as to their qualifications to serve.⁷⁰ If the Assembly wished to present charges against the Socialists of any violation of law, it should do so, he said.⁷¹ But until that occurred and was “established by proof, after due opportunity to be heard,” the Socialist Assemblymen should “enjoy all the privileges of their seats in recognition of their own rights and of the rights of their constituencies.”⁷²

Hughes’ stirring words were not enough. After a 21-day trial, a majority of the Judiciary Committee recommended that the five Socialists be expelled from the Assembly. On April Fool’s Day, the full Assembly overwhelmingly voted to expel the Socialists. At a subsequent special election, the voters returned to office all five Socialists. However, the Assembly refused to seat three of

them and the other two resigned in solidarity with their ousted colleagues. As a consequence, “60,000 New Yorkers were denied their legally elected representation.”⁷³

While he was unable to change the outcome of the Assembly’s proceedings, Hughes’ efforts helped bring an end to the Red Scare. He made it safe for others to criticize the Assembly and the nation began to come to its senses. As Zechariah Chafee, Jr., the nation’s leading scholar on civil liberties in the period, wrote: “The American people, long bedrugged by propaganda, were shaken out of their nightmare of revolution.... A legislature trembling before five men—the long-lost American sense of humor revived and people began to laugh. That broke the spell.”⁷⁴

1954: *Brown v. Board of Education*

*Brown v. Board of Education*⁷⁵ is celebrated as one of the greatest Supreme Court decisions in American history.⁷⁶ The Court held that the racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁷⁷ This epochal ruling helped put an end to institutionalized discrimination and dismantle Jim Crow law.⁷⁸

One doesn’t normally think of *Brown* as a New York case. After all, the case as heard before the United States Supreme Court involved a group of lawsuits against school districts in Kansas, South Carolina, Virginia, Delaware and the District of Columbia.⁷⁹ Each of these cases, however, was coordinated by the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) in New York City.⁸⁰ Moreover, the team that handled the case in the Supreme Court included New Yorkers, such as Thurgood Marshall—the team’s leader—and Robert L. Carter, Jack Greenberg, and Constance Baker Motley. Marshall later served on the United States Court of Appeals for the Second Circuit and Solicitor General, and became the first African-American Justice of the Supreme Court. Likewise, Carter, Greenberg, and Motley moved from strength to strength in New York after *Brown*. Motley and Carter became United States District Court Judges in the Southern District of New York, and Greenberg succeeded Marshall as head of the LDF.⁸¹

In *Brown*, these New York lawyers demonstrated the power and potential of public impact litigation by fundamentally altering the trajectory of race relations in the nation.

1971-1972: The Investigation of the Attica Uprising

Among the darkest chapters in New York history are the events that unfolded over four bloody days in 1971 at the Attica Correctional Facility near Buffalo. On September 9, 2,200 inmates overcame correction officers and took over the facility.⁸² Rioting and hostage taking ensued.⁸³ Governor Nelson Rockefeller lost patience with attempts to negotiate a peaceful resolution and ordered the State Police to retake the facility.⁸⁴

On the morning of September 13, a helicopter dropped tear gas into an outdoor exercise yard where

most of the inmates and hostages congregated.⁸⁵ This was followed by an assault led by State Police Troopers.⁸⁶ Sharpshooters with rifles opened fire into the yard, joined by others firing buckshot from shotguns.⁸⁷ “Save for the Wounded Knee massacre...[it] was the bloodiest one-day encounter between Americans since the Civil War.”⁸⁸ Within six minutes, nine hostages and twenty-six inmates were dead and eighty others wounded; over the next few days another hostage and three inmates died.⁸⁹

In the aftermath of the raid authorities began telling lies. The media was advised that the hostages did not die during the gunfire, but rather, were executed earlier by inmates.⁹⁰ One hostage was said to have been castrated.⁹¹ But none of this was true.⁹² Autopsies proved the hostages were killed by gunfire from the State Police and prison guards.⁹³

The Governor and legislative leaders recognized that the public would not accept an investigation conducted by the state, so they turned to the Judiciary to select an unbiased fact-finding group.⁹⁴ On September 30, 1971, senior state judges appointed a diverse “nine-member citizens committee with instructions to conduct a ‘full and impartial’ investigation of all aspects of the [] prison uprising.”⁹⁵ None of the panel’s members had official ties to the state government and none participated in the Attica affair.⁹⁶

The Commission’s Chair was Robert B. McKay, Dean of the New York University Law School and Chair of the Citizens Union.⁹⁷ He had previously headed important study groups and was a man of principle.⁹⁸ “Under his leadership,” the *New York Times* editorial page wrote:

the panel promises to bring a high degree of intelligence, compassion and doggedness to its task. It should command the confidence of the public at large, as well as the community at Attica where prison personnel and their families live, the urban slums where criminals are spawned and the political leadership which must respond positively to the group’s findings.⁹⁹

The Commission’s first decision was one of its best. It appointed as General Counsel Arthur L. Liman, a partner at the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP. Liman labored tirelessly. He and his team of investigators conducted more than 3,000 interviews—2,000 inmates who had been at Attica, 550 State Troopers, and 450 prison guards.¹⁰⁰

The Commission released its report one year to the day after the assault at Attica.¹⁰¹ Over 500 pages long, the report was comprehensive in scope and unsparing in its criticisms. The Commission faulted Governor Rockefeller for failing to go to Attica to manage the crisis.¹⁰² It also took to task the State Police for inadequate planning and excessive use of force resulting in needless loss of life.¹⁰³

The Commission's findings were unanswerable and widely accepted as a definitive statement of what happened at Attica. The report itself was so well-written it was nominated for the prestigious National Book Award. But far more important, the report "helped start the prisoners' rights movement," which has made important contributions to the State and nation's correctional systems.¹⁰⁴

Conclusion

So there you have it—six glorious moments in New York pro bono history. There are countless others. More recently, the pro bono response of New York lawyers to the horror of 9/11 was exemplary. For fourteen years Albany attorney Scott Fein successfully prosecuted the longest running civil rights case in American history involving widespread racial profiling by State Police in Oneonta.¹⁰⁵ In the tradition of Elijah Miller, William Seward, and Charles Evans Hughes, New York lawyers represent Guantanamo Bay and death row inmates, despite intense public outcry. Each year, millions of pro bono service hours are provided by the New York Bar.

And so I end where I began. New York is exceptional. Its pro bono history is one from which we can all take pride. May the lawyers of today and tomorrow draw inspiration from it and write their own chapters in New York history. Pro bono publico indeed!

Endnotes

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4. Rule 6.1 of the New York Rules of Professional Conduct strongly encourages lawyers to aspire to provide at least fifty hours of pro bono legal services each year and to support financially the work of organizations that provide such services. N.Y. RULES OF PROF'L CONDUCT r. 6.1 (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2014)).
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13. See ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819–1847* at 35 (1946).
14. See MONROE, *supra* note 12, at 48–49.
15. Carmen Bertonica, *The Crime of Delaware John*, AUBURN N.Y. CITIZEN ADVERTISER, Apr. 28, 1973, at 2, available at <http://fultonhistory.com/newspaper%202/Auburn%20NY%20Citizen%20Advertiser/Auburn%20NY%20Citizen%20Advertiser%201973.pdf/Newspaper%20Auburn%20NY%20Citizen%20Advertiser%201973%20-%20204240.PDF>; ELLIOTT G. STORKE, *HISTORY OF CAYUGA COUNTY, NEW YORK: ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES* 92 (1879).
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19. STORKE, *supra* note 15, at 92–93; Bertonica, *supra* note 15.
20. STORKE, *supra* note 15, at 93.
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Pushing the Envelope on Pro Bono: The New York Judiciary's Initiatives in Legal Education

By Chief Judge Jonathan Lippman

I. The Crisis in Civil Legal Services for the Poor

It is often in times of hardship and adversity that innovations in policy reach new heights. When I was sworn in as chief judge in February 2009, it had only been a few months since the collapse of Lehman Brothers and the height of the global financial crisis. The effect of the economic crisis was reverberating around the globe, yet it was most acutely felt among the low-income individuals and families in New York. From my 40-year tenure in the courts, I knew that multitudes of unrepresented litigants came to the New York courts without access to legal help in cases concerning the most basic necessities of life. The justice gap, the difference between the level of civil legal assistance available and the level that is necessary to meet the legal needs of the poor and near poor, considerably widened in the aftermath of the events of Fall 2008, as the ranks of the poor swelled and government funds for services dried up. Even currently, in the midst of the economic recovery, more than one-third of New Yorkers live at or below 200 percent of the poverty level, the benchmark for receiving civil legal services grants and other benefits.¹ Meanwhile, declining tax revenue has translated into dramatic cuts to health care, services to the elderly and disabled, and other aspects of government-funded public services for the poor.²

The economic recession exacerbated the already untenable situation in civil courtrooms across the state. Each year, more than 2.3 million litigants throughout New York are unrepresented in civil cases.³ As measured in 2010, over 98 percent of tenants were unrepresented in eviction cases in New York.⁴ Additionally, a shocking 99 percent of borrowers were unrepresented in consumer credit cases in New York City, and over 95 percent of parents were unrepresented in child support matters.⁵ Millions of New Yorkers fighting for the custody of a child, facing eviction or foreclosure, or seeking access to health care, education, and subsistence income, were forced to navigate the state's complex court system without representation. At the same time, funding for civil legal services declined on the federal and state level when it was needed the most. The Interest on Lawyer Account Fund of New York State ("IOLA") fell from \$32 million annually to less than \$8



million as interest rates plummeted.⁶ The Legal Aid Society in New York City, the premier legal services organization in the country, "turn[ed] away eight of every nine people seeking help with civil legal matters" following the economic downturn.⁷

In response to these challenges, I formed the Task Force to Expand Access to Civil Legal Services in New York and convened annual hearings to assess the level of unmet need for legal representation in civil proceedings involving fundamental human necessities.⁸ The Task Force was charged with preparing a report based on the testimony from hearings throughout the state and issuing recommendations to the Chief Judge, the Legislature, and the Executive about the public resources needed to meet the civil legal needs of the poor. As a result, the Judiciary has been able to obtain critical state funding for civil legal services over the past four years, growing from 0 to \$27.5 million, to \$40 million, to \$55 million, and now \$70 million in much-needed funds for the 2014-2015 Judiciary budget.⁹ This funding has been crucial in the Judiciary's collective effort to close the justice gap, yet it only has been one component of a multi-faceted approach to promote access to justice.

A central and necessary factor in bridging the vast justice gap is the role of pro bono service to the poor within the legal profession, and a new, creative strategy to encourage pro bono work was vital given the great need for civil legal help in cases involving the essentials of life. For centuries, pro bono service for those in need has been an integral part of the legal profession. The American Bar Association's Model Rule 6.1 states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year."¹⁰ New York's Rules of Professional Responsibility echo the ABA's Model Rules in strongly encouraging lawyers to provide pro bono legal services to benefit poor persons.¹¹ While many lawyers in New York have embraced a culture of service and use their skills and position to provide for the justice needs of those less fortunate, the harsh reality is that the voluntary efforts of the bar, however commendable on the part of many attorneys, are far from sufficient to meet the civil legal needs of the poor. A report to the Chief Judge by the Marrero Committee in 1990 estimated that no more than 10 to 15 percent of admitted attorneys participate in efforts to render professional services to poor persons.¹² A statewide survey of the pro bono activities of the New York bar in 2002 found that less than 50 percent of New York's lawyers provided some pro bono service, and only 26.5 percent of attorneys

provided over 20 hours of service.¹³ Though some current estimates indicate that the bar annually contributes 2.5 million hours of pro bono work, the civil legal needs of the poor are simply too numerous compared to the availability of assistance. Despite all the valuable work of those who selflessly answer the call, it became necessary to think outside the box to mine untapped legal resources to address the ever-increasing need, particularly in regard to academia and the role it can and should play in access to justice. Law schools are the perfect place to ensure that the next generation of lawyers are values-driven and full partners in addressing the crisis in access to justice.

