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Juvenile Justice Reform 2.0

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JUVENILE JUSTICE REFORM 2.0

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ABSTRACT

Before the 1954 decision in Brown v. Board of Education*, the United States Supreme Court's exercise of judicial review did not support the notion that constitutional litigation could be an effective instrument of social reform. The Court's principled rejection of racially segregated public education, however, gave new legitimacy to the concept of judicial review, transforming it from an obstacle into a principal means of achieving social progress. Since then, federal courts have impacted public policy in many areas—from housing, welfare, and transportation, to mental health institutions, prisons, and juvenile courts. Yet, there are inherent structural challenges to effecting institutional change through litigation: courts are themselves passive institutions that respond slowly to new information; they are oriented toward past events and circumstances rather than the possibilities implicit in future ones; and they graft qualifications onto preexisting law rather than engaging in a fresh consideration of the issues. In his major work,*

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The Hollow Hope: Can Courts Bring About Social Change?*, Professor Gerald Rosenberg persuasively argued that in order to overcome these constraints in a particular case or controversy, certain key elements must be present: incentives for the institution to change; costs to the institution for not changing; the existence of parallel institutions to help implement the change; and the use of court orders to leverage additional resources to bring about the change or to serve as a cover for administrators who are willing to act but fear political repercussions.*

For more than sixty years after the founding of the first juvenile court in 1899, its philosophy and guiding principle were based on the rehabilitative ideal. This model rejected the traditional adversary system found in criminal court proceedings in favor of informal procedures, indeterminate sanctions, judicial discretion, and individualization. The 1967 Supreme Court case of In re Gault *struck at the core assumptions of this paradigm with its emphasis on the functional similarity between juvenile and adult criminal courts and extension of key due process protections to youth charged in delinquency court, including the right to counsel and the privilege against self-incrimination. As revolutionary as the Gault decision was, however, its holding failed to translate into long-term sustainable reform—the result, at least in part, of the absence of the requisite factors articulated by Professor Rosenberg. Whether the recent Supreme Court cases of* Roper v. Simmons, Graham v. Florida, J.D.B. v. North Carolina *and their progeny will facilitate such reform remains an open question.*

This Article, written for a symposium at Brooklyn Law School, Adolescents in Society: Their Evolving Legal Status, *explores the potential for twenty-first century Supreme Court decisions implicating juveniles' constitutional rights to transform the way in which the courts process and punish young offenders. It discusses the method and means by which institutional reform litigation brings about change and the structural*

challenges that arise when courts attempt to transform complex institutions. It provides a brief review of Supreme Court decisions prior to Brown *that served to prevent rather than enable social change in the areas of slavery, racial segregation, and workers' rights; it contrasts these cases with the decision and impact of* Brown. *It argues that although* In re Gault *was a foundational legal holding, it did not translate into effective policy due in part to local officials' failure to implement the decision as expected and lawmakers' inability to enact legislation that was true to the spirit of* Gault. *The Article argues that based on the analysis developed by Professor Rosenberg, recent Supreme Court decisions ending the juvenile death penalty and juvenile life without parole (JLWOP) sentences for non-homicides, and holding that a child's age properly informs the Miranda custody analysis, could lead to significant change in both the juvenile and criminal justice systems for young offenders. It acknowledges the limitations of this theory and the challenges that are likely to arise, and concludes that, although courts can reform complex institutions, constitutional litigation is an unreliable path to social change.*

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I. INTRODUCTION

From the perspective of many juvenile justice advocates, the Supreme Court decision in *Roper v. Simmons*[1] was a long time coming. *Simmons*, which held in 2005 that imposing the death penalty on juvenile offenders violated the Eighth Amendment,[2] was the first Supreme Court decision in decades to acknowledge the significance of the differences between minors and adults in the context of criminal justice.[3] Five years later, *Graham v. Florida*,[4] which held that life without parole sentences for non-homicides were unconstitutional for juveniles,[5] provided advocates with further reason to hope for an overhaul of the way in which the criminal and juvenile courts process and punish young offenders.[6] *J.D.B. v. North Carolina*, decided by the Court in 2011,[7] was perceived as extending this trajectory with its holding that courts must consider the youth of the suspect when determining whether questioning had been custodial and, therefore, that Miranda warnings should have been given.[8]

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[1] Roper v. Simmons, 543 U.S. 551 (2005).

[2] *Id.* at 575.

[3] *See, e.g.*, Press Release, Nat'l Ctr. for Youth Law, Victory for N.Y.C.L. and Other Youth Advocates on Juvenile Death Penalty Ban (Mar. 2, 2005), *available at* http://www.youthlaw.org/press_room/press_releases/2005/juv_deathpenalty_ban/ ("The Court's decision is a much-needed reminder that children are different from adults in terms of judgment and maturity, and are, therefore, less culpable . . . . [and w]e need a juvenile justice system that reflects those differences." (internal quotation marks omitted)).

[4] Graham v. Florida, 130 S. Ct. 2011 (2010).

[5] *Id.* at 2034.

[6] *See, e.g.*, *Decision Called a "Significant Victory for Children,"* EQUAL JUST. INITIATIVE (May 17, 2010), http://www.eji.org/eji/node/393 ("It's an important win not only for kids who have been condemned to die in prison but for all children who need additional protection and recognition in the criminal justice system." (internal quotation marks omitted)).

[7] J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[8] *Id.* at 2406; John Kelly, *Supreme Court Gives Juveniles Protection in Police Interrogations*, YOUTH TODAY (June 16, 2011), http://www.youthtoday.org/view_article.cfm?article_id=4846 ("The case, *J.D.B. v. North Carolina*[,] is the latest in a string of cases in which the high court has applied protection to certain groups of juveniles.").

Each of these decisions has been hailed as "landmark,"[9] and together they have raised expectations among scholars, advocates, and practitioners that a new era of reform may be emerging for young offenders.[10] In fact, such enthusiasm over a Supreme Court opinion on the rights of juveniles has not been expressed since *In re Gault*,[11] the 1967 case establishing that youth in delinquency court have basic due process rights, including the Sixth Amendment rights of notice, counsel, and confrontation, and the Fifth Amendment privilege against self-incrimination.[12] An unanswered question is whether these twenty-first century litigation victories will fundamentally alter the nature of juvenile justice policy or ultimately fail to bring about sustainable reform, a charge that has been leveled at the *Gault* decision itself.[13]

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[9] *See, e.g.*, Scott Hechinger, *Juvenile Life Without Parole (JLWOP): An Antidote to Congress's One-Way Criminal Law Rachet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 410 (2011) (referencing *Graham*); *see also* Jeffrey Rosen, *The Brain on the Stand*, N.Y. TIMES (Mar. 11, 2007), http://www.nytimes.com/2007/03/11/magazine/11Neurolaw.t.html (describing *Simmons*); Press Release, Juvenile Law Ctr., Landmark U.S. Supreme Court Decision Protects Miranda Rights for Youth (June 16, 2011), *available at* http://www.jlc.org/images/uploads/Press_Release_JDB_Supreme_Court_Decision.pdf (referencing *J.D.B.*).

[10] *See, e.g.*, Kelly, *supra* note 8 ("[*J.D.B.*] represents the court's settled commitment to its view that kids are different . . . . It's just a further shoring up of that direction they've been moving in for [the] last several years." (internal quotation marks omitted)).

[11] Sidney E. Zion, *Court Ruling on Juveniles Is Hailed as Ending Unfair Treatment*, N.Y. TIMES, May 17, 1967, at A31 ("What this case means in its most dramatic terms is that for 68 years we've been putting youngsters into juvenile institutions by procedures which we now learn have been unconstitutional . . . ."); *see also* Fred P. Graham, *High Court Rules Adult Code Holds in Juvenile Trials*, N.Y. TIMES, May 16, 1967, at A1 ("The landmark [*Gault*] decision is expected to require that radical changes be made immediately in most of the nation's 3,000 juvenile courts.").

[12] *In re Gault*, 387 U.S. 1, 41, 56–57 (1967).

[13] *See, e.g.*, Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 41–43 (2003) ("In failing to consider what procedural adaptations were demanded by the special context of juvenile court, *Gault* reduced the analysis of children's due process rights to the simple-minded question of adult rights or no rights. And in the many cases considering accused juveniles' due process rights since *Gault*, the Court has adhered to

This Article, written for a symposium at Brooklyn Law School on "Adolescents in Society: Their Evolving Legal Status," explores the contours and nuances of this question. Part II discusses the method and means by which institutional reform litigation is designed to bring about change and the structural challenges that arise when courts attempt to transform complex institutions. It provides a brief review of late nineteenth century Supreme Court decisions that served to prevent rather than enable social change in the areas of slavery, racial segregation, and workers' rights. Part II then contrasts these cases with the decision and impact of *Brown v. Board of Education*, in which the Court rejected racially segregated public schools, giving new legitimacy to the concept of judicial review.[14] Part III argues that, although *Gault* was a foundational legal holding, it did not translate into effective policy due in part to the failures of local officials to implement the decision as intended and lawmakers to enact legislation that was true to its spirit. Part IV argues that, based on the analysis established by Gerald Rosenberg,[15] *Simmons* and its progeny have the potential to catalyze significant change for young offenders in both the juvenile and criminal justice systems. Part V acknowledges the limitations to this theory and the challenges that are likely to arise and concludes that although courts can reform complex institutions, constitutional litigation is an "unreliable path to social change."[16]

II. WHAT IS INSTITUTIONAL REFORM LITIGATION?

Using the frame of "institutional reform litigation"[17] to

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this narrow and nonsensical framing.").

[14] *See generally* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[15] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 32–36 (2d ed. 2008); *see also* CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 10 (1998) (stating that courts can become generators of social reform when certain conditions are met).

[16] MANFREDI, *supra* note 15, at 10.

[17] This type of litigation is also frequently referred to by other terms, such as "structural reform litigation," "constitutional reform litigation,"

examine whether Supreme Court decisions can bring about long-term, sustainable reform of the juvenile courts may not be a perfect fit.[18] Although juvenile courts may be broadly defined as "institutions," they are not institutions in quite the same sense as the entities and public organizations considered the traditional objects of this type of litigation—school districts, state prisons, and mental health hospitals.[19] Nonetheless, given the emphasis advocates and interest groups since *In re Gault* have placed on using constitutional litigation to bring about change in the juvenile courts, and the failure of both lawmakers and bureaucrats to alter the fundamental nature of the system, it is conceptually useful to analyze the strategy through this lens. Further, it may be argued that the project of court-ordered reform of a *legal system* is ideally positioned for success, as judges presumably have a level of expertise in this area that they lack in other settings.[20] It may also be said, however, that appellate court judges—particularly members of the Supreme Court—have limited appreciation for the day-to-day functioning of the juvenile court system[21] or understanding of children and adolescents.[22]

"impact litigation," "cause litigation," and "public law litigation."

[18] *See* Stephen L. Wasby, *The Supreme Court and Juvenile Justice, by Christopher P. Manfredi*, 8 LAW & POL. BOOK REV. 32, 33–34 (1998) (book review), *available at* http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/manfredi.htm; *see also* Emily N. Winfield, *Judicial Policymaking and Juvenile Detention Reform: A Case Study of* Jimmy Doe et al. v. Cook County, 12 J. GENDER RACE & JUST. 225, 238–39 (2008) ("Courts are rarely equipped to engage in the sort of long-term monitoring required to bring about systemic reform.").

[19] Wasby, *supra* note 18, at 33.

[20] *See* MANFREDI, *supra* note 15, at xi; *see also* DONALD T. KRAMER, *Post*-Gault *Reforms and Trends: The Juvenile Justice and Delinquency Prevention Act*, *in* LEGAL RIGHTS OF CHILDREN § 21:5 (2d ed. 2010) (stating that juvenile justice litigation is "proving to be a most effective means of advocacy as well as a catalyst for legislative reform and citizen mobilization").

[21] *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 547, 550–51 (1971) (holding that juveniles do not have a constitutional right to a jury trial, that juvenile court judges can be as objective fact-finders as jurors, and that "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence").

This Part begins the analysis by setting out the nature and process of constitutional reform litigation, the inherent challenges faced by courts that assume this role, and the key factors needed in a case or controversy to overcome these constraints. It then briefly examines the shift in the Supreme Court's exercise of judicial review after *Brown v. Board of Education*, transforming the concept from a major obstacle to social progress to a "principal means" of achieving it, and catalyzing a trend that included reform of the juvenile courts.[23]

A. A Systemic Approach

The general objective of institutional reform litigation is to "modify the framework of procedural and substantive rules according to which social and political institutions operate."[24] Through the process of judicial review, courts utilize primary rights—such as the Bill of Rights and the Fourteenth Amendment's Due Process and Equal Protection Clauses—to "acquire and mobilize" secondary rights—such as the right to racially integrated school districts or the right to representation by counsel at juvenile delinquency hearings.[25] They invoke these rights to impact the way in which an institution functions, generating remedial decrees or policy directives from the court

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[22] *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2416 (2011) (Scalia, J., dissenting) ("[F]urther problems are likely to emerge as judges attempt to put themselves in the shoes of the average 16-year-old. . . . Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15-year-old.").

[23] MANFREDI, *supra* note 15, at 1.

[24] *Id.* at 2.

[25] *Id.* at 2–3. *See generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 18–42, 111–57 (2008) (comparing "strong" judicial review, in which judicial interpretations of the constitution prevail over legislative interpretations, with "weak" judicial review, which enables legislative interpretations of the constitution to operate alongside judicial interpretations, and arguing that weak review may lessen the strain that strong review places on the democratic principle of majority rule).

to the institution as the principal means of effecting change.[26] In this way, courts address an issue by adopting an aggressive role as enforcers of the constitutional rights of individuals.[27] They order the expenditure of funds necessary to protect the right at stake and create oversight mechanisms to ensure the continued implementation of their remedies.[28]

Much has been written regarding the phases of institutional reform litigation, with Phillip Cooper's scholarship being among the most consistently cited.[29] Cooper describes the process as occurring in four basic stages: the "triggering" event, policy or practice; the finding of liability during the litigation; the development of a remedy, in which the judge serves the roles of facilitator, negotiator, and ultimate ratifier of the remedial decree; and the post-decree phase when the parties may return to the judge to request changes in the implementation process.[30] Cooper's extensive research reveals that the majority of remedial decree cases are not planned but reactive—and thus unpredictable—in nature, triggered by anything from a riot to a frustrated tenant to a lawyer determined to right a wrong that she read about online.[31] Once the matter finds its way into court, the case is likely to expand from a single issue into a set of issues that had been "lying out there waiting for a trigger."[32] The development of the litigation phase is determined largely by the skill of the lawyer involved, whose ability to establish an

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[26] MANFREDI, *supra* note 15, at 2–3.

[27] *Id.* at 2. *But see* E-mail from Kathryn Sabbeth, Assistant Professor of Law, Univ. of N.C. at Chapel Hill Sch. of Law, to author (June 26, 2011) (on file with author) (suggesting that the attorney representing the plaintiff, as the private attorney general, is the enforcer of the plaintiff's constitutional rights in a greater sense than the court).

[28] *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 6–7 (1977).

[29] *See, e.g.*, ROBERT COLDWELL WOOD & CLEMENT E. VOSE, REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS 32 (1990); Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1310–11, 1314, 1325 (2004).

[30] PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS 16–24, 328–50 (1988).

[31] WOOD & VOSE, *supra* note 29, at 32.

[32] *Id.* at 33.

adequate record affects the availability of potential remedies.[33] The lawyer must make strategic decisions when defining the issues to be presented, taking into consideration such factors as convenience and litigation costs. Lawyers for public interest organizations with affiliated membership groups may be influenced by the pre-established priorities of their members and the lawyers' understanding of how best to prioritize the divergent interests of a loosely-defined population whose interests they must represent.[34] Cooper has identified three approaches to the post-decree or implementation phase that are based on the degree to which a judge "trusts" and is willing to defer to a target agency: a judge may directly oversee compliance, leaving the details of the way in which goals are met to the organization itself; parties may enter into a consent decree or mutually agreeable, legally binding plan or process; or a judge may place the agency in receivership, substituting its administration for the current one.[35] Given the number of variables necessary to generate litigation that results in a remedy with which the target institution complies, it is hardly surprising when courts fall short of achieving their goals.

1. Inherent Challenges

The social science literature on institutional reform litigation is dominated by work that emphasizes the inability of courts to bring about meaningful social change, with perhaps the most influential studies conducted by Gerald Rosenberg[36] and Donald Horowitz.[37] These scholars and others have described the multiple ways in which courts are structurally ill-suited for the project. The "bounded nature of constitutional rights" prevents

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[33] COOPER, *supra* note 30, at 343; WOOD & VOSE, *supra* note 29, at 33.

[34] *See* Sabbeth, *supra* note 27, at 1; *see also* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 13 (2007) ("My goal . . . is to highlight the consequences of [civil rights] lawyers' strategic litigation choices about which cases to pursue and which to avoid, which harms to emphasize and which to ignore, [and] which constituencies to address and which to disregard.").