II. The 50-Hour Pro Bono Rule and Its Implementation

On May 1, 2012, I announced in my Law Day address that prospective attorneys to the New York bar will be required to spend 50 hours performing pro bono work before gaining admission to the bar. The pro bono admission requirement was formed in response to the crisis in access to justice and with the goal of helping prospective attorneys build important skills while inculcating them with the core values of the profession—first and foremost of which is service to others. The 50-hour rule did not emerge in a vacuum. For many years, the New York State Bar Association, the City Bar, the New York County Lawyers' Association, and many other local and statewide bar associations have operated programs to encourage their membership to volunteer their time and resources to provide legal aid to those in need. Law schools in New York and around the nation have also encouraged pro bono practice for decades, as well as spurring law students to seek out careers in public service.¹⁴ And for years, there has also been vigorous debate on how to better prepare law students for law practice given the difficult job market for new attorneys and the reduced opportunities for legal training. The 50-hour rule emerged as a natural outgrowth of the existing pro bono programs for licensed New York attorneys and for law students and as a creative way to address the dire need for civil legal services for the poor.

In my experience, there are two approaches to implementing significant policy changes in the Judiciary. One way is to collect input, to conduct detailed research, and to build consensus before proceeding in a new course. Alternatively, in instances where a policy issue is so basic to our professional responsibility and our obligation to pursue justice, I believe strong leadership should be demonstrated at the outset by announcing with great strength and conviction the direction that will be taken. Then, detailed feedback is gathered in order to draft and shape the particulars of the actual new rule. In issuing the 50-hour rule, I believed the importance of promoting access to justice and cultivating a culture of service among future lawyers was absolutely fundamental to the constitutional mission of the courts to promote equal justice. Therefore, it was not a question of measuring the popular-

ity of the rule or taking a poll or vote as to the wisdom of requiring law students to do 50 hours of pro bono work during law school. Instead, I announced my intention and decided to fill in the canvas later! While critics argued that the 50-hour pro bono rule imposed too onerous of a burden on law students in the midst of an economic recession, I countered that getting students to understand the core values of the profession outweighed any modest inconvenience the students faced. Law students have nearly three-and-a-half years to fulfill the requirements of the 50-hour rule, which can be accomplished easily with a little more than a week's worth of work. Moreover, law schools, partnering with legal service organizations, have provided manifold opportunities for students to meet the requirement.

The initiative was designed so that law students would demonstrate before they are admitted to the Bar that they understand what it means to be part of the legal profession, which entails a responsibility to the community. Learning the value of giving back to the community as a lawyer is just as important as learning the basic principles of Torts and Contracts. Performing 50 hours of legal service at the dawn of their legal careers helps to imbue new lawyers with lifelong habits, and providing legal services for the poor gives young people a window into the real world, building empathy and understanding for the less fortunate. In my view, pro bono must become a part of the DNA of new lawyers and be part of the very fiber of their beings, so the question of whether or not to do pro bono will no longer be a point of contention for the next generation of lawyers.

In the weeks following the Law Day announcement, I appointed the Advisory Committee on New York State Pro Bono Bar Admission Requirements, a group that represented all the stakeholders interested in the formulation of the pro bono requirement for bar admission.¹⁵ The Committee was co-chaired by Judge Victoria A. Graffeo, then-Associate Judge of the New York Court of Appeals, and Alan Levine, a practicing lawyer and former Chair of the Legal Aid Society.¹⁶ The group was composed of current and former law school deans, representatives of legal service providers throughout the state, members of the judiciary, pro bono counsel from law firms, and state and local bar leaders.¹⁷

In my years of experience as a court administrator and a judge, I knew that launching a truly innovative program often generates controversy and some pushback. It was fundamentally important that the relevant stakeholders supported the initiative in order for it to succeed, and soliciting comments was crucial to engaging the law schools, legal service providers, law firms, and other players and for making sure that the 50-hour rule would be practical and workable. The Committee was tasked with gathering feedback and comments on the 50-hour rule and drafting recommendations for the parameters of the rule and its implementation. The Advisory Committee specifically recommended that qualifying pro bono work

must be law-related, that the Court of Appeals should permit work that is performed outside of New York, and that mandatory supervision of pro bono work was essential.¹⁸ The Court of Appeals carefully scrutinized the Advisory Committee's recommendations and considered them in creating the contours of the 50-hour rule. I was encouraged to hear from the Advisory Committee that while many of the law schools had initial concerns about the 50-hour rule, they all expressed their commitment to the initiative and promoting access to justice.

The New York Court of Appeals approved Rule 520.16 of the Court of Appeals for the Admission of Attorneys and Counselors at Law on September 14, 2012, and the rule applied immediately to students then in their first and second years of law school.¹⁹ The rule lays out that beginning on January 1, 2015, applicants to the New York State Bar must complete 50 hours of qualifying pro bono service prior to seeking admission to the New York Bar and must submit affidavits of compliance attesting that they have done so.²⁰ Rule 520.16 defines pro bono service as the provision of legal services for persons of limited means; non-profit organizations; or individuals or groups seeking to secure or promote access to justice.²¹ Providing legal assistance to a judicial, legislative, executive, or other governmental entity also qualifies as pro bono service under the definition of the rule.²² As the first state in the nation to implement such a pro bono admission requirement, it required New York's judiciary to confront issues of first impression such as what type of pro bono work would fulfill the 50-hour requirement, how to match students to pro bono opportunities, how to track the number of pro bono hours, and how to track the quality of the pro bono experience.

Moreover, an immense number of candidates—nearly 16,000 in 2013—take the New York bar exam each year,²³ and the judiciary had to consider that the candidate pool includes students from other states as well as many foreign jurisdictions. New York tests more foreign-educated candidates than any other jurisdiction in the country,²⁴ and in 2013, foreign-educated candidates comprised almost 30 percent of all bar exam takers.²⁵ The Advisory Committee engaged in extensive discussion about how to accommodate such a challenging and diverse constituency of bar admission candidates, where the majority of test takers come from out-of-state law schools.²⁶ The Court of Appeals ultimately decided that the 50-hour requirement should apply to all applicants to the New York Bar and that the qualifying pro bono work can take place outside of New York, including foreign countries. Candidates simply are asked that if the pro bono work is completed outside of the United States, that they “explain in detail the nature and circumstances of [their] work as part of [the] application for admission.”²⁷

Even if applicants to the New York Bar do not intend to practice in New York or end up performing their qualifying work out of state, the goals of the 50-hour rule are still vitiated because once the candidates experience the

intrinsic rewards that come from helping others through pro bono service, many of them will be hooked for life on the joy of using their legal skills to help those most in need. The dividends from their future pro bono service as licensed attorneys will provide enormous benefits to those desperately in need of legal help, and the positive impact on persons of limited means, communities, and organizations that gain from this infusion of pro bono work is immeasurable.

By requiring, as a condition for admission to the bar and the practice of law, that applicants demonstrate 50 hours of participation in law-related and uncompensated pro bono service, the New York Judiciary is sending a very strong message that assisting in meeting the urgent need for legal services is a necessary and essential qualification to becoming a lawyer. Law students, practicing lawyers, and the entire legal community must understand service to others is an indispensable part of legal training, and all new attorneys in New York are now required to show their commitment to the legal profession's ideals.

Contributions by bar applicants located in New York alone will provide as much as an additional half million hours of pro bono legal services to those in dire need of legal assistance in the Empire State and also will help prospective attorneys build valuable skills and acquire the practical experience crucial to becoming a good lawyer. Newly minted lawyers are simply better at their jobs when they receive direct experience in the practice of law, and the 50-hour rule provides that all qualifying legal work must be supervised by an experienced attorney. The Advisory Committee noted that practicing lawyers supervising the pro bono work “have an important mentoring function” and also suggests that bar associations create programs to facilitate mentorship relationships.²⁸ Under appropriate supervision, law students will have the opportunity to assist families facing eviction or foreclosure, draft contracts for fledgling not-profits, help victims of domestic violence, or help state and local government entities in times of economic stress. Through these experiences, law students will access real-world lessons that are part of an important foundation for successful law practice.

III. Advancing a National Conversation on Pro Bono Bar Admission Requirements

Since the Court of Appeals approved the 50-hour pro bono admission rule in New York, it has propelled forward the national dialogue regarding how to prepare new lawyers for the practice of law with pro bono work, the importance of inculcating them with the values and ethics of the profession, and the impact on narrowing the justice gap. Various states around the country have already begun to discuss implementation of the 50-hour rule.

A California State Bar Task Force recommended adopting New York's 50-hour pro bono service requirement in a report issued in mid-2013.²⁹ The Task Force on Admissions Regulation Reform relied on a 2010 Core

Competencies study published by the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers that examined past legal education and competency studies including the 1992 MacCrate Report, the 2007 Carnegie Report, the 2007 Stuckey Report, and others.³⁰ The 2010 Core Competencies study concluded that programs designed to help law students transition to full-time legal practice must focus on competencies such as problem solving, exercising good judgment, client relations, time management, communication, and the ability to see multiple points of view.³¹ The California Task Force Report determined that training for new lawyers must become more practice oriented and that pro bono and modest means representation should be part of a well-rounded competency training program.³² The Report also noted that New York's 50-hour rule depends heavily on a high level of supervision by experienced attorneys as law students perform their qualifying work and drew from New York's example to recommend that newly admitted California attorneys complete 10 hours of CLE courses on competency training or participate in a certified mentoring program.³³ The State Bar of California is currently in the process of implementing a 50-hour pro bono service requirement for new attorneys, tentatively to go into effect in 2016.³⁴ The California proposal differs slightly from New York's pro bono rule in that it allows new attorneys to satisfy the 50 hours of pro bono service after admission in the first year of licensure and includes service to people of modest means in addition to the poor.³⁵

In addition to the promising progress in California, the Conference of Chief Justices passed a resolution in July 2013 referencing New York's 50-hour rule and encouraging the Chief Justice of each state to discuss proposals that would require law students to perform pro bono service as a condition of admittance to their state bar.³⁶ The Chief Justices' Resolution acknowledged that "pro bono services performed by law students during law school are a form of essential training which provide students with a real opportunity to learn about the law, the courts, and the students' own professional responsibility for helping to assure access to justice."³⁷ Earlier in 2013, I had the opportunity to give a presentation during the conference of chief justices about the 50-hour rule, and I spoke with numerous other chief justices about New York's rule. New York has been a successful incubator of many cutting-edge programs in the fight for access to justice, and it is my hope that other states will follow our lead in regard to the 50-hour requirement.