[35] WOOD & VOSE, *supra* note 29, at 36–37.

[36] *See* ROSENBERG, *supra* note 15, at 35.

[37] *See* HOROWITZ, *supra* note 28.

courts from hearing many types of claims; precedent and culture prevent judges from recognizing new rights; and courts often decide issues on technical bases, lessening the "chances of popular mobilization."[38] Scholars have also highlighted the fact that courts are passive institutions that must wait for others to bring claims and raise issues. The resulting pool of available cases may not accurately reflect or represent the general impact of the policies under review.[39] Further, unlike legislatures, courts typically focus on past events, speaking the language of "rights" and "remedies," rather than on the future impact of their decisions or the costs and benefits of taking different courses of action.[40] Courts are thereby forced to graft qualifications onto new decisions rather than to consider issues de novo. A narrow focus on the anomalies of individual cases makes it difficult, at best, to fashion systemic remedies.[41] With the current economic downturn, conditions have become even more challenging, as U.S. courts grapple with budget crises that can either limit or completely quash proposals for reform.[42]

In recent years, major constitutional law scholars such as Ran Hirschl and Mark Tushnet have enriched this classic literature with comparative work on the politics of constitutionalism and judicial review and the allocation of social and economic rights. For instance, through in-depth case studies on constitutional reforms in Canada, New Zealand, Israel, and South Africa, Hirschl has demonstrated that elected officials initiate legal reform and delegate political power to the courts not to protect minority groups from the tyranny of majority rule, but as a means of preserving their own interests.[43] Meanwhile, Tushnet has addressed the conventional view that social welfare

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[38] ROSENBERG, *supra* note 15, at 10–13.

[39] MANFREDI, *supra* note 15, at 9–10; *see also* ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1978).

[40] MANFREDI, *supra* note 15, at 9.

[41] HOROWITZ, *supra* note 28, at 35–38.

[42] *See, e.g.*, Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1352 (2005) (discussing the need for legislative funding as a means of reinforcing judicial legitimacy).

[43] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 149–210 (2004).

rights do not belong in constitutions because courts cannot enforce them.[44] Using empirical studies of courts in Ireland, South Africa, and the United States, he challenged the assumption that judicial enforcement of social and economic rights must take the form of coercive orders to the political branches by suggesting that courts exercise weaker forms of remedies to enforce these rights.[45]

Not all scholars share Horowitz's approach to the question of whether courts are equipped or designed to bring about social change. Some have challenged the seemingly single-minded focus on the shortcomings of judges and courts during the adjudicative process, asserting that the decision-making processes of legislators and administrators can be equally ineffectual.[46] Others have suggested that court-based systemic reform can divert activists from pursuing the avenues of legislative and political reform, which historically have been more successful than judicial rulemaking in effecting change.[47] Conservative scholars have characterized judicial oversight of schools, prisons, and other state institutions as "intervention [that] conflicts with democratic principles," asserting, inter alia, that it grounds social policy on "atypical situations and the ever-shifting judgments of experts."[48] Such critics have contended that Congress should "narrow the concept of standing, the availability of class actions, and provisions for declaratory and injunctive relief."[49] In contrast, progressive scholars have warned that because the legal system favors those of means and because courts are either unwilling or unable to address fundamental economic and social inequality, the remedies

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[44] TUSHNET, *supra* note 25, at 196–264.

[45] *Id.* at 228.

[46] *See, e.g.*, Wasby, *supra* note 18, at 35.

[47] *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 185–94 (1999).

[48] Tinsley E. Yarbrough, *The Political World of Federal Judges as Managers*, 45 PUB. ADMIN. REV. 660, 660 (1985) (internal quotation marks omitted).

[49] *Id.* (citing Gary L. McDowell, *A Modest Remedy for Judicial Activism*, PUB. INT., Spring 1982, at 3).

imposed through litigation are likely to be modest.[50] This point is likely to be particularly salient in the context of constitutional—as opposed to statutory—litigation, in which the poor have not been recognized as a protected class, and the Constitution has not been found to support a right to equal access to social resources.[51] Similarly, it has been observed that impact litigation "unleashes legal, political, and social forces over which the initiators of institutional reform litigation have little control," highlighting the difficulty of managing the direction and speed of systemic reform.[52]

While the assertion that there is no silver bullet for policy reform is undoubtedly true, there is value in closely examining the efficacy of litigation, as it has been one of the principle means of bringing about change in the United States since the mid-twentieth century.[53] Given the ongoing focus of liberal reformers on impact litigation (and its increasing use by conservatives as well),[54] it is critical that scholars continue to analyze why certain structural reform cases succeed while others do not.

2. Necessary Factors

With his 1991 work (and its 2008 second edition), *The Hollow Hope: Can Courts Bring About Social Change?*, Gerald Rosenberg persuasively argued that in order for courts to

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[50] *See, e.g.*, SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 148–59 (1990); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 150 (1974); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1982).

[51] *See* Sabbeth, *supra* note 27, at 1.

[52] MANFREDI, *supra* note 15, at 199.

[53] ROSENBERG, *supra* note 15, at 430.

[54] *See, e.g.*, LEE EPSTEIN, CONSERVATIVES IN COURT 15–16, 148–53 (1985); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 8–40 (2008) (tracing how conservative and libertarian lawyers have created dozens of public interest organizations modeled on those of the political left and demonstrating how these groups have succeeded in shaping law and public policy).

overcome structural constraints, certain key elements must be present in a particular case or controversy: incentives for the institution to change; costs to the institution for not changing; the existence of parallel institutions to help implement the change; and the use of court orders to leverage additional resources to effectuate change or to serve as a cover for administrators who are willing to act but fear political repercussions.[55]

Although each case presents its own specific circumstances and hurdles, the terms used share certain commonalities. "Incentives" typically refer to rewards for successful implementation of reform proposals, which most often take the form of federal funding or other monetary benefits.[56] "Costs" generally mean the loss of money, either public or private, resulting from legislative or administrative action taken when the key actors fail to implement a particular decision.[57] When individuals or groups are willing and able to create their own institutions, rather than relying on existing ones to act, courts can bring about social change through markets—although this avenue is only possible when a realistic market alternative exists and when courts allow market forces to act.[58] The use of court orders and consent decrees can be effective for securing increased funding from the legislature; they can also be used to gain the cooperation of staff members, community members, and politicians who are otherwise resistant to reform.[59] Thus, Rosenberg's model calls for the presence of sufficient precedent; executive and legislative support; low-level public support or limited public opposition; and *either* positive incentives to induce compliance, costs to induce compliance, the possibility of market implementation, *or* key administrators who desire change or for whom the court provides leverage or cover.[60]

Although Rosenberg's analysis has not been without its

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[55] ROSENBERG, *supra* note 15, at 32–36.

[56] *Id.* at 32–33.

[57] *Id.* at 33.

[58] *Id.*

[59] *Id.* at 33–34.

[60] *Id.* at 30–36.

detractors,[61] his framework setting out the factors necessary for successful court-driven reform and his ultimate conclusion that American courts are relatively weak and ineffectual have become a touchstone for subsequent scholarship in this area.[62]

B. The Role of the Supreme Court

During the late nineteenth century, the Supreme Court issued a series of decisions that served to prevent rather than enable social change in such areas as slavery, racial segregation, and workers' rights. By the 1930s, the NAACP had organized a broad program of legal attacks on racial segregation aimed at the "most blatant inequalities in school facilities and teacher salaries."[63] During the 1940s and early 1950s, Department of Justice lawyers in the Civil Rights Division addressed the labor-based and economic harms of the Jim Crow system.[64] With its opinion in *Brown v. Board of Education*, the Court dramatically shifted the paradigm. Civil rights doctrine post-*Brown* has primarily addressed policies of classification based on personal characteristics, such as race, gender, and national origin, and the "stigmatic harm" of such governmental classifications.[65] This Section contrasts the Supreme Court cases that preceded *Brown* with the federal circuit court cases that followed it, suggesting

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[61] *See, e.g.*, David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's* A Hollow Hope: Can Courts Bring About Social Change?, 12 J.L. & POL. 63, 66 (1996) (discussing critiques of Rosenberg's approach by legal scholars); Daniel W. Skubik, *The Hollow Hope: Can Courts Bring About Social Change?*, 39 FED. B. NEWS & J. 538, 539–40 (1992) (book review) (critiquing Rosenberg's "linear" analysis of the role of courts in social change theory).

[62] *See, e.g.*, Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 433, 433 (2005) (book review) (comparing Ran Hirschl's Toward Juristocracy: The Origins and Consequences of the New Constitutionalism with Rosenberg's The Hollow Hope).

[63] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 473 (1976).

[64] GOLUBOFF, *supra* note 34, at 10–11.

[65] *Id.* at 4.

that *Brown* served as a "crystallizing moment that channeled legal energy toward some kinds of cases and legal theories rather than others."[66]

1. Judicial Review Pre-1950s

Prior to the 1950s, the Supreme Court's exercise of judicial review did not support the notion that constitutional litigation could be an effective instrument of progressive social reform.[67] There are numerous examples of late nineteenth- and early-twentieth century cases that substantiate this view, with perhaps the most notable being major decisions in the areas of slavery, civil rights, economic regulation, and child labor.[68] During this period, the Court upheld the right to make and enforce contracts, the right to property, and the right to liberty afforded to employers and employees. For instance, in *Dred Scott v. Sandford*, the Court allowed slavery to expand into the federal territories when it held that the Fifth Amendment's Due Process Clause protected the property rights of slave owners.[69] In the 1883 *Civil Rights Cases*, the Court held that the Fourteenth Amendment's Equal Protection Clause protected against racial discrimination committed only by governments, not by private individuals and organizations.[70] In *Plessy v. Ferguson*, the Court upheld state-mandated racial segregation on intrastate railroads.[71] In *Lochner v. New York*, the Court invalidated a New York statute forbidding bakers from working more than sixty hours per week.[72] In both 1918 and 1935, the Court declared

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[66] *Id.*

[67] *See* MANFREDI, *supra* note 15, at 1.

[68] *See id.*; ROSENBERG, *supra* note 15, at 5.

[69] Scott v. Sandford, 60 U.S. 393, 450–52 (1856).

[70] The Civil Rights Cases, 109 U.S. 3, 24–25 (1883) ("It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.").

[71] Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

[72] Lochner v. New York, 198 U.S. 45, 64 (1905).

congressional attempts to regulate exploitative child labor practices unconstitutional.[73] As a result of such opinions, constitutional litigation became a principle means of maintaining the status quo.[74]

Several studies on the role of the judicial branch during this period further illustrate its expanding scope and impact.[75] Arnold Paul has found that because post-Civil War era social protests were perceived as placing property interests at risk, arguably necessitating judicial involvement, the courts assumed increased importance.[76] By the mid-1890s, the judiciary "emerged . . . as the principal bulwark of conservative defense," with the Supreme Court consistently striking down legislative attempts at economic regulation.[77] Meanwhile, legal progressives who supported such regulation were critical of the Court, asserting that it was antidemocratic and acting against the people's will.[78] As the work of Paul and other scholars demonstrates, the relationship among the legal doctrines, court decisions, and attitudes of lawyers and judges of that era shifted as social tensions grew and evolved.

2. Brown v. Board of Education

With *Brown v. Board of Education*, the Supreme Court's rejection of racial segregation in public education gave new legitimacy to the concept of judicial review, transforming it from an obstacle into a principal means of achieving social progress.[79] Holding that the policy of "separate but equal" violated the Fourteenth Amendment, "*Brown* overturned nearly

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[73] A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 524, 550–51 (1935); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918).

[74] MANFREDI, *supra* note 15, at 1.

[75] *See, e.g.*, ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887–95 (1960).

[76] *Id.* at 2.

[77] *Id.*

[78] *Id.* at 39–60.

[79] MANFREDI, *supra* note 15, at 1. *See generally* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

sixty years of Court-sanctioned segregation."[80] The decision has been said to have "buried Jim Crow,"[81] and to have "served as the . . . ideological engine" of the civil rights movement.[82] For nearly six decades it has been considered the "principal inspiration to others who seek change through litigation"[83] and the "symbol" of the Court's ability to generate social change.[84]

There are, however, critics of this view. Michael Klarman, for instance, has asserted "that *Brown* was *directly* responsible for only the most token forms of southern public school desegregation."[85] Relying on a variety of secondary sources, Klarman established that nearly a decade after *Brown*, the number of children attending desegregated schools had not measurably increased.[86] He illustrated further that it was only after the 1964 Civil Rights Act threatened to cut federal funding to southern school districts that the numbers began to shift.[87] As a result, *Brown* did not bring about change by stirring northern whites into action or by raising the expectations of southern blacks, but did so *indirectly* by spurring white segregationists to suppress civil rights demonstrations violently, which in turn led to national demands for civil rights legislation.[88] Michael Seidman has argued that *Brown* merely reinforced the fiction that desegregation brought an end to all racial barriers, enabling white society to blame blacks for their continued poverty and disempowerment, a status that "was now no longer a result of

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[80] ROSENBERG, *supra* note 15, at 39.

[81] T. Alexander Aleinikoff, *The Limits of Litigation: Putting the Education Back into* Brown v. Board of Education, 80 MICH. L. REV. 896, 923 (1982).

[82] Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1522 (1968).

[83] Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N B. N.Y.C. 320, 331 (1974).

[84] ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 57 (1982); *see also* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 235 (2008) (describing *Brown* as "transformative").

[85] Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) (emphasis added).

[86] *Id.* at 9–10.

[87] *Id.*

[88] *Id.* at 11.

the denial of equality . . . . [but] marked a personal failure to take advantage of one's definitionally equal status."[89] Observing that the quality of public education for many minority children has decreased and that levels of racial segregation in city schools remain high decades after *Brown*,[90] Derrick Bell has suggested that the civil rights lawyers who litigated *Brown* were more committed to their belief in racial integration than to the educational interests of their clients.[91] In writing that *Brown* failed to "reform[] the ideology of racial domination that *Plessy v. Ferguson* represented,"[92] Bell has provocatively argued that if the Court in *Brown* had upheld the doctrine of "separate but equal," the civil rights loss may have ultimately opened up "opportunities for effective schooling capable of turning constitutional defeat into a major educational victory."[93] Meanwhile, Cooper and other scholars have observed that while *Brown* was a legal success, it was neither a typical nor an ideal impact litigation case. Instead, it resulted from "careful planning, control, and coordination" by well-established civil rights lawyers who utilized a precise and coherent strategy, factors not often present in these types of cases.[94]

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[89] Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 717 (1992).

[90] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 127–29 (2004) ("The unhappy fact is that the quality of education is shockingly bad in many—perhaps most—schools attended by poorer black and Spanish-speaking children in what are nominally desegregated schools."); *see also Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28 ("The nation is getting more diverse, but by many measures public schools are becoming more segregated."); Press Release, The Civil Rights Project at UCLA, Report Finds Separate but Unequal Schools Pervasive in Southern California 2 (Mar. 18, 2011), *available at* http://civilrightsproject.ucla.edu/news/press-releases/2011/separate-and-unequal-schools-pervasive-in-southern-california/press-release-divide-we-fail-final.pdf (stating that statistics show that patterns of racial isolation in middle and high schools are "linked to a host of educational disparities and a subsequent decline in average educational levels, which is virtually certain to produce a decline in economic success across the region").

[91] *See* Bell, *supra* note 63.

[92] BELL, *supra* note 90, at 9.

[93] *Id.* at 20.

[94] COOPER, *supra* note 30, at 16; *see also* Susan D. Carle, *Debunking*

Regardless of the exact chain of causation linking *Brown* to the end of segregation, the decision continues to represent an instance in which a court acting in tandem with the legislative and executive branches produced significant social reform—indirectly if not directly.

3. Federal Courts Post-Brown

In the wake of *Brown v. Board of Education*, federal courts took steps to reform public policy in a variety of areas. For instance, mandatory bus transportation was ordered to implement desegregation in North Carolina public schools.[95] Likewise, providing inadequate medical treatment to patients confined at state mental hospitals in Alabama was found to be unconstitutional.[96] Yet, litigation victories for plaintiffs have been consistently followed by push-back from other constituencies. One example is prison reform, which is premised on the claim that prison conditions violate the Eighth Amendment's ban on cruel and unusual punishment. Following several successful litigation campaigns in this area,[97] Congress passed the Prison Litigation Reform Act (PLRA),[98] which placed

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the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890, 77 FORDHAM L. REV. 1479, 1479–81 (2009); Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1693–95 (2004).

[95] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27–32 (1971).

[96] Wyatt v. Stickney, 344 F. Supp. 373, 375–77 (M.D. Ala. 1972), *aff'd in part*, *rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[97] *See, e.g.*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (modifying but maintaining district court order for system-wide relief in Alabama), *rev'd in part on other grounds sub nom.*, Alabama v. Pugh, 438 U.S. 781 (1978); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (affirming district court ruling and order for relief of Eighth Amendment violations by state prison); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ala. 1969) (finding certain prison conditions unconstitutional).