Chief Justice Stuart Rabner of New Jersey formed a working group in October 2012 to consider a pro bono requirement for admission to the New Jersey bar.³⁸ The Working Group's April 2013 Report noted that New York's 50-hour preadmission requirement influenced New Jersey's decision to investigate its own bar admission requirement since a significant number of students take both the New York and New Jersey bars.³⁹ The Working

Group determined that New Jersey should require bar applicants to perform 50 hours of preadmission pro bono work to fulfill the objectives of serving the growing population of those unable to afford legal services, providing law students with legal experience assisting underserved populations, instilling prospective attorneys with a career-long habit of performing pro bono service, and ensuring that the court's adversarial system is able to operate as intended.⁴⁰ Currently, the Working Group's proposal is still under consideration by the Supreme Court of New Jersey.⁴¹

Similarly, a committee of Connecticut's Access to Justice Commission has recommended that the Connecticut Judicial Branch convene an exploratory task force with representatives from the Connecticut Bar Examining Committee and Connecticut law schools to consider whether to implement a 50-hour pro bono bar admission requirement.⁴² However, the chairman of the judicial branch's pro bono committee, Judge William Bright Jr., commented that Connecticut was not pursuing such a rule and instead planned on working with individual law schools to look for ways to involve students in pro bono.⁴³

Montana's Access to Justice Commission has also investigated whether to require 50 hours of pro bono service for admission to the bar. Its current recommendation to the Montana Supreme Court is that all bar applicants submit a report of their pro bono service during the three-year period preceding their admission.⁴⁴ The mandatory reporting requirement would apply even if the bar applicant has no hours to report,⁴⁵ essentially creating an expectation but not requiring that candidates complete pro bono service.

The uptake of the 50-hour rule has been progressing, and momentum is gradually building on bar preadmission pro bono. Most recently, the ABA has modified its interpretation of the standard pertaining to pro bono work by suggesting that law schools aspire to have each student perform 50 hours of pro bono.⁴⁶ The ABA's interpretation of Standard 303(b) now reads, "law schools are encouraged to promote opportunities for law students to provide at least 50 hours of pro bono service over their law school careers that complies with 303(b)(2)."⁴⁷ The ABA Council of the Section of Legal Education and Admissions to the Bar acted after receiving a petition from more than 600 law students and graduates from around the country supporting the concept of an aspirational pro bono target for law school.⁴⁸ Furthermore, advocates continue to urge the ABA to modify its accreditation standards to specify the number of pro bono hours law students must perform in order to graduate.⁴⁹

Movement toward a pro bono bar requirement in other states, the resolution by the chief justices, and the work to modify the ABA's accreditation standards are all part of a wave of action in response to New York's first-of-its-kind, 50-hour rule. Though not all may agree with the rule, commentators have noted that the 50-hour rule is "a

groundbreaking development” that is reshaping the bar admission landscape and that “will certainly change the way that many law students across the nation are introduced to pro bono and public service.”⁵⁰ With New York as the trailblazer, I believe that more states in the near future will take the path we have chosen to engage aspiring lawyers to achieve equal justice for all.

IV. Pro Bono Scholars Program

As an outgrowth of the 50-hour pro bono admission requirement, the New York State Judiciary has also pioneered a program called Pro Bono Scholars that gives law students an incentive to devote their entire last semester of law school to pro bono work, going far beyond the mandatory 50 hours and making a significant contribution to addressing the access to justice gap. The program was announced during the State of the Judiciary address in February 2014, and already, all fifteen New York law schools are offering the program to their rising third-year students.⁵¹ Pro Bono Scholars from around the state will be devoting a semester to full-time pro bono work at a law school clinic, legal services organization, government agency, or law firm. In return for their semester-long service, the Scholars are permitted to sit for the February bar exam during their third year of law school and will be able to receive bar admission approximately seven months before their classmates who take the July bar exam. Early bar admission dramatically accelerates Pro Bono Scholars’ entry into the job market and allows them to be in a position to start repaying any outstanding education loans.

Pro Bono Scholars will earn at least twelve academic credits for twelve weeks of work, and a key component of the Pro Bono Scholars Program is mandatory supervision by a licensed attorney. The goal is to have a supervising attorney who provides the student with meaningful training, oversight, instruction, and evaluation.⁵² Many new law graduates have difficulty finding quality mentoring relationships and adequate practical training in their first job out of law school. The Pro Bono Scholars Program facilitates mentoring as students provide essential services to people in need. Additionally, there will be an academic component that gives students the opportunity to reflect on the work they are performing at the placement and to explore their ethical obligations.

In its inaugural year, about 150 students will participate in the program. Each New York law school is selecting its enrollees, whose names are submitted to the court system for approval. While some law schools will have their Pro Bono Scholars work full-time in an in-house clinic, others will be placing students in legal service organizations or law firms.⁵³ The court system is also proud to have Pat Bucklin, former executive director of the New York State Bar Association, to serve as executive director of pro bono services and to oversee the Pro Bono Scholars Program. I am confident that the Program will be a great success.

Like the 50-hour rule, the intent behind the Pro Bono Scholars Program is to instill in future members of the New York Bar the value of public service to the poor, to provide the opportunity to develop valuable legal skills that will prepare them for the practice of law, and to make a meaningful contribution to bridging the justice gap with an infusion of civil legal services for the poor. New York’s efforts in increasing pro bono service among prospective attorneys is only one portion of a broader strategy to improve access to justice, which includes increasing funding for civil legal services, facilitating assistance by non-lawyers, pursuing untapped legal talent, expanding resources for self-represented litigants, and many other initiatives. The cause of equal justice is worthy of New York’s resources, attention, and our most creative thinking given how fundamental it is to a well-functioning society and to the legal profession. Though it may entail making sacrifices and require great persistence to achieve change in a tradition-bound profession, the stakes are much too high to sit on our laurels and to be satisfied with the status quo. I strongly believe that both the 50-hour pro bono rule and the Pro Bono Scholars Program will have a significant impact on future generations of lawyers by mobilizing them to embrace a culture of service. With such new and innovative thinking, we can help to reform and revitalize legal education and the legal profession to adapt to society’s changing needs.

Endnotes

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State Intervention in Municipal Fiscal Distress

By Peter J. Kiernan

I. Introduction

Many states have municipalities and other political subdivisions, all of which are creatures of the states, that are experiencing fiscal distress. The Great Recession of 2007–2009, the effects of which still linger in many regions, was characterized by severe contractions of governmental revenues, particularly sales tax, income tax, and property tax receipts. Declining manufacturing, eroding tax bases, loss of population, and demographic change, as well as years of poor fiscal practices have put many municipalities in fiscal peril for more than a decade. In recent years, their problems have been worsened by growing, staggering personnel costs in the form of retirement and health care benefits,¹ for which layoffs and reduction of services are not an optimal solution. Also, local governments too often exhibit a debt reflex to address budget gaps that usually just compound the problem because most budget deficits are structural, not temporary, phenomena. Adding debt burdens without producing new assets adds costs to subsequent generations of taxpayers and increases borrowing costs for essential infrastructure investment. The Great Recession did not cause this systemic fiscal stress of municipalities as much as it exposed and exacerbated it.

It is natural for fiscally stressed municipalities to petition their states for financial assistance, often in the form of “spin ups” (accelerated aid), new taxing authority, loans, grants, and takeovers of service responsibilities. States suffer, too, and, as exemplified during recent years, are not able to supplement local government revenues. They also may be unwilling. Politicians at higher levels of government resist making difficult political choices to assist politicians at lower levels of government who are trying to avoid such decisions. As economist Don Boyd said, “[F]iscal stress runs downhill.”²

Only about nineteen states have statutory programs to address local government fiscal distress and fiscal emergencies; that is, in various forms, intervention regimes.³ No two states have intervention programs that are identical: Michigan’s approach is draconian; California does not have one; Pennsylvania’s is ineffective; arguably, New York’s is the best. Many of the intervention programs are ad hoc and reactive. Some are evolving pragmatically as financial circumstances and policy choices are presented. At their core, all interventionist regimes involve political decision making. The distinguishing



essence of the New York approach is political accountability, as first given practical form during the infamous New York City Fiscal Crisis of the 1970s.

II. The New York City Fiscal Crisis, 1975–1980 (the “Fiscal Crisis”)

New York State had the severest test of any interventionist state when its largest municipality and most significant economic engine was abruptly cut off from the capital debt markets in 1975. In the 1970s, New York City comprised more than 40% of the state’s population, and its immediate region comprised more than 70%.⁴ The city generated more than 50% of the state’s economic activity and considered itself to be the financial capital of the world. Yet its own finances were in disarray. The city had become addicted to debt. The proceeds of its short-term debt (less than one year in duration) were constantly “rolled over,” and, thus, were counted as revenue for purposes of achieving a facially balanced budget by using bizarre “checkbook” accounting that accrued revenues and delayed expenses.

The city also was using long-term debt (capital budget) to pay operating expenses. In 1975, almost \$700 million of operating expenses were improperly financed in the capital budget. That year, about one-third of all government short-term debt in the United States (about \$2.6 billion) was New York City paper and the five New York City clearing house banks owned about 50% of it.⁵ When these banks, worried about their own stability and exposure to claims of securities fraud by shareholders, announced that they no longer would underwrite any New York City debt,⁶ the city could not finance its operations (which were understated) or capital budget, could not service much of its existing debts, could not meet its obligations as they became due, and was insolvent. The city appealed to the state for urgent assistance. Over the ensuing five years, the state responded in many creative ways to save the city and, it thought, its own credit.

There are many explanations of and innumerable causes for why the financial structure of New York City collapsed.⁷ In the 1970s, the city’s population declined by nearly 800,000; in 1974, it had lost 143,000 jobs (a 4.1% drop); 21,000 housing units were abandoned yearly; and approximately 12% of its available office space was vacant, which was “almost as much as the total office space in Philadelphia” in 1975.⁸ This article, however, focuses only on elements of the solutions as illustrative of preferred ways for a state to intervene in municipal fiscal distress. These solutions, with variations, were employed subsequent to the Fiscal Crisis in Erie County, Buffalo, Yonkers, Troy, and, most recently, Nassau County.

It is important to emphasize that the Fiscal Crisis fundamentally was a financing crisis and not a revenue crisis. The difference is significant. For example, New York State in the period between 2008 and 2010 became starved for revenues as tax receipts fell at an unprecedentedly severe pace. Nevertheless, the State never lost the ability to borrow or suffer a diminution of its credit during this revenue crisis. In 1975, New York City had no credit.⁹ Every remedial decision made during the five years of the Fiscal Crisis was designed to regain New York City's access to the credit markets. Financing became policy. This was manifested in the courts also.¹⁰ By contrast, between 2008 and 2010, revenue became policy. New York City had borrowed excessively because it was spending too much in relation to its revenues as it experienced a loss of industrial jobs and was transitioning to a primarily service economy. The city had a structural budget deficit, i.e., its recurring revenues were exceeded by its recurring expenses that it failed to recognize and tried to mask. The structural deficit overwhelmed it. Eventually, the city, through state (and federal government) intervention, largely corrected its structural deficit.

Local governments throughout New York State and the country also are suffering from chronic structural deficits. While in some cities these deficits morph into defaults and financing problems, in most instances, state intervention programs are designed to address structural deficits and impose fiscal discipline to curtail spending. (New York's intervention approach is moving in this direction.) Nearly all municipal government fiscal distress is characterized by failures in local government political decision making. The New York approach, as demonstrated in the Fiscal Crisis, is imbued with political values and seeks to incentivize and enhance good political decision making processes at the local government level. Rather than supplant local government prerogatives, the New York approach intends that fiscal reforms be consensual and enduring. A review of some of the key steps taken to resolve the Fiscal Crisis shows how the New York interventionist approach developed.