[98] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 to -77 (codified as amended in scattered sections of 11, 14, 18, 28 U.S.C.).

rigorous procedural requirements on judicial orders and mandated that remedies be directed only at constitutional violations.[99] Although Congress adopted a statute allowing prevailing parties in federal court to collect attorneys' fees in constitutional challenges to the actions of government officials,[100] the statute had "some downsides," including the diversion of resources from precedential but risky cases to those in which success was more likely and could, therefore, cover the expenses of litigation.[101] The PLRA further limited attorneys' fees by significantly lowering the reimbursement rate to that earned by lawyers appointed to represent federal indigent defendants.[102] Despite the adverse reactions to *Brown*, however, the decision did catalyze numerous organizations and individuals to bring types of actions that had rarely been pursued before.[103] Reform of the juvenile courts was an important part of this post-*Brown* trend, with *In re Gault* having the broadest impact.

III. WHY *GAULT* FAILED

In 2007, juvenile justice advocates, scholars, and practitioners celebrated the fortieth anniversary of *In re Gault*.[104] The decision was lauded as having ushered in the modern juvenile court, one in which youth receive many of the same due process rights as adult criminal defendants, including the right to counsel and the privilege against self-incrimination.[105] Yet, it has also been acknowledged that the victory was bittersweet, for in

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[99] Tushnet, *supra* note 94, at 1704.

[100] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006).

[101] Tushnet, *supra* note 94, at 1702.

[102] Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(d)(1) (2006).

[103] *See* Tushnet, *supra* note 94, at 1695–96.

[104] *See, e.g.*, *40th Anniversary of* In re Gault, GEORGETOWN LAW CTR., http://www.law.georgetown.edu/clinics/jjc/InreGault.htm (last updated May 8, 2007).

[105] *See, e.g.*, Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1370–71 (2000).

many of today's juvenile courtrooms, youth regularly waive their right to legal counsel, are adjudicated delinquent despite a lack of sufficient evidence, and are sentenced to serve terms in facilities that are little more than warehouses for our communities' poor children of color.[106] The examination of why *Gault* failed, therefore, is a vitally important one, particularly in light of recent Supreme Court cases brought on behalf of juveniles.

*A. Juvenile Justice Policy Pre-*Gault

Before 1899, criminal suspects and offenders under the age of eighteen were treated no differently than their adult counterparts and were subject to the same procedures and penalties, resulting in high rates of recidivism.[107] In Chicago, for instance, children as young as seven were arrested for petty theft and detained with adult offenders until the next court session, prompting the *Chicago Herald* to report, "[t]here are no healthful influences brought to bear on these youthful offenders, neither physically nor morally . . . . It is not a house of correction with them—it is a house of perversion, corruption and retrogression for them."[108] The 1893 article concluded by asserting that "these boys were really more sinned against than sinning," echoing the views of lawyers and judges who held the city itself responsible for a justice system that "manufactured criminals."[109]

The juvenile court movement developed in reaction to the punitive treatment of young offenders by the criminal courts as well as the perception that the family unit had failed to supervise

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[106] *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260, 266–83, 285 (2007).

[107] DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 8 (2004); Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 845–47 (2010).

[108] TANENHAUS, *supra* note 107, at 10 & n.34.

[109] *Id.* at 8–10.

its children.[110] Greater numbers of women were working outside the home during the Progressive Period of the late nineteenth century and forced to balance the competing obligations of employment and child supervision.[111] While institutional care for poor families in alms houses and asylums had been a popular policy, "the public became increasingly unwilling to mix children with other paupers and demanded the creation of separate orphanages for children."[112] The juvenile court emerged during this period, which was characterized by anxiety over the "social decline" of urban life, optimism that solutions could be found by skilled professionals, and a strong belief that criminal behavior was caused by the failure of nurture, not nature.[113] Reformers focused on environmental causes of delinquency, asserting that children must be properly socialized against corruption; they deemphasized the importance of specific misconduct in favor of evaluating the whole child,[114] an example of "substantive" rather than "legal" justice.[115] The belief that the juvenile court must serve as a substitute for parents when they

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[110] LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW 273–74 (2d ed. 2006).

[111] *See* Martha May, *Bread Before Roses: American Working Men, Labor Unions and the Family Wage*, *in* WOMEN, WORK AND PROTEST: A CENTURY OF WOMEN'S LABOR HISTORY 1, 7 (Ruth Milkman ed., 1985); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State*, *in* WOMEN, THE STATE, AND WELFARE 123, 137 (Linda Gordon ed., 1990).

[112] Nelson, *supra* note 111, at 137–38 ("These asylums quickly developed into the major social mechanism for sustaining children of low-income parents faced with unemployment, financial collapse, or death of a male breadwinner." (internal quotation marks omitted) (quoting Ann Vandepol, *Dependent Children, Child Custody, and Mothers' Pensions*, 29 SOC. PROBS. 221, 224 (1982))).

[113] HARRIS & TEITELBAUM, *supra* note 110, at 274–75; Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1311–1313 (2000).

[114] DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205–07, 210–11 (2d ed. 2002).

[115] HARRIS & TEITELBAUM, *supra* note 110, at 282 (citing ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 88–92 (1975)).

neglect to follow through on their responsibilities formed the basis for the doctrine of parens patriae.[116]

During the first fifty years of the juvenile court's development, it had broad jurisdiction over all types of conduct by and circumstances affecting children. State juvenile codes contained expansive definitions of "neglect" and "delinquent" and utilized catch-all phrases such as "incorrigible" and "growing up in idleness or crime" to reach any disfavored behavior that suggested parental failure.[117] The court was run informally and few procedural protections were afforded to juveniles. The judge typically focused on reforming the child rather than deterrence or retribution and on determining the "truth" of what happened rather than strict adherence to the rules of evidence.[118] This approach often resulted in indeterminate probationary or incarcerative dispositions that relied on a judge's subjective assessment of a child's needs, rather than the nature and seriousness of the offense committed.[119] It is not surprising, therefore, that this model led to circumstances such as those faced by fifteen-year-old Gerald Gault when he appeared in the Gila County juvenile court in Arizona in 1964.

B. The Impact of Gault

In re Gault was the second in a trio of cases decided by the Supreme Court between 1966 and 1970 that addressed the due

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[116] *See* ROTHMAN, *supra* note 114, at 212. The Latin term "parens patriae" translates literally as "parent of the country," but refers here to the state's ability to serve as the surrogate parent to juveniles. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

[117] *See, e.g.*, Illinois Juvenile Courts Act, 1899 Ill. Laws 131–37 (current version at 705 ILL. COMP. STAT. ANN. 405/1-2 (West 2007)) (creating Illinois's first juvenile code). A national volunteer network called the "friendly visitor movement" developed in response to the lack of outside oversight of the juvenile courts. Cara Rodriguez, Comment, *Oklahoma's Parentless Child: Determining the Best Interest of the Child by Making Multilateral Adoption Decisions*, 59 OKLA. L. REV. 319, 320–22 (2006).

[118] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106–08, 119–21 (1909).

[119] HARRIS & TEITELBAUM, *supra* note 110, at 284.

process rights of juveniles. *Gault* was preceded by *Kent v. United States*, which held that a juvenile cannot be transferred from delinquency to adult criminal court without a "fair hearing" in which the youth is represented by counsel who has access to the client's probation records.[120] It was followed by *In re Winship*, which held that the standard of proof in juvenile court must be the same as that in adult criminal court—beyond a reasonable doubt—and not the lesser preponderance of the evidence standard.[121] Together these cases reflected the view that the system's purpose is to assess whether a young person committed a criminal offense, and that juvenile courts should be concerned with what a child *does*, rather than who a child *is*.[122]

The facts of *Gault* provided an ideal forum for the Court to review the progress and impact of juvenile court during its first half century. Gerald Gault, who had previously been on probation for being with a boy who stole a wallet, was sentenced to up to six years in juvenile prison for making a "lewd or indecent" phone call to a female neighbor, for which the maximum penalty for an adult was only two months or a fifty dollar fine.[123] Gault's parents had not been given meaningful notice of the charges; he had no lawyer at the hearing; and he was not advised of his right to remain silent.[124] No record was made; no witnesses were sworn; and no appeal was possible.[125] *Gault*'s holding that basic due process rights apply to juvenile delinquency proceedings—including the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses—struck at the core assumptions of a paradigm that had guided juvenile justice reform for decades.[126] By recognizing that "[u]nbridled discretion . . . is frequently a poor substitute for principle and procedure," the Court ruled that practices that had long been accepted and even

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[120] Kent v. United States, 383 U.S. 541, 553–54 (1966).
[121] *In re* Winship, 397 U.S. 358, 368 (1970).
[122] MANFREDI, *supra* note 15, at 150.
[123] *In re* Gault, 387 U.S. 1, 4, 8–9 (1967).
[124] *Id.* at 5, 10, 41–42.
[125] *Id.* at 5–6, 8.
[126] *Id.* at 30–31.