A. Big MAC

New York's most widely recalled step to address the New York City Fiscal Crisis was to create a financing entity known as the Municipal Assistance Corporation (Big MAC).¹¹ Big MAC was authorized to borrow short- and long-term debt on behalf of the city. The New York City Sales Tax and the Stock Transfer Tax became state-collected taxes that were designated to be held by MAC in amounts sufficient to pay the debt service on MAC bonds and notes.¹² There also was a diversion to MAC of state aid due to the city. Thus, revenue-backed debt of MAC was intended to replace general-obligation backed debt of the city. The credit of MAC was to be substituted for the credit of the city. The MAC legislation required regular reporting from the city for purposes of investor disclosure, and further required the city to undertake accounting and

other long-term financial reforms. However, MAC, all of whose board members were appointed by the governor,¹³ necessitated annual appropriations by the state legislature of the newly state-collected city sales and stock-transfer tax proceeds to fund MAC's debt service accounts and reserves.¹⁴ There was no constitutional full faith and credit protection for MAC debt. Thus, for there to be acceptance of MAC debt, fundamental investor trust in the state's routine legislative and political processes was required. There was none. Despite offering yields as high as 11.5% and incentives to convert short-term city debt to longer-term MAC bonds, \$1.941 billion of city short-term debt remained outstanding.¹⁵ There was not a robust market for MAC debt. It became obvious that the creation of a financing agency alone would not solve the Fiscal Crisis. There was need for political reform.

B. The Emergency Financial Control Board

The state and the city had appealed to the federal government to guarantee New York City's debt, much like the federal government did to bail out Lockheed and later Chrysler.¹⁶ But the Administration of President Gerald R. Ford refused, giving rise to the famous *New York Daily News* headline, "Ford to City: Drop Dead."¹⁷ With the city on the verge of collapse, the state promulgated the New York City Financial Emergency Act (FEA)¹⁸ and created the New York City Emergency Financial Control Board (EFCB or "Control Board"), which authorized the state to intervene in the city's financial management.¹⁹ This became the cornerstone and model for the state's intervention program.

The FEA declared a financial emergency for New York City, and that was the predicate for creation of the EFCB mechanism to assume supervisory control over the financial affairs of New York City.²⁰ (Note that in some other states, the governor declares a municipal financial emergency. In New York State, it is the legislature.) The Control Board had seven members including the governor, the mayor, the state and city comptrollers, and three private citizens appointed by the governor.²¹ There was political control because a majority of the members were elected officials, and there was political accountability because the governor controlled a majority of the votes. There was also political risk since the governor was accountable to the other elected officials who had their own constituencies. Moreover, the legislature had passed the legislation with wide bi-partisan support, especially from legislators from New York City who were surrendering, at least temporarily, some of New York City's home-rule privileges. This gave the Control Board political legitimacy and integrity. All constituencies were represented and their electoral remedies were intact.

The Control Board had a wide array of powers, but, importantly, they were aggregate ones, consistent with an oversight and review responsibility. The city retained the power of initiative and the power of determining priorities. The FEA required the city to prepare a four-year

financial plan (the “Plan”) designed to achieve a budget balanced in accordance with generally accepted accounting principles (GAAP) by the end of the 1978 fiscal year.²² The Plan was to be modified quarterly, and the Plan and the quarterly modifications had to be approved by the EFCB. The Plan set forth aggregate amounts of expenditures and revenues, but it was not a budget. The mayor and the city council determined the budget and how the revenues were to be spent.²³

The Control Board also had the important power to approve all new collective-bargaining agreements proposed to be entered into by the city, but it did not have the power to abrogate existing labor agreements or any other existing contracts. (As part of the FEA negotiation, the city’s public service labor unions had agreed to a wage and hiring freeze, including step-ups, through the 1978 fiscal year.)²⁴ The EFCB’s approval power was constructed on a single criterion: whether the proposed agreement was consistent with the four-year financial plan. This criterion also applied to the Control Board’s power to approve all proposed city contracts over a threshold amount. The approval process became routinized, while the power to negotiate contracts and implement them was wholly retained by the city.

The EFCB also had the authority to control all incursions of debt by the city. To insure that the city’s debt-service obligations were met on a timely basis, all city revenues were deemed to be Control Board revenues. Debt-service reserves were established and maintained. This, of course, was the fundamental objective of the FEA, to wit: to restore the city’s access to the credit markets by restoring the city’s financial credibility. To the extent the city might fail to comply with the requirements of the legislation and not be in conformity with the Financial Plan (for example, if a debt service payment were not to be paid), the Control Board could be proactive and act in the stead of the city. But this power would lapse as soon as the city became Plan compliant.

The Executive Director of the Control Board was a joint appointment of the governor and the mayor. The Control Board had a large staff consisting primarily of about fifty professionals (auditors and accountants) and a Special Deputy Comptroller for New York City who was appointed by the state comptroller.²⁵ The Special Deputy Comptroller exercised a broad responsibility of performance auditing which served to enhance the city’s financial reporting and helped build confidence in its operations. There was external monitoring while the city remained active and responsible for internal monitoring.²⁶

The FEA, as implemented by the EFCB, required very substantial fiscal-practice reforms. The four-year financial plan was innovative and politically counterintuitive, since politicians typically are not incentivized to think long term. Political practice is incremental;²⁷ sound financial planning is not. The EFCB provided context and structure for large decisions with multiyear implications. There was

no room or opportunity for the employment of budgetary gimmicks or accounting legerdemain that defers crucial decisions. Rather, an impulse to act and decide was created. The political characteristic to keep one’s options open was belied, and the truth, that in government and politics, when one pursues a policy of keeping one’s options open, one invariably ends up with the option least preferred, was exposed. The New York State interventionist model in local government fiscal affairs is simply a structure that incentivizes all stakeholders to act in their collective best interests with a clear gauge of how to assess best interests.

C. The Seasonal Financing Act

A failing of the control board model is that it cannot produce revenues. It can alter political and governmental behavior and induce investment, but it cannot levy taxes or change the laws of economics. Thus, the State and city continued to pursue federal government assistance. In the fall of 1975, the Congress enacted the Seasonal Financing Act (the “Act”) which created a \$2.3 billion revolving-loan account for the city which provided it with cash flow relief and allowed it to finance its short-term operations.²⁸ The Act stabilized the city’s operations and helped create a market for MAC debt.

For present purposes, the significance of the Act is that it continued the themes of indirect management embraced by the FEA and was consensual. The Act had many onerous terms and conditions (in order to deter other U.S. cities from requesting similar borrowing privileges and to gain Congressional approval), but they were voluntary. For example, the Act required the city to pay a rate of interest 1% above the federal government’s cost of borrowing,²⁹ to impose taxes and fees, to fund its pension systems fully, and to engage in regular financial oversight reporting. But the city could choose not to borrow.

The Act also had a loan condition that the city’s actuarially funded pension systems had to invest about 40% of their assets in city bonds. But they could choose not to. The Act also required the five clearing house banks to exchange their short-term city paper for long-term MAC bonds, and they did, but they could have chosen otherwise.³⁰ As with the FEA, the Act persuaded the stakeholders to act, assume risk, and contribute to the solution to the Fiscal Crisis. That they did is a credit to them and to the magnificent political leadership of Governor Hugh L. Carey whose acumen gave confidence that the correct decisions were being made. But the successful implementation of the Act and all the substantial fiscal reforms that were achieved are mostly a testament to shadow governing: inducing, not imposing; guiding, not directing; incentivizing, not impelling; helping, not resisting. The federal government cast its shadow on state and city decision making, and the state cast its shadow on the city.

This is the essence of indirect management and epitomizes the New York approach. The Act and the FEA

(and Big MAC) brought vital financial assistance to the city. A significant tradeoff was that stakeholders made very significant concessions, such as wage freezes, debt lengthening, and increased fees and oversight. The many stakeholders all benefited from the federal and state interventions and rightly had to contribute to the restoration of the city's financial health without resort to the uncertainties of bankruptcy. In large part, however, the concession agreements were worked out among the affected parties prior to the passage of legislation. They were negotiated, not dictated.

The Act and FEA also gave the respective administrators, to wit, the Secretary of the Treasury and the EFCB, flexibility to negotiate additional concessions and important program details. With respect to oversight, there were broad reporting requirements, but the oversight structure sought as little management of the city's operations as possible, consistent with taxpayers' interests and democratic goals. The respective laws recognized that higher levels of government do not have the expertise to engage in day-to-day management of a large city. The federal and state governments required long-range financial and operating plans and reserved the right not to approve them if they were to cause unacceptable levels of risk, but the details of modifying the plans were left to the city.

This approach necessarily must be ad hoc as the details of various distressed circumstances always have significant differences. Very diverse situations are presented to which the state is often petitioned to respond and react. It would not be practical to promulgate all-encompassing eligibility standards to take account of the differences of time, space, and condition. An ad hoc approach based on clear principles and values provides the necessary flexibility and focus.³¹

The control board approach of New York State is imperfect. Control boards tend to single out public employees and give primacy to creditors who have the greatest bargaining leverage and the least inducements to bargain. Control boards also can be very long-term, spanning multiple gubernatorial administrations, and require careful political management. But they provide the opportunity to succeed and a forum of cooperation.

III. Alternatives to the New York Approach

The efficacy of the New York approach may be best judged by an examination of alternatives.

A. Chapter 9 of the U.S. Bankruptcy Code

As a result of many defaults by municipal debt issuers during the Great Depression, the Congress enacted a municipal bankruptcy statute in 1937. It was amended substantially in 1976 and codified as Chapter 9 when the U.S. Bankruptcy Code was enacted in 1976. It permits a municipality to file for bankruptcy.³² In order to be judicially declared eligible to file, a municipality must be insolvent and must demonstrate that it engaged in good

faith negotiations with its creditors before filing.³³ Pursuant to the Tenth Amendment of the U.S. Constitution, no municipality can file a petition for Chapter 9 relief unless it is authorized by its state to do so.³⁴ In various ways, twenty-seven states authorize their municipalities to file.³⁵ Among them are New York, California, and Michigan.³⁶ As a consequence of the Great Recession, there have been prominent Chapter 9 filings in California and Michigan, but there has never been a local government Chapter 9 in New York State.³⁷ That is partly a function of the respective states' approaches to municipalities within them that are in distress.

Unlike the more widely understood Chapter 11 corporate reorganization process, a Chapter 9, if concluded, results in a Plan of Adjustment, whereby the debts of the debtor are adjusted either by changes in terms or by reduction and settlement. Chapter 9 filings are very rare and they remain a venture into the unknown. Since 1937, there only has been 646 Chapter 9 filings (among 55,000 municipal debt issuers).³⁸ The vast majority of them have been small, special taxing districts and 180 of them were dismissed.³⁹ Since 1980, there has only been about 276 filings and 30% of them were dismissed.⁴⁰ There have only been about seven Chapter 9 filings of large debt issuers and, of those, four are in California: Vallejo, Stockton, San Bernardino, and Orange County.⁴¹ Stockton and San Bernardino are concluding; each has a population of less than 300,000, and their filings were precipitated by defaults on pension obligation bonds.⁴² Vallejo, concluded in 2011,⁴³ was precipitated by unwise development commitments, and Orange County, filed in 1994, concerned highly risky derivative investments.⁴⁴ California deliberately does not have a statutory interventionist regime and has taken a hands-off attitude towards local government fiscal distress. Some observers believe there will be additional filings in California particularly due to rapidly rising pension costs, but the experiences to date with Vallejo, Stockton, and San Bernardino have been expensive, wasteful, and inconclusive.⁴⁵ As municipal restructuring expert James Spiotto said: "You can adjust the debt without solving the systematic problems, and then you just repeat the problems."⁴⁶ That appears to be the circumstance in Vallejo.⁴⁷

On two occasions, in the darkest hours of the 1975 crisis, New York City prepared petitions in bankruptcy and came within hours of filing only to receive last-minute cash infusions, for example, a note sale to the Teachers Retirement Fund.⁴⁸ Both the city and the state went to extraordinary lengths to avoid bankruptcy, although the FEA explicitly retained the option for the city to file, and bankruptcy remains an option for all fiscally distressed cities in New York.