encouraged under traditional juvenile court theory were unconstitutional.[127]

Gault, however, was not a complete rejection of the juvenile court model or of non-punitive responses to adolescent misconduct. The Court's decision acknowledged that there were "substantive benefits" to the system that basic due process protections would not "abandon or displace."[128] Finding that the system had failed to reduce crime or rehabilitate offenders effectively, the Court noted its regret that the juvenile court had been unable to achieve its goals, but expressed confidence that "the features of the juvenile system[,] which its proponents have asserted are of unique benefit[,] will not be impaired by constitutional domestication."[129]

C. What Factors Were Missing?

Despite the Court's assurance that the positive aspects of the traditional juvenile court would not be lost with adherence to due process standards, developments in juvenile justice policy after *Gault* were the opposite of what the Court had predicted.[130] In perhaps the largest study completed in the years immediately following the decision, it was found that "failure to comply with *Gault*'s rules was widespread," resulting in "sometimes flagrant disregard of constitutional rights."[131] Many juvenile court judges believed that they were not bound by the requirements of *Gault* as long as the adjudication of delinquency did not result in incarceration of the child; others were unfamiliar with the specifics of the decision.[132] Local officials resisted implementing rules of the Supreme Court, which they perceived as having little enforcement power over them.[133] States passed legislation

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[127] *Id.* at 4, 18.

[128] *Id.* at 21.

[129] *Id.* at 22.

[130] MANFREDI, *supra* note 15, at x, 156.

[131] ROSENBERG, *supra* note 15, at 314–15 (citing Norman Lefstein et al., *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491, 527, 530 (1969)).

[132] MANFREDI, *supra* note 15, at 157.

[133] *Id.* at xi.

that was designed to make the juvenile court system look more like the adult criminal court system, but much was lost in the translation.[134] A "quid pro quo" attitude took effect in which courts denied specific procedural protections to young offenders out of a belief that juvenile court was rehabilitative rather than punitive.[135] Alternatively, some courts asserted that if *too many* procedural rights were extended to juveniles, the "intimate, informal, [and] protective" nature of delinquency court would be lost.[136]

Applying the analytic framework developed by Rosenberg to *Gault*, it is clear that very few of the key elements needed for successful institutional reform litigation were present. There were no incentives from outside actors that served to catalyze change within the juvenile court. Equally important, there were few incentives for the main participants *within* the system to change, as most were invested in maintaining the informal culture of the court. Juvenile defense attorneys, for instance, lacked the inclination and commitment to assume a truly adversarial role on behalf of young offenders and instead acted as mediators.[137] Judges were committed to the rehabilitative ideal and were protective of their broad discretionary powers.[138] Likewise, there were no outside actors or parallel institutions imposing *costs* for non-compliance.[139] Because hearings were either closed to or ignored by the public, there was little to no oversight of the proceedings.[140] Although *Gault* had some effect on the work of state lawmakers, reform of juvenile codes focused mainly on the decriminalization of status offenses such

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[134] *Id.*

[135] *See* HOROWITZ, *supra* note 28, at 174, 177–78; Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1449–50 (2009).

[136] Birckhead, *supra* note 135, at 1449 n.13 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971)).

[137] HOROWITZ, *supra* note 28, at 218.

[138] *Id.* at 188–91; ROSENBERG, *supra* note 15, at 315–16.

[139] ROSENBERG, *supra* note 15, at 315.

[140] *See, e.g.*, William McHenry Horne, Note, *The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment Analysis*, 39 IND. L. REV. 659, 676–79 (2006).

as incorrigibility, truancy, and running away, which formerly had been punished in delinquency court.[141] In these ways, the implementation of *Gault* fell far short of its goals because the Court "lack[ed] the tools to enforce its decree."[142]

D. Juvenile Court Forty Years Later

Studies conducted two decades after *Gault* by Barry Feld and others reported findings similar to the data collected immediately following the decision: juvenile courts had continued to fail to comply with the Court's holding.[143] During this period and well into the 1990s, sanctions became increasingly punitive for young offenders; the age cap on delinquency court jurisdiction was lowered in some states and never raised in others, and the percentage of juveniles transferred to adult criminal court grew.[144] In fact, in many states, there was no check on

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[141] HOROWITZ, *supra* note 28, at 207–218.

[142] ROSENBERG, *supra* note 15, at 316; *see also* HOROWITZ, *supra* note 28, at 179–81 (suggesting that *Gault*'s failure may be attributed to its narrow focus on courtroom procedure, which "probably plays little or no role in conditioning the offender's receptivity to reformative efforts"); Buss, *supra* note 13, at 42 (arguing that *Gault* failed not because its vision was poorly implemented but because "the Court failed to consider . . . whether children's due process rights could be tailored actually to advance, rather than simply not undermine, the laudable substantive and procedural goals of the juvenile court system").

[143] *Compare* Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1188–89 (1989) (finding that juvenile courts in the 1980s failed to comply with the holding in *Gault*), *with supra* notes 131–33, 137–40 (finding that in the years immediately following *Gault*, judges, court officials, and defense attorneys failed to comply with its holding).

[144] *See* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 388 (2008); *see also* PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (1998), *available at* https://www.ncjrs.gov/pdffiles/172836.pdf (finding that the age cap of juvenile court jurisdiction decreased in some states); HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF

prosecutorial discretion regarding whom to charge, what to charge, and whom to transfer from juvenile to adult court.[145] In most states, juveniles did not have the right to a jury trial, one of the few protections against racial bias and discrimination by prosecutors.[146] Similarly, few states provided judicial oversight of discretionary decisions made by police or juvenile probation officers, decisions that impacted who entered the juvenile court system and who remained there.[147]

Forty years after *Gault*, the juvenile justice system continues to provide children with "the worst of both worlds."[148] There is overwhelming evidence that juveniles receive substandard representation, according to state assessments of the quality of defense counsel conducted by the American Bar Association.[149] There is a mixed record on rehabilitation of young offenders, with empirical data showing that recidivism rates increase as a result of juvenile court involvement[150] and that exposure to the juvenile justice system enhances the risk that youth will engage in criminal activity as adults.[151] Further, "disproportionate minority contact," the phenomenon in which children of color

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JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 93 (1999), *available at* https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (finding that sanctions became more punitive for young offenders).

[145] HARRIS & TEITELBAUM, *supra* note 110, at 369–70; Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 515 (2009).

[146] Linda A. Szymanski, *Juvenile Delinquents' Right to a Jury Trial (2007 Update)*, NCJJ SNAPSHOT (Nat'l Ctr. for Juvenile Justice, Pittsburgh, Pa.), Feb. 2008, at 1, *available at* http://www.ncjj.org/PDF/Snapshots/2008/Vol13_no2_righttojurytrial.pdf; *see also* Birckhead, *supra* note 135, at 1451.

[147] *See* Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 975–77 (2010).

[148] Kent v. United States, 383 U.S. 541, 555–56 (1966).

[149] *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 792 (2010).

[150] *See* Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 30, 36 (2009).

[151] *See id.*

enter the juvenile justice system at a higher rate than their white counterparts, is an entrenched problem, as confirmed by statistics from the United States Office of Juvenile Justice and Delinquency Prevention.[152]

In short, the beneficial effects of *Gault* were temporary. The victory was a largely symbolic one in which change was inspired but not maintained.[153] The case, therefore, stands as an example of what happens when courts serve "an ideological function of luring a movement for social reform to an institution that is structurally constrained from serving its needs, providing only an illusion of change."[154] Whether twenty-first century juvenile justice litigation will confront the same fate remains to be seen.

IV. TWENTY-FIRST CENTURY JUVENILE JUSTICE LITIGATION

Between 1970 and 2005, there were few Supreme Court decisions involving juvenile justice and even fewer that extended the legacy of *In re Gault*. In fact, nearly all of the Court's opinions during this period served to curb *Gault*'s efforts to bring standard criminal court processes to juvenile court. Beginning in 1971, the Court held in *McKeiver v. Pennsylvania* that juvenile proceedings are *not* equivalent to criminal prosecutions, and that the context-driven standard of "fundamental fairness" does not require that an accused youth has a right to a jury trial.[155] Four years later in *Breed v. Jones*, the Court decided that the double jeopardy clause prohibits juvenile courts from conducting transfer hearings *after* delinquency adjudication hearings, although in sharp contrast to

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[152] *See* JEFF ARMOUR & SARAH HAMMOND, NAT'L CONF. ST. LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 4 (2009), *available at* http://www.ncsl.org/print/cj/minoritiesinjj.pdf; *see also* Alex R. Piquero, *Disproportionate Minority Contact*, FUTURE CHILD., Fall 2008, at 59, 60 (discussing recent changes to the Juvenile Justice and Delinquency Prevention Act to investigate disproportionate minority contact more broadly).