That the bankruptcy option has been retained is good policy. If the state were to remove the threat of bankruptcy from local government economics, it might build in increased tendencies for inefficiency, waste, and misman-

agement, which adversely affect access to credit. The loss of autonomy and pervasive failure that bankruptcy would occasion is a strong incentive to governments to address their problems by themselves. Bankruptcy is a last resort and to be avoided, so its threat should remain. Of course, in extreme circumstances, bankruptcy, however unwelcome, might be the only recourse to prevent chaos and catastrophe.

Chapter 9 bankruptcy is an intense negotiation process overseen by a federal court. A Plan of Adjustment is an aggregation of settlements in the context of contentious and expensive litigation. A municipality cannot be liquidated. An unelected judiciary, politically accountable to no one, can impose federal judicial power on a helpless electorate, although the court has no power to direct the daily operations of a debtor municipality.

A Chapter 9 represents a failure of a political system. There may be several external reasons why a city may become insolvent, such as a rapid decline in population or loss of a key industry, but when an insolvent city takes the extreme step of filing for bankruptcy, and its state lets it, there has been a breakdown in political and governmental problem solving. Unlike in New York City, which was insolvent but never judicially so declared, and where the labor, management, business, and political communities managed to reach momentous compromises and address seemingly intractable problems, bankrupt cities fail to do so. In those cities, there is exhibited a lack of talent, political acumen, leadership, creativity, and will. The underlying attitude and system of the host state toward dealing with local government distress may be a large contributing factor.

Alabama is an illustration. Jefferson County, which contains Birmingham, the state's largest city and largest revenue producer of all of Alabama's 67 counties, is undergoing Chapter 9 bankruptcy proceedings (now on appeal).⁴⁹ This is now the fourth year of the case, which was precipitated by a failed sewer bond issue and endemic corruption that led some county officials to be sentenced to prison.⁵⁰ The State of Alabama refused to get involved in the crisis even though the legislative delegation from Jefferson County is the largest in Alabama. The State even exacerbated the problem significantly when the Alabama Supreme Court struck down an occupation tax on workers' salaries that provided for more than a quarter of Jefferson County's general fund revenue, leaving the legislature unable to enact legislation for a new tax.⁵¹ "We're letting Jefferson County die on the vine," said one state legislator.⁵² It is inconceivable that such a statement could creditably be made in New York.

B. Receivership

Some states, most notably Michigan, Rhode Island, Pennsylvania, and New Jersey, have appointed receivers to take over the operations of distressed cities.⁵³ Receivership, while perhaps especially necessary in the instance of

severe, uncompromising distress, is a vivid demonstration of political and local government failure.

1. Michigan

In 2014, Michigan had six cities under receivership, including Detroit, which concluded its bankruptcy in November 2014.⁵⁴ Detroit by far is the largest city ever to file a Chapter 9 and is the largest city in Michigan, although it only contains about 9% of the population of the state. Detroit is the closest analogue (and starkest contrast) to the New York City Fiscal Crisis. Detroit's financial circumstances are truly dire. Like New York City, Detroit has a huge debt burden and can no longer borrow. It has lost more than one-half of its population since its and the automotive industry's heyday, and its government has failed. Basic services delivery has been badly impaired.⁵⁵ Michigan has had two statutes that permit the Governor to appoint an Emergency Manager with broad powers to operate and restructure a municipality. An emergency manager can abrogate contracts, including collective bargaining agreements,⁵⁶ and can file a petition in Chapter 9 notwithstanding the preferences of the electorate. An Emergency Manager is politically accountable to no one and supplants the local government. This has happened in Detroit.

Detroit's Emergency Manager, Kevyn Orr, a Washington D.C.-based partner in the law firm of Jones Day, was appointed in March 2013.⁵⁷ Lawyers of Jones Day and other outside nonpolitically accountable professionals comprise the Emergency Manager's staff. Mr. Orr engaged in negotiations with Detroit's creditors and labor unions but failed to reach agreements, and after several months, he caused Detroit to file in Chapter 9 in July.⁵⁸ The Emergency Manager continued the negotiating process in bankruptcy and "was" the city-debtor. The Emergency Manager drafted the Plan of Adjustment ("POA") and submitted it to the Court. A majority of the various creditor classes voted to approve the POA at a confirmation hearing which began in late August 2013 and concluded in November 2014.

The state legislature has promulgated oversight legislation loosely modeled on the New York City FEA's EFCB structure to oversee the financial affairs of Detroit, after the POA is confirmed. There can be no assurance that the Oversight Commission, which may not have a professional staff, will be effective; the governor is neither a member nor the chair. There are to be appointees of the governor and the legislative leaders on the Oversight Commission, but elected officials will be "removed" from the actual Oversight Commission decisions. This is different from the New York City EFCB where the elected officials were directly and publicly responsible: they had to make every major decision. A premium was placed on unanimity, and thus, there was political need for constant compromise. There never was going to be a politically unaccountable emergency manager for New York City. There could be another one in Detroit.

2. Rhode Island

The small Rhode Island city of Central Falls had an experience similar to Detroit. In the face of a financial emergency, primarily brought to the tipping point by unsustainable personnel costs, the governor declared an emergency and appointed a receiver in 2010 with near dictatorial powers (e.g., the receiver disbanded the city council).⁵⁹ The receiver drastically cut pensions and labor agreements, and filed Chapter 9.⁶⁰ A lawyer involved in the matter said, "It looks like the Germans occupying Paris."⁶¹

The arbitrariness (although not unprofessionalism) and evisceration of local political control by the Michigan emergency manager and the Rhode Island receiver approach also have been seen in Pennsylvania and New Jersey.

3. Pennsylvania

Pennsylvania has made a substantial commitment to assist its distressed municipalities through what is commonly known as the Early Intervention, or Act 47 program.⁶² Act 47, enacted in the 1980s, is an intervention program intended to rescue local governments that have chronic budget deficits and are in danger of default.⁶³ Act 47 essentially is a monitoring system. A state-appointed Coordinator, in conjunction with a distressed Act 47 city, proposes a multiyear recovery plan but has no authority to compel a city to implement its plan.⁶⁴ Since the Coordinator is a private consulting firm or, perhaps, a law firm, it is providing a service but has no political constituency or political power.

Pennsylvania does make grants and loans to local governments in conjunction with the Act 47 program. These are carrots without sticks and they generally are not in substantial amounts. Act 47 is not particularly successful. Most cities in the program (there are more than twenty-five) tend not to get out of it.⁶⁵ Some cities have been designated as an Act 47 city for more than twenty-five years. The program has become a "holding zone"⁶⁶ with insufficient impact to alter local political decision making favorably or markedly, while discouraging outside investment. The city of Harrisburg, Pennsylvania's capital, is illustrative.

Harrisburg engaged in a disastrous incinerator deal that did not generate revenues sufficient to service the debt that Harrisburg had guaranteed to build it.⁶⁷ It led to default. Notwithstanding the efforts of the Act 47 coordinator, infighting between the mayor and the city council led to near paralysis.⁶⁸ On two occasions in 2012, the city council approved a resolution to file for Chapter 9. After the second mayoral veto, the Council filed. The petition was dismissed by the Bankruptcy Court as being invalid and unauthorized.⁶⁹ The state legislature then passed a law specifically prohibiting the city from filing in Chapter 9 and the governor appointed a receiver to take over the city's affairs, effectively eliminating the power of the

elected mayor and council. Eventually, the receiver (the second one to be appointed) successfully negotiated an array of agreements and caused a practical recovery plan to be adopted. The incinerator problem may be solved, but Harrisburg's underlying problems and possible continued political dysfunction remain.

4. New Jersey

New Jersey has been referred to as a "nanny state." Like activist North Carolina since 1931,⁷⁰ New Jersey has had a longstanding monitoring program of its municipalities.⁷¹ Institutionally, the Governor of New Jersey is the most powerful governor in the United States as he or she appoints all the executive branch officials, such as the Attorney General, that are usually separately elected in the other states.⁷² This centrality of power theme is extended to local government, all of whose annual budgets must be approved by the State before formal adoption. Of course, this is not physically possible for the state government to implement, so it selectively monitors and audits certain municipalities on a rotating basis. A designated state agency approves debt issuances,⁷³ and most budgets are deemed approved, although all municipalities must submit standardized financial reports to the State at proscribed times. The inherent approval powers provide a predicate for the state to intervene in a municipal government's fiscal practices whenever the state deems it necessary.⁷⁴ This was seen in 2013 in Camden, New Jersey, which had become severely distressed despite years of substantial state development assistance.⁷⁵ Eventually, the state assumed control of the Camden government, school system, and police department.⁷⁶ Camden has every conceivable problem an aging rust-belt city can have. It has lost a substantial portion of its population and almost all of its industry. Its structural budget deficit is staggering (expenses exceed tax revenues by a ratio of nearly 6:1), and it has been rife with mismanagement and corruption (three of its mayors were sentenced to prison). Crime is so bad that the governor sent state troopers to patrol the streets.⁷⁷

The Camden experience argues the proposition that local political failure can be so complete and external economic forces so great that a state takeover is the best alternative. Thus, in Detroit and Central Falls, and to only a slightly lesser extent in Harrisburg, near complete governmental authority became vested in a single individual. The emergency manager and the respective receivers were superior to all local officials for the duration of their appointments. There was no assurance of political due process. But receiverships do not solve political failure. They do not "encourage the locality to correct the political pathologies that led to...economic struggles."⁷⁸ As former acting governor and state senator Richard Codey said of the Camden takeover, however necessary it may have been, "it is simply wrong to tell voters in New Jersey they might wake up one morning and discover their votes don't count anymore."⁷⁹ New York State emphatically has

rejected this Michigan, New Jersey, Rhode Island, and Pennsylvania approach in favor of preserving political and democratic accountability.

II. New York's Evolving Proactivity

The revenue impact of the Great Recession hit some stressed New York cities very hard. Schenectady, Rochester, Newburg, Yonkers, Syracuse, and others had service delivery needs and personnel costs beyond their revenues. In response, the state comptroller developed a carefully structured Fiscal Stress Monitoring System (the "Monitoring System").⁸⁰ The Monitoring System relies on data from annual financial reports submitted by local governments to the Comptroller.⁸¹ The comptroller has developed a detailed scoring system that categorizes reporting governments as having "Significant Stress," "Moderate Stress," and "Nearing Fiscal Stress."⁸²

By November 29, 2013, the comptroller reported twelve counties, towns, and cities in the category of "Significant Stress," ten as having "Moderate Stress," and eighteen as being "Susceptible to Fiscal Stress." These are early warning indicators and trigger increased monitoring and technical assistance from the Office of the State Comptroller. The developing database is designed to create objective criteria, predictability, and hopefully, prevention of unwise fiscal-management decisions at the local level. New York Comptroller Thomas DiNapoli offered: "[W]e can have a more honest conversation about the status of their [local governments], what the numbers are, as a way to come up with solutions."⁸³

In the same time frame, Governor Andrew Cuomo advocated for and the legislature enacted the Financial Restructuring Board.⁸⁴ The Board offers assistance to the distressed localities that make application to the Board.⁸⁵ Eligibility for assistance is determined by data submitted to the comptroller and is centered on the local government's average full property tax rate (the property tax burden) and the average fund balance percentage (an indicator of a municipality's ability to pay for unexpected costs without raising taxes).⁸⁶ The Board offers a comprehensive review of a municipality's finances and operations, and may make recommendations to that municipality on improving its fiscal stability, management, and the delivery of public services.⁸⁷ The Board also can offer grants and loans of up to \$5 million as an inducement for a municipality's undertaking the Board's recommendations.⁸⁸ The Board also offers an arbitration panel for binding arbitration with municipal labor unions, but only if the negotiating parties request arbitration.⁸⁹

Consistent with New York's political accountability sensitivities, assistance from the Board is entirely voluntary and consensual. It is a bottom-up system. A municipality, by resolution of its governance board, may request assistance. There is no imposition of State power unless it is sought and contracted.

Because of widespread financial distress, as revealed by Comptroller Di Napoli's Fiscal Stress Monitoring System,⁹⁰ some advocates proposed enactment of what is termed a "Super Control Board," which would be generic control board legislation modeled on the New York City EFCB. The argument for a generic control board would be that it would be automatic, triggered by objective information, and would avoid the ad hoc, case-by-case use of control boards employed several times since the Fiscal Crisis. This advocacy was wisely rejected by the comptroller and the governor.

A super control board, data triggered, would reverse New York's long standing policy of reluctant and consensual intervention in local government. It would make the state an aggressive interventionist and would substitute information-dictated decisions rather than promote and facilitate political compromises. It would place a premium on financial transparency, but that value can be achieved in less intrusive ways such as the Fiscal Stress Monitoring System and the Financial Restructuring Board. In 1975, the state did enact a generic MAC statute,⁹¹ which like the New York City MAC, is a financing vehicle whereby certain local taxes would be diverted to state-collected ones to back to-be-issued MAC bonds and notes. While generic MAC is also consensual, it is not particularly relevant to the revenue problems prevalent currently. The municipal capital debt markets are not punitive, and most New York municipal debt issuers have access to the debt markets despite structural deficits.

Local governments are responsible for most of the government activity with which citizens interact. Some government issues are so local that they are exclusively the province of local government.⁹² States should be very careful whenever they intervene in local government. When local government power is subsumed, undesirable incentives can be occasioned. Politics is the struggle for power.⁹³ If a state government struggles for local government power, an effect is to cause interest group politics to reappear at the state level where differences may be even more difficult to reconcile because sacrifice may be asked of persons who have no real stake in the problem and a lesser incentive to solve it. There is scant empirical evidence that shows higher levels of government are better suited or have better management skills to solve local issues. While the maxim "the higher the elevation, the broader the view" is generally true, it is not necessarily when focus should be on local, nuanced detail.

The imposition of state power should not be formulaic but tends to be such. In the Fiscal Crisis, both the state and federal government emphasized the need for the city to balance its budget in accordance with GAAP so that there would be true balance. That introduced necessary and broad improvement in the city's information management systems and financial reporting. It created financial credibility, and it prevented counting debt proceeds as revenue. The year 1975, however, was before

the era of personal computing and wholesale reliance on electronic data processing and information gathering. In 2015, that is a given. Yet forty-nine of the fifty states have either a constitutional or statutory requirement that they enact balanced budgets. Few of them actually do and the budgets they call balanced are illusory. New York State's budget, for example, is facially balanced on the day it is enacted and is never balanced again. There is no requirement that the budget be balanced at the end of the fiscal year, even facially. So, formulaically imposing on cities requirements that states do not recognize for themselves invites cynicism. The real problems are not quantitative; they are political. Political problems need a context for solution, and aggregate limits of debt and expenses can provide the necessary context, but the details and tradeoffs are best arrived at through local political negotiations to the extent practicable. That is why an ad hoc approach to State intervention that shifts power only when necessary, as judged by all stakeholders and those elected to take responsibility, is preferred. That is the New York approach.

An ad hoc approach necessarily involves a hierarchy of values. Severe local government distress presents a clash among hard-nosed financial best practices and the political goals of elected officials and their governing styles. These conflicts and the allocation of hierarchical value are a function of particular circumstances. Facts change attitudes, as does political contest. Flexibility and adaptability is important so long as certain key standards have adherence. The New York approach is predicated on agreed principles, and while it gives clear guidance to local governments as to what to anticipate, it is sufficiently flexible to be adapted to varied conditions.

III. New York's Judicial Interventionist Decisions

Financing-related legal issues generated by Big MAC and other steps taken during the New York City Fiscal Crisis to create borrowing avenues for the city brought New York courts to the center of the emergency. Several lawsuits challenged the constitutionality of MAC debt and a prior financing effort known as the Stabilization Reserve Corporation on the basis that the state was doing indirectly what it was prohibited from doing directly, namely, issuing general obligation bonds without approval by a general election referendum.⁹⁴ One lawsuit challenged the Moratorium Act whereby the legislature enacted provisions that placed a moratorium on payment of city bonds and notes so that the holders thereof would exchange their city paper for MAC bonds.⁹⁵

These cases caused the New York Court of Appeals to dissect and interpret the meaning of the Full Faith and Credit clause of the state constitution⁹⁶ and to explore the extent of the state's legal authority to intervene in the financing of the city. In several decisions, the Court of Appeals exhibited a pragmatic, public policy, results-oriented approach. It upheld MAC borrowing, and while it found the Moratorium to be unconstitutional, it did not issue

an injunction. Rather, it gave the city time to reach accord with debt holders to pay them what they were owed. The court sanctioned the primacy of the state's inherent police power to protect the health, safety, and welfare of its citizenry. In part, it relied on a 1934 ruling of the United States Supreme Court⁹⁷ that a state could use its "protective powers." It quoted the U.S. Supreme Court thusly: "While emergency does not create power, emergency may furnish occasion for the exercise of power."⁹⁸

In effect, the Court's analyses conferred constitutionality on the emergency provisions of the FEA and the contours of what would emerge as the New York approach of using State power to intervene in local government fiscal affairs to protect the public welfare while preserving democratic values and voting rights.

IV. Comment

A prominent politician once sagely observed, "Life always interferes." Government priorities changed significantly after the events of September 11, 2001, and are under robust debate following the financial collapse of 2008. Long held beliefs and assumptions may no longer be valid. In the financial sector, a new phrase entered our lexicon: "Too big to fail." But it is not necessarily true, either with financial institutions or governments. Some now ask whether failure should be permitted and whether we should focus on devising protections from, and management methods of, such failures. For example, there is no assurance that Detroit or Puerto Rico can regain economic viability. In respect of certain large public employee pension systems, there may not be a practical way to save them. Bridges too far may have been built. What had been unthinkable at the end of the twentieth century may have to be reconsidered now.

If the persistent economic strains on many older cities do not abate, if inflation never spurs government revenues (as it did in New York City in the late 1970s), if the tax system has reached its political limits, the way that federal and State governments respond to cities may have to become more proactive. Since the New York City Fiscal Crisis, the federal government has not been willing to get involved in the financial problems of municipal governments. Local distress is the province of the states, it says. It may not remain so. The values imbued in the New York interventionist model may be tested and difficult to preserve.

V. Conclusion

New York State is attentive to the fiscal stress of its cities. It is one of nineteen states that has statutory regimes for intervention in local government fiscal management. Unlike other states, New York emphasizes local government political primacy and seeks to preserve and enhance local political management of local financial issues. When the state does intervene, it creates political accountability and promotes consensual action by all stakeholders. This

tested, value-laden approach should be an aspirational goal of other State interventionist regimes.

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23. *Id.*
24. Financial Emergency Act of 1975 § 10. The statute created a one year wage freeze subject to extension by the Board as warranted by circumstances through the Financial Plan period which, initially, was through 1978.
25. *Id.* at 1129.
26. *Staats Hearing Statement*, *supra* note 5, at 2.
27. Shalala & Bellamy, *supra* note 13, at 1122–23.
28. New York City Seasonal Financing Act of 1975, 89 Stat. § 797 (1975).
29. Through the 1978 fiscal year, the city paid the federal government about \$18 million in interest. Bowsher, *supra* note 16, at 12.
30. Shalala & Bellamy, *supra* note 13, at 1130.
31. See generally *id.*
32. Bankruptcy Act, amendments, Pub. L. No. 94-260, 90 Stat. 315 (1976).
33. 11 U.S.C. § 109(c) (2014).
34. PEW, *supra* note 3, at 12.
35. *Id.*
36. *Id.* tbl. 1, at 9; N.Y. LOCAL FIN. LAW § 85.80; PUB. FIN. MGMT., STATE PROGRAMS FOR MUNICIPAL FINANCIAL RECOVERY: AN OVERVIEW 5, 7–8, 10 (2011) [hereinafter *PFM*], available at https://www.pfm.com/uploadedFiles/Content/Knowledge_Center/Whitepapers,_Articles,_Commentary/Whitepapers/State%20Programs%20for%20Municipal%20Financial%20Recovery.pdf.
37. In 2010, the New York City Off-Track Betting (OTB) filed a Chapter 9 pursuant to an Executive Order. The matter was ultimately dismissed due to debtor's failure to develop an acceptable Plan of Adjustment. NYC OTB was dissolved. *In re N.Y.C. Off-Track Betting Corp.*, 434 B.R. 131, 158 (Bankr. S.D.N.Y. 2010); Allison Grande, *NYC Off-Track Betting's Ch. 9 Case Shut Down*, LAW 360 (Jan. 26, 2011), <http://www.law360.com/articles/222115/nyc-off-track-betting-s-ch-9-case-shut-down>. In 2011, the Suffolk County OTB also filed in Chapter 9. It is pending. *In re Suffolk Regional Off-Track Betting Corp.*, 462 B.R. 397 (Bankr. E.D.N.Y. 2011).
38. JAMES E. SPIOTTO, THE ROLE OF THE STATE IN SUPERVISING AND ASSISTING MUNICIPALITIES, ESPECIALLY IN TIMES OF FINANCIAL DISTRESS 27, 28 (2013), available at <http://www.chapman.com/insights-publications-168.html>.
39. *Id.*
40. PEW, *supra* note 3, at 13.
41. SPIOTTO, *supra* note 38, at 27.
42. *Id.*
43. *Id.*
44. PEW, *supra* note 3, at 43.
45. See SPIOTTO, *supra* note 38, at 19–20 (discussing the use and uncertainty of the neutral evaluator in California).
46. Tim Anderson, *After Detroit's Filing: A look at Bankruptcy Laws in the Midwest and State Oversight, Help for Local Governments in Financial Distress*, CSG MIDWEST (Oct. 2013), <http://www.csghmidwest.org/policyresearch/1013bankruptcylaws.aspx>.
47. See generally STANDARD & POOR'S FIN. SERVS., CASE STUDY: THE VALLEJO, CALIF. BANKRUPTCY (2012), available at www.ibvallejo.com/docs/s_p_vallejo_2012.pdf.
48. RICHARD RAVITCH, SO MUCH TO DO: A FULL LIFE OF BUSINESS, POLITICS, AND CONFRONTING FISCAL CRISES 91 (2014). Chapter 4 of "So Much to Do" has a good discussion of various events of the Fiscal Crisis.
49. PEW, *supra* note 3, at 27.
50. *Id.*
51. *Id.*