[153] *See* MANFREDI, *supra* note 15, at 197–99.

[154] ROSENBERG, *supra* note 15, at 427.

[155] McKeiver v. Pennsylvania, 403 U.S. 528, 528, 540, 545 (1971).

the cynicism expressed in *Gault*, *Kent v. United States*, and *In re Winship*, the Court took pains to portray the juvenile system as largely beneficial to children.[156] In 1975, in *Goss v. Lopez*,[157] the Court held that students do *not* have the right to a formal hearing before receiving a school suspension of fewer than ten days. Three years later in *Swisher v. Brady*, the Court declined to strike a state statute allowing the prosecutor to file exceptions to a "not guilty" finding made by a master of the juvenile court.[158] In 1979, in *Fare v. Michael C.*, the Court refused to apply elements of *Miranda v. Arizona* to juvenile proceedings when it held that a sixteen-year-old's request to speak to his probation officer was not the equivalent of an invocation of the right to remain silent and to consult with an attorney.[159] *Michael C.*, together with *Goss* and *Swisher*, gave new life to the traditional view of juvenile court that had been discredited in *Gault*.[160] The 1984 case of *Schall v. Martin* furthered this trend by allowing for preventative pretrial detention of accused juveniles upon a finding of "serious risk" that they would reoffend.[161] The majority opinion in *Schall*, written by Chief Justice William Rehnquist, is perhaps best known for justifying institutional restraints on minors by the fact that "juveniles, unlike adults, are always in some form of custody."[162] The following year, the Rehnquist Court gave states even wider latitude over the rights of youth when it held in *New Jersey v. T.L.O.* that searches of students by school officials are not subject to the warrant requirement of the Fourth Amendment and need only be justified by a reasonable cause standard.[163]

It was not until 2005, nearly forty years after *Gault*, that the

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[156] Breed v. Jones, 421 U.S. 519, 528–29 (1975) (stating that the failure of juvenile courts to meet expectations "in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny").

[157] Goss v. Lopez, 419 U.S. 565, 581–584 (1975).

[158] *See generally* Swisher v. Brady, 438 U.S. 204 (1978).

[159] Fare v. Michael C., 442 U.S. 707, 721, 723 (1979).

[160] *See* MANFREDI, *supra* note 15, at 153.

[161] *See* Schall v. Martin, 467 U.S. 253 (1984).

[162] *Id.* at 265.

[163] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

Supreme Court introduced a major shift in the perspective of the legal system towards young people who commit crime. A discussion of whether the Court's decisions in *Roper v. Simmons*, *Graham v. Florida*, and *J.D.B. v. North Carolina* have the potential to transform the juvenile justice system on either the macro or micro level follows.

A. Eighth Amendment

In the two decades between *T.L.O.* and *Simmons*, the Supreme Court addressed the rights of youth charged with criminal offenses on only two occasions, both in the context of the Eighth Amendment.[164] In 1988, the Court prohibited the death penalty for offenders who were fifteen and younger in *Thompson v. Oklahoma*,[165] only to uphold it the following year for sixteen and seventeen-year-olds in *Stanford v. Kentucky*.[166] With its 2005 decision in *Simmons*, the Court held that as a categorical matter, juveniles are not as culpable as adults and, thus, are not deserving of capital punishment, overruling *Stanford*.[167] Citing sociological and scientific research, the Court emphasized the differences between children and adults in such areas as impulse control, susceptibility to peer pressure, and character formation.[168] While *Simmons* is clearly important from the perspective of Eighth Amendment jurisprudence, the decision also has potential ramifications for the juvenile justice system at large.[169] The majority's recognition that age matters and that it would be misguided from a "moral standpoint" to

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[164] SUSAN GLUCK MEZEY, CHILDREN IN COURT: PUBLIC POLICYMAKING AND FEDERAL COURT DECISIONS 24–25 (1996); *see also* Leonardo P. Caselli, Note, *Criminal Law—One Small Step for Juveniles, One Giant Leap for Juvenile Justice;* Graham v. Florida*, 130 S. Ct. 2011 (2010)*, 11 WYO. L. REV. 269, 270–71 (2010).

[165] Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[166] Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

[167] Roper v. Simmons, 543 U.S. 531, 570, 575 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

[168] *Id.* at 569–70.

[169] *See* Birckhead, *supra* note 144, at 393–94.

equate the failings of minors with those of adults has been and will continue to influence other areas of doctrine and theory.[170]

Five years later, the Court relied on *Simmons* when it held, in *Graham v. Florida*, that the Eighth Amendment does not permit juveniles convicted of nonhomicide crimes to be sentenced to life in prison without the possibility of parole (JLWOP).[171] The *Graham* Court applied a form of Eighth Amendment comparative analysis that previously had been reserved only for capital cases, exempting an entire class of offenders who had committed a range of crimes from JLWOP, rather than balancing the gravity of the crime against the severity of an individual sentence, as is typically done in term-of-years cases.[172] Relying on *Simmons*, the Court again invoked social science research on adolescent behavior as well as neuro-scientific data on brain development to support the view that young offenders are incomplete works in progress for whom redemption remains viable.[173] Justice Anthony Kennedy, who wrote the majority opinions in both *Simmons* and *Graham*, felt strongly that courts must take age into account at all stages of the criminal justice process. This view became central to the court's opinion in *J.D.B. v. North Carolina*, decided one year after *Graham*.[174]

B. Fifth Amendment

In 2011, the Supreme Court held that a suspect's age must be a factor when determining whether police interrogation was custodial, thereby requiring Miranda warnings.[175] The Petitioner, J.D.B., was a thirteen-year-old student who was questioned about local break-ins by a uniformed police investigator in a conference room at his middle school.[176] The school resource

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[170] *Simmons*, 543 U.S. at 570.

[171] Graham v. Florida, 130 S. Ct. 2011, 2022, 2026, 2028 (citing *Roper* in support of the Court's holdings).

[172] *Id.* at 2022–23.

[173] *Id.* at 2026.

[174] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398–99 (2011).

[175] *Id.*

[176] *Id.* at 2399.

officer, assistant principal, and administrative intern were also present, although no one had attempted to reach J.D.B.'s grandmother who was his legal guardian.[177] The assistant principal urged him to "do the right thing," asserting that "the truth always comes out in the end."[178] Without advising him that he could refuse to speak with them and could have a lawyer appointed, the police investigator warned J.D.B. that if he kept breaking into houses, he could "get sent to juvenile detention before court."[179] The North Carolina juvenile and appellate courts found the boy's youth to be irrelevant to the custody analysis, and determined that the test of whether a suspect feels "free to leave" during questioning was based only on "objective" factors.[180] *J.D.B.* represents the first time that the Supreme Court has addressed this question directly,[181] and it relied on both *Simmons* and *Graham* to overrule the state courts.[182]

C. Looking Ahead

Despite *Gault*'s failures of policy, the decision was the culmination of a movement that was a legal success.[183] The holding that juveniles have a right to notice of charges against them, representation by counsel, and cross-examination of state witnesses triggered legislation that brought juvenile courts—for better or worse—much closer to the criminal court model. In turn, twenty-first century juvenile justice cases have prevailed, at least in part, as a result of *Gault*.

In looking ahead, it is critical to identify the areas of juvenile and criminal justice reform that are primed for future institutional reform litigation in the wake of *Simmons*, *Graham*, and *J.D.B.* On the macro level, potential areas of focus include cases that affirm

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[177] *Id.*
[178] *Id.*
[179] *Id.* at 2399–400.
[180] *Id.* at 2400–01, 2405–06.
[181] *See id.* at 2405–06.
[182] *Id. passim*.
[183] *See* MANFREDI, *supra* note 15, at xi.

the fundamental differences between adult and juvenile offenders, call for qualitatively different treatment for the two groups, ensure that "youth" is considered as mitigating and not aggravating, and perform a signaling function that the juvenile and criminal courts' treatment of young offenders is both serious and important.

On the micro level, recent precedent could support future litigation directed at each stage of the investigative and adjudicatory process. For instance, *J.D.B.* could lead to a cultural shift in the approach of police officers towards young suspects, in which age is taken into account during investigation, interrogation, and detention.[184] At the trial stage, *Simmons* and *Graham* could support litigation that results in rigorous client—centered representation for juveniles—whether in delinquency court, transfer hearings, or criminal court. Such reform could lead to elimination of the troubling practice of waiver of counsel by juveniles.[185] At the dispositional or sentencing stage, litigation could mandate that prosecutors, judges, and probation officers take into account the youth's brain development, mental and emotional state, making the process more uniformly appropriate for juvenile offenders.