52. *Id.*
53. *Id.* at 4, 5.
54. These cities include Pontiac, Hamtramck and Flint. SPIOTTO, *supra* note 38, at 15–16.
55. Detroit Disclosure Statement with Respect to Plan for the Adjustment of Debts of The City of Detroit at 19, 20, 44, available at http://www.detroitmi.gov/Portals/0/docs/EM/Bankruptcy%20Information/Disclosure%20Statement%20_Plan%20for%20the%20Adjustment%20of%20Debts%20of%20the%20City%20of%20Detroit.pdf; *In re City of Detroit*, Mich., No. 13-53846 (Bankr. E.D. Mich. 2013).
56. MICH. COMP. LAWS §141.1501-141.1531 (2011); SPIOTTO, *supra* note 38, at 16.
57. Monica Davey, *Bankruptcy Lawyer Is Named to Manage an Ailing Detroit*, N.Y. TIMES, Mar. 14, 2013, http://www.nytimes.com/2013/03/15/us/gov-rick-snyder-kevyn-orr-emergency-manager-detroit.html?_r=0&pagewanted=print.
58. See PEW, *supra* note 3, at 5.
59. See *id.* at 15.
60. See SPIOTTO, *supra* note 38, at 13.
61. Romy Varghese, *Receiver Replaces Elected Council of Rhode Island City*, WALL ST. J., available at <http://online.wsj.com/article/BT-CO-20101111-715808.html>; Jess Bidgood, *Plan to End Bankruptcy in Rhode Island City Gains Approval*, N.Y. TIMES, Sept. 6, 2012, http://www.nytimes.com/2012/09/07/us/central-falls-ri-to-emerge-from-bankruptcy.html?_r=0.
62. 53 PA. CONS. STAT. §§ 11701.101–11701.501.
63. PEW, *supra* note 3, at 30.
64. *Id.* at 32.
65. *Id.* at 30; Eric Boehm, *Pennsylvania Needs to Reassess Act 47 Program, Expert Says*, WATCHBLOG.ORG (July 23, 2013), <http://paindependent.com/2013/07/watchblog-pennsylvania-needs-to-reassess-act-47-program-expert-says/>.
66. EIDE, *supra* note 1, at 7; Jeff Frantz, *Bill Aims to Get PA's Financially Distressed Municipalities Through Act 47, or Else*, PENN LIVE (Apr. 10, 2014), http://www.pennlive.com/midstate/index.ssf/2014/04/act_47_pennsylvania_distressed.html.
67. PEW, *supra* note 3, at 32.
68. *Id.*
69. SPIOTTO, *supra* note 38, at 27.
70. N.C. STAT. ANN. § 159. North Carolina can order its local governments to raise taxes or other revenues. PFM, *supra* 36, at 4.
71. PEW, *supra* note 3, at 36.
72. STATE BUDGET CRISIS TASK FORCE, NEW JERSEY REPORT 13 (2012), available at <http://www.statebudgetcrisis.org/wpcms/>.
73. See N.J. STAT. § 52:27BBB-6; see Division of Local Government Services in the New Jersey Department of Community Affairs, at <http://www.state.nj.us/dca/divisions/dlgs/>.
74. Municipal Rehabilitation and Economic Recovery Act of 2002, N.J. STAT. § 52:27BBB-1 *et seq.* (2014).
75. PEW, *supra* note 3, at 36.
76. *Id.*
77. *Id.* at 37.
78. Lyle Kossis, Note, *Examining the Conflict between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1136 (2012).
79. *Id.* at 1148.
80. See PEW, *supra* note 3, at 23.
81. *Id.*
82. *Id.*
83. *Fiscal Stress Monitoring System for Local Governments*, OFFICE OF THE N.Y. S. COMPTROLLER (Oct. 15, 2012), https://www.osc.state.ny.us/press/video_press_releases/oct12/fiscal_stress_01.htm.
84. N.Y. LOCAL FIN. LAW § 160.05 (McKinney 2014).
85. *Id.*
86. See *id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. By the end of the 2011 and 2012 fiscal years, “almost 300 local governments in New York State ended one of the last two fiscal years with a deficit and 27 have depleted their rainy-day reserves.” Phillips Lytle LLP, *Super Control Board May Be in the Near Future for New York State*, BEYOND DISPUTE, June 2013, at 8, available at www.phillipslytle.com/include/uploads/BD-2013-06.pdf.
91. Gayle Gutekunst-Roth, Comment, *New York—A City in Crisis: Fiscal Emergency Legislation and the Constitutional Attacks*, 6 FORDHAM URB. L.J. 65, 68–69 (1977).
92. Kossis, *supra* note 78, at 1123.
93. See generally HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (Alfred A. Knopf ed., 2d ed. 1948).
94. See generally Gutekunst-Roth, *supra* note 91, at 74–99 (providing a careful review of several legal challenges of financing measures brought during the Fiscal Crisis).
95. *Id.* at 81–94; *Flushing Nat’l Bank v. Municipal Assistance Corp.*, 40 N.Y.2d 731, 732–33 (1976).
96. Gutekunst-Roth, *supra* note 91, at 84; N.Y. CONST. art. VIII, § 2.
97. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).
98. *Flushing Nat’l Bank*, 40 N.Y. 2d at 750 (Cook, J., dissenting) (quoting *Blaisdell*, 290 U.S. at 426).

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Public Authorities and Their Reform: A New York State Innovation

By Scott Fein

New York State's accomplishments in the area of criminal and civil justice, government performance and human services are well regarded and examined in this *Journal*.¹ There are, in addition, two unheralded State innovations which have had an incalculable impact on the fiscal operations of every state in the nation and many nations of the world. The development of the modern public authority concept established a template for funding critical government services in the modern era. Having then created this funding mechanism, New York State realized that meaningful public control was necessary over public authorities and, alone among the States, sought to increase the public accountability of these entities. Both the development of public authorities and their reform merit discussion in this *Journal*.



Public authorities are not on their face spellbinding. Should one seek to explain that public authorities are the most powerful branch of government, incredulity follows. High school and college courses on government, policy, or civics often do not even mention the role of these authorities. There are three branches of government...that's it, or so we were taught. Yet, in New York State alone there are more than 400 state and local public authorities designed to provide governmental services by government chartered corporations (more often referred to as public authorities) acting outside of the traditional government framework. Currently, more than 94 percent of the New York State's indebtedness has been incurred by public authorities.² From an operational perspective, public authorities own and manage more than 85 percent of our State's infrastructure.³

Beyond this, well more than 35,000 public authorities exist nationwide and are responsible for many of our nation's vital services including transportation, economic development, housing, water supply, sewage treatment, power distribution and generation, urban redevelopment, and the construction of universities, hospitals and prisons.⁴ Worldwide there are thousands more.⁵ Increasingly used by underdeveloped nations to access capital market to construct infrastructure, they have become the stimulus vehicle of preference. As described by Donald Axelrod, "in what amounts to a quiet revolution, we now have two

governments working by side: the visible general government and the shadow government of public authorities."⁶

New York State's Role in the Development of the Modern Public Authority

Public authorities are private or quasi-governmental entities established and chartered by the government to provide government services and are rooted in antiquity. Roman emperors who paid private mercenaries to wage war on their behalf contributed to the concept. For our purpose, we begin with the colonization of the new world. European monarchs were fiscally challenged. They desired to live in high style, prosecute and defend pan-European conflicts, and explore new lands. Many sovereigns, confronting decade-long wars, were chronically short of funds.

The solution, happened as some suggest by a French monarch, was to charter private companies to manufacture tobacco, liquor, textiles, and weapons. In operation it was simple: the monarch conferred a charter on a private company. The chartered company borrowed money from private financiers, then manufactured the item of choice and sold it at market price. The profit would be used to pay down the debt, satisfy shareholders and remaining revenue would be available to the monarch to purchase the items.

Exploration posed a particularly difficult problem. It was expensive and not always productive. Many of the voyages were abject failures—lost ships and seafarers and only intermittent discoveries. Enter the crown corporations. These entities could borrow money, purchase and provision ships and pay seafarers.⁷ Captains would set sail for new lands. Upon arrival, the land would be claimed for the monarch and the proceeds derived from the land (typically furs and lumber) and trade with the indigenous population would be used to pay the outstanding debt. Thus a public purpose—exploration—was accomplished using quasi-private chartered corporations. The Plymouth Bay Company, the London Company, the Massachusetts Bay Company and more were central to the exploration and colonization of the New World.⁸

The use of chartered corporations in America was largely dormant through the early 1800s.⁹ (During this period it appears the term "public authority" began to supplant "chartered corporation.") Beginning with the period of westward expansion in the United States public authorities came into more common use.¹⁰ Railroads, canals, and banks to finance the infrastructure were critical to westward growth.¹¹ The issuance of bonds for

roads, levee construction, and irrigation was important for sustaining the expansion.¹² State governments typically lacked the necessary money to support the initiatives and created public authorities to own and operate the canals and railroads and support institutions. Debt issued by public authorities underwrote construction. Tolls and tariffs satisfied the debt. The Erie Canal Corporation is among the few remaining artifacts of this period.¹³

Unfortunately, in many instances revenue from railroads, canals, and other ventures was insufficient to pay the debt or even operational costs.¹⁴ More than fifty percent of the authorities established to hasten the westward expansion could not weather the depression of 1837 and defaulted on their debt.¹⁵ Unbeknownst to many state residents, the enabling statutes, guarantees and debt covenants provided by the states to the public authorities and lending institutions committed the states to pay any shortfall in the event of a default.¹⁶ The voters were stunned. They never approved the debt. How could they be held accountable?¹⁷

In a number of states, including New York, the voters reacted by demanding voter approval of the issuance and terms of future debt. This limitation was embodied in the New York State Constitution in 1846.¹⁸

Between 1900 and 1970, public authorities grew in number, but their scope was hampered by the 1846 Constitutional limitation on borrowing money absent public approval. Notwithstanding the constraints on borrowing, the NY-NJ Port Authority and New York State Power Authority, among others, were established during this period.¹⁹ Their revenue was largely sufficient to support the operations and public approval was unnecessary.²⁰

Nelson Rockefeller is credited with dramatically expanding the scope and importance of public authorities and transforming them from a tool of government to the "Shadow Government."²¹ Upon his election in 1959, Rockefeller found that the state was lagging in health and human services, particularly for the poor and elderly, the state college and university system ranked in the lower quadrant nationwide, and public housing and transportation were deteriorating.²² He pledged to address each of the problem areas. Lacking available state funds and disinclined to press for new state taxes, he directed that a series of statewide public referenda be placed on the ballot.²³ Over the next six years, the voters repeatedly rejected the Governor's multi-billion dollar referenda including referenda for housing (on five occasions), and transportation (two times), and higher education (four times).²⁴

Undeterred, the Governor sought counsel from John Mitchell, a partner at the New York City law firm of Nixon, Rose and Mudge, and much later a person involved in President Nixon's undoing. Mitchell suggested an unprecedented approach to circumvent the State limitation on incurring debt without public approval and

making the debt instruments attractive to private sector investors.²⁵ His concept had three components: (i) allow state authorities to issue state tax-exempt bonds that it could pay off with fees and rents, (ii) structure the public authority bonds so that the state had a moral, but not legal, obligation to pay off bondholders in event of default and, (iii) establish a public authority budget outside of the traditional governmental budgeting process.²⁶

The approach, some would later say, was brilliant, others devious. Voter approval would not be required because the debt was not guaranteed by the government; rather it was simply a moral obligation. While moral obligations looked like a guarantee, they were at best informal pledges to pay any shortfall. These were referred to as "feel-good" bonds because they made the electorate feel good but lenders knew the state would never permit a default because it would impair the future ability to borrow.²⁷ (It bears note that since the inception of moral obligation bonds, the state has honored its moral commitment and never allowed a default.) By providing that interest on bonds was tax exempt, it would materially increase desire for the bonds among highly taxed individual and funds. Finally, concerned that the public might have misgivings about an off-budget financial structure, Rockefeller and the legislature insured they were off budget and not reported as liabilities in the state budget.²⁸

It worked. Rockefeller, with support of the legislature, added 23 new public authorities, most of the larger ones relying exclusively on the concept of moral obligation bonds.²⁹ Despite the new off-books debt, most would agree the authorities stabilized our cities, particularly through the Urban Development Corporation and Housing Finance Agency, strengthened health care using, among other entities, the Health Facilities Construction Fund, enhanced the stature of the State University System by relying on the Dormitory Authority and State University Construction Fund as funding vehicles, and the Metropolitan Transit Authority and Thruway Authority gave our transportation infrastructure new life.³⁰

Pollination

Other states quickly took note of New York's fiscal inventiveness, particularly those that also mandated public approval on the issuance of public debt. Nixon Rose (later Mudge Rose Gutherie Alexander & Ferdon, dissolved in 1995) became the legal touchstone. Over time virtually every state adopted the public authority model using tax-exempt bonds, with more than half issuing moral obligation bonds.³¹ By 1987, the Bureau of the Census identified more than 35,000 public authorities nationwide.³² It is anticipated that there are currently well more than 50,000 authorities and various adaptations in existence nationwide.³³

Over time, the public authority model for financing infrastructure was adopted worldwide. Tens of thou-

sands authorities exist in industrialized countries.³⁴ More recently, the concept has taken root in developing countries. In an effort to access private capital for the construction of infrastructure and basic services, these countries turned to the public authority model.³⁵ While successful in marshalling funds, it has been alleged that they have contributed materially to the debt crisis in Africa and South America.³⁶ While hardly empirical, such criticism gives pause.³⁷

New York's Repair

Every new public policy innovation, in this instance New York's public authority model, has benefits and drawbacks. The principal benefit: it allowed fiscally strapped state and local governments to fund the necessary infrastructure improvements and human services. The weakness: it resulted in thousands of entities operating outside of public sphere, relegating control of most vital public services to entities not publicly accountable and quietly burdening the public with considerable debt.³⁸ Most states and public officials, aware of the aggregate debt peril proposed by public authorities, concluded that tinkering with public authority operations and debt covenants could upset the capital markets and creditors and foreclose future borrowing. Most states decided to forgo reform. New York State chose a different path. Responsible for the initial concept, New York decided to implement a series of reforms intended to increase transparency and compel good governance practices and begin to bring public authority operation within public control.³⁹ Commentators have already begun to encourage others to follow New York's lead and enact similar reforms.⁴⁰

Beginning in 2000, New York sought to wrestle with the growing aggregate state debt, primarily attributable to public authorities, with enactment of the Debt Reform Act.⁴¹ The Act provided that (i) new debt issued after April 1, 2000 was to be capped at 4% of personal income and 5% of all fund receipts and (ii) debt can only be used for capital works and not have a maturity longer than 30 years.⁴² While the Act brought much needed fiscal discipline, it had an inherent weakness. It excluded debt service on outstanding debt and only limited impact on back door (moral obligation) borrowing by public authorities that were increasingly relied upon for funding capital projects. However, the Act did serve to shine a light on authority operations.

Ultimately it was decided that controlling public authorities should begin with removing the "Shadow" from the "Shadow Government" by increasing transparency, accountability and compliance.⁴³ In 2005, the first New York State Public Authority Accountability Act was enacted.⁴⁴ The Act, among other things, (i) established an independent state entity to oversee and audit all state and local public authorities, (ii) required submission to a central depository accessible to the public of information of each authorities prior years projects and proposed proj-

ects, debt issuance and proposed budgets, (iii) required an annual independent audit of each authority budget, (iv) enhanced fiduciary obligations of the board members and required that each board member be trained in the requirements of the Act and state ethics obligations, (v) required the establishment of Codes of Conduct, and (vi) conferred upon the State Inspector General the jurisdiction to conduct investigations of state authorities.⁴⁵

The Public Authorities Accountability Act of 2005 was an important step in improving oversight, accountability and transparency of public authorities. After several years it was clear that although public authority operations were better understood and controlled, more governance reforms and oversight were required. In 2009, the state enacted the Public Authorities Reform Act ("PARA").⁴⁶ PARA (i) materially enhanced the jurisdiction of the authority oversight entity, (ii) provided guidance on the specific nature and scope of the authority audits expected, (iii) directed that the oversight entity develop best management practices for each authority to implement, (iv) conferred upon the State Inspector General the Authority to investigate authorities, and (v) empowered the State Comptroller to review and approve authority contracts. Following enactment of the PARA the New York State Comptroller and the Independent Authority Budget Office developed a publicly accessible website which contained all available information relating to the 500 state and local public authorities. With one keystroke, the public, media, elected officials could determine and make reasoned judgments about the efficacy and accountability of each public authority operating in the state.⁴⁷

There is consensus that still more needs to be done. Debt issues too quickly, and public authorities are too often used as ATMs to raise cash for important but underfunded government services. But the state appears to be on the right path in acknowledging that good governance requires that important public institutions operate with full transparency and accountability. Having created the necessary but very aggressive public authority funding mechanism, New York is now in the forefront of states bringing authorities within purview and control of the public and its elected officials.

Endnotes

1. The articles in this edition of the Government Law and Policy Journal are fairly illustrative of a large and growing number of progressive initiatives developed in New York. One of the more significant, the 1894 State Constitutional establishment of the Adirondack Park (Article XIV), the largest State park protected area in the contiguous United States, since has served as a prototype for the preservation of lands throughout the country and some nations of the world.
2. OFFICE OF THE STATE COMPTROLLER, PUBLIC AUTHORITIES BY THE NUMBERS 5 (2013), available at www.osc.state.ny.us/reports/pubauth/public_authorities_btn_2013.pdf; Lynn Wilson and Clayton Eichelberger, *New York State Public Authority Reform: Where We Have Come From and Where We Need to Go*, 11 NYSBA GOV'T LAW AND POL'Y J. 15, 16 (2009).

3. Scott Fein, *Introduction: Public Authorities*, 11 NYSBA GOV'T LAW AND POL'Y J. 5, 5 (2009).
4. REPORT OF THE GOVERNOR'S TASK FORCE ON THE IMPLEMENTATION OF THE 2009 PUBLIC AUTHORITIES REFORM ACT 4 (2010), available at www.abo.ny.gov/aboTaskForce/ParaTaskForceFinalReport.pdf.
5. *Id.*
6. DONALD AXELROD, SHADOW GOVERNMENT: THE HIDDEN WORLD OF PUBLIC AUTHORITIES, at iii (1992).
7. *Id.*
8. See JACK NEWFIELD & PAUL DU BRUL, ABUSE OF POWER: THE PERMANENT GOVERNMENT AND THE FALL OF NEW YORK 11 (1978); ANNMARIE WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS 16 (1978).
9. AXELROD, *supra* note 6, at 23.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. See generally *id.*
18. N.Y. Const. art. 7 § 11 ("[N]o debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election nor shall it be submitted to be voted on within three months after its passage nor at any general election when any other law or any bill shall be submitted to be voted for or against.")
19. Merl M. Hackbart & James Leighland, *State Debt Management Policy: A National Survey*, 10 PUB. BUDGETING & FIN. 43 (1990), available at <http://phdtree.org/pdf/44648933-state-debt-management-policy-a-national-survey/>.
20. *Id.*
21. See generally AXELROD, *supra* note 6; New York State Assembly Committee on Public Authorities 1987.
22. WALSH, *supra* note 8, at 265.
23. *Id.*
24. *Id.*
25. *Id.* at 129.
26. William J. Quirk & Leon E. Wein, *A Short Constitutional History of Entities Known as Authorities*, 56 CORNELL L. REV. 521, 526 (1971).
27. *Id.*
28. WALSH, *supra* note 8, at 132.
29. AXELROD, *supra* note 6, at 6.
30. *Id.*
31. *Id.*
32. *Id.* at iii.
33. See Paul Glastris, *The Government Debt Racket*, THE WASHINGTON MONTHLY (1985).
34. AXELROD, *supra* note 6, at 17.
35. *Id.*
36. *Id.*
37. Merl M. Hackbart & James Leighland, *State Debt Management Policy: A National Survey*, 10 PUB. BUDGETING AND FIN. 43 (1990), available at <http://phdtree.org/pdf/44648933-state-debt-management-policy-a-national-survey/>.
38. See generally NATALIE R. COHEN, MUNICIPAL DEFAULT PATTERNS: A HISTORICAL STUDY (1988); CITIZEN'S BUDGET COMM., NEW YORK'S PUBLIC AUTHORITIES: PROMOTING ACCOUNTABILITY AND TAMING DEBT (2006), available at http://www.cbcny.org/sites/default/files/reportssummary_authorities_06012006.pdf.
39. See generally NY STATE OFFICE OF THE COMPTROLLER, PUBLIC AUTHORITIES IN NEW YORK: ACCELERATING MOMENTUM TO ACHIEVE REFORM (2005); NY STATE OFFICE OF THE COMPTROLLER, REIGNING IN NEW YORK'S SECRET GOVERNMENT (2004); *Public Authority Reform*, 11 GOV. LAW AND POL'Y J. (2009); Reports of the Office of the New York State Comptroller available at www.osc.state.ny.us; CITIZENS BUDGET COMMISSION, PUBLIC AUTHORITIES IN NEW YORK STATE (2006).
40. See, e.g., DAVID CARR, PUBLIC AUTHORITIES GOVERNING NEW JERSEY (2012).
41. ACCELERATING MOMENTUM TO ACHIEVE REFORM, *supra* note 39, 42.
42. *Id.*
43. REPORT OF THE GOVERNOR'S TASK FORCE, *supra* note 4, at 78.
44. See 766 N.Y. Laws 2005.
45. *Id.*; ACCELERATING MOMENTUM TO ACHIEVE REFORM, *supra* note 39, 5-6.
46. See 2009 N.Y. Laws 506.
47. New York State Independent Authorities Budget Office, Annual Reports, (www.abo.ny.gov).

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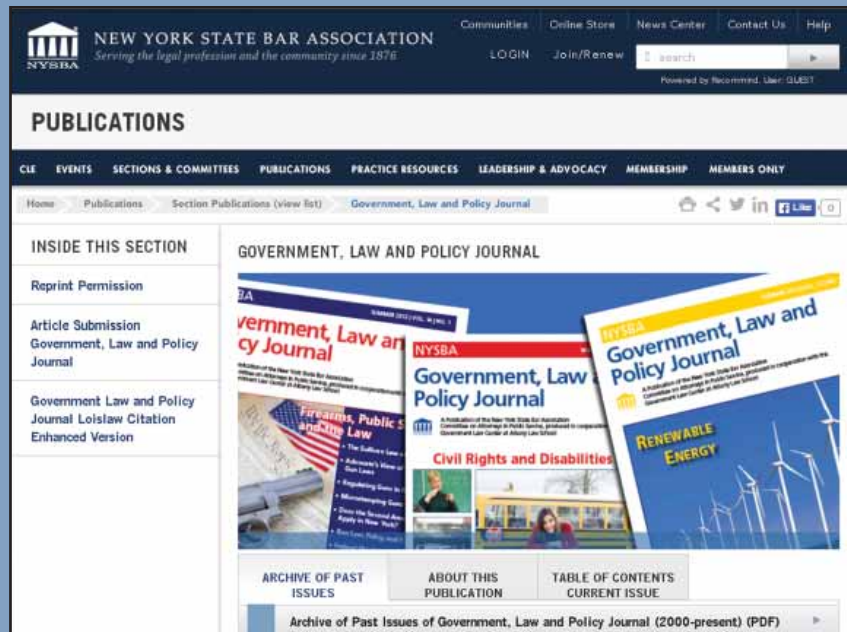
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