Simmons and *Graham* could also support future litigation that removes the option of "benign detention" and long-term warehousing of youth, thereby strengthening families through providing rehabilitative treatment within the community.[186] These cases could be invoked to encourage system-wide recognition of the positive aspects of the rehabilitative ideal and the capacity of all young offenders to be redeemed. Further, these cases could be used to narrow the circumstances under which transfer from juvenile to criminal court is possible, as empirical data has shown that minors tried as adults receive little or no rehabilitation, are at greater risk of victimization in adult facilities, and experience severe collateral consequences of

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[184] *Cf.* Thurau, *supra* note 150, at 38–39.

[185] *See* Drizin & Luloff, *supra* note 106, at 285.

[186] *See* James Bell, Founder & Exec. Dir., W. Haywood Burns Institute, Address at the Tenth Annual Zealous Advocacy Conference at the University of Houston Law Center: Disproportionate Minority Contact (May 20, 2011) (notes on file with author).

criminal convictions.[187] At the post-conviction stage, *Graham* has mandated that young offenders sentenced to lengthy terms of incarceration be offered a "meaningful opportunity" for release, requiring prisons that house juveniles to provide young offenders with the means to demonstrate maturity and rehabilitation.[188] While it is unclear how this will translate into practice, as the "mechanisms for compliance" have been left to the states, future litigation could result in improved prison conditions for juveniles.[189]

Thus, similar to the period post-*Gault* when reformers had high expectations that the legal victory would translate into long-term policy change, there is optimism in the juvenile justice field that the litigation successes of *Simmons*, *Graham*, and *J.D.B.* will have a positive—if not transformative—effect upon the juvenile and criminal court systems.[190] Challenges, however, are inevitable, illustrating once again that courts are constrained in their ability to reform complex institutions.

V. LIMITATIONS & CHALLENGES

Perhaps the most significant legacy of *In re Gault* was the Supreme Court's acknowledgement that constitutional rights are not limited to adults. The decision led to an increasing number of constitutional challenges to federal and state laws and policies brought on behalf of youth, which in turn has enlarged the role of the federal courts in children's lives.[191] Yet, litigation

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[187] *See* Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1459–60 & n.78 (2008).

[188] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[189] *Id.*

[190] *See, e.g.*, Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, 87 CRIM. L. REP. 664, 664 (2010) ("Together [*Simmons* and *Graham*] provide the framework for a developmentally driven juvenile Eighth Amendment jurisprudence that has potentially broad implications for the laws, policies, and practices that govern the treatment of offenders under the age of 18, particularly sentencing practices."); Juvenile Law Ctr., *supra* note 9 (expressing optimism regarding the potential impact of *J.D.B.*).

[191] MEZEY, *supra* note 164, at 2; *see also supra* notes 121–22, 155–63 and accompanying text.

implicating the rights and liberties of children can raise difficult and highly charged questions about state authority over disenfranchised youth. It can force states to intervene between children and parents, challenge cultural norms regarding the role of the child in the family, and catalyze turf wars over already-limited government funding.[192] Although it is tempting to assume a "glass half full" approach to the question of whether *Roper v. Simmons*, *Graham v. Florida*, and *J.D.B. v. North Carolina* will lead to more meaningful policy reform than did *Gault*, it is essential to acknowledge what may be a harsh reality.

A. Back Steps & Caveats

Just as the successes of *Kent v. United States*, *Gault*, and *In re Winship* were followed by decisions that reversed course (or, as critics would say, that addressed the trio's initial overcorrection),[193] *Simmons*, *Graham*, and *J.D.B.* could generate a similar pattern. Future litigation relying on *Simmons et al.* will inevitably challenge less severe sentencing practices and less significant due process violations; as a result, the circumstances of future plaintiffs will not be as compelling as those faced by Christopher Simmons, Terrance Graham, or thirteen-year-old J.D.B. The criminal justice system could then shift back—at least temporarily—to a model that places more weight on the *harm* committed by a young offender than the developmental *causes* that mitigate culpability.

In addition, as this Article is framed by a comparison of the effects of *Gault* with those of *Simmons* and its progeny, several caveats are in order. First, there are basic differences between *Gault* and the recent cases. As discussed, *Gault* paved the way for delinquency court to shift from a rehabilitative model to a retributive one that provides juveniles with many of the same due process protections that adults receive in criminal court. The litigation was a product, at least in part, of the new children's

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[192] MEZEY, *supra* note 164, at 4–5.

[193] *See supra* notes 155–63 and accompanying text (discussing cases holding, inter alia, that juveniles do not have the right to a jury trial, to a formal hearing before a short-term school suspension, or to searches by school officials that are subject to the warrant requirement).

rights movement of the 1960s.[194] Although the Court in *Gault* explicated the rights that should be afforded to juveniles charged with crimes, it left open many questions, including whether the due process rights to counsel and confrontation apply to other adjudicatory stages of the proceeding, such as detention and dispositional hearings.[195] *Gault* did not define the specific role and purpose of counsel for children in juvenile court, leaving unsettled whether lawyers should represent the "expressed interests" of their young clients or advocate for their "best interests."[196] The decision did not address the matter of whether, and under what circumstances, a juvenile may waive the right to counsel.[197] It also left the role of parents ambiguous.[198] In addition, *Gault* declined to find a right to a transcript, to appeal, or to post-dispositional representation for juveniles.[199]

In contrast, neither *Simmons* nor its progeny resulted from broad coalitions or movements determined to change the institution of the juvenile court or the fundamental ways in which the criminal and juvenile justice systems treat young offenders. The lawyers and human rights activists supporting the *Simmons* litigation were motivated as much or more by a determination to end capital punishment as by a desire for juvenile justice reform.[200] Similarly, the *Graham* decision was

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[194] *See* Mariah Adin, Adult Crime, Adult Time: Defining the Teenager in the American Legal System 6 (July 2010) (unpublished paper), http://albany.academia.edu/MariahAdin/Papers/270189/Adult_Crime_Adult_Time_Defining_the_Teenager_in_the_American_Legal_system.

[195] *See* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 250–54 (2005).

[196] Fedders, *supra* note 149, at 785–87.

[197] *Id.* at 787–88.

[198] *Id.* at 788–90.

[199] *Id.* at 782–83.

[200] *See, e.g.*, Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 994–95 (2008) (providing an account of the international dimension of the human rights advocacy movement to end capital punishment, a legal campaign that culminated in the United States with *Simmons*); Editorial, *Still Cruel and Unusual*, WASH. POST, Feb. 3, 2004, at A18 ("At first glance, the Supreme Court's decision to reconsider whether the juvenile death penalty violates the Constitution may seem to be

viewed by many advocates as the first step in a broader campaign to challenge all lengthy terms of incarceration.[201] Likewise, *J.D.B.*'s appeal was initiated by local attorneys who were incensed by the opinions in the courts of North Carolina, not by organized children's rights groups.[202] Further, *Simmons* and *Graham* each addressed relatively narrow (although critically important) questions regarding sentencing practices, and *J.D.B.* focused on a specific issue related to the provision of Miranda warnings. While these recent cases also left open questions, their holdings do not go to the heart of either the juvenile or criminal justice system, making it particularly difficult to predict whether they will facilitate broad reform.

B. Will History Repeat Itself?

In the wake of the legal successes of *Simmons*, *Graham*, and *J.D.B.*, lower federal courts, state courts, and legislatures have issued holdings and passed laws that provide a glimpse of the

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good news for opponents of capital punishment."); Editorial, *Too Young to Die?*, BRATTLEBORO REFORMER (Vt.), Oct. 13, 2004 ("If the high court [rules for Simmons], it will be a landmark victory for child and human rights advocates, but it will also be a win for death penalty opponents, who view the possible ruling as one more way to curtail the law.").

[201] *See, e.g.*, Adam Liptak, *Justices Limit Life Sentences for Juveniles*, N.Y. TIMES, May 17, 2010, at A1 ("Although the majority limited its decision to non-homicide offenses, advocates may try to apply its logic more broadly to the some 2,000 inmates serving life-without-parole sentences in the United States for participating in killings at 17 or younger."); Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES, Apr. 20, 2011, at A13 ("Now the inevitable follow-up cases have started to arrive at the Supreme Court. Last month, lawyers for two other prisoners who were 14 when they were involved in murders filed the first petitions urging the justices to extend last year's decision, *Graham v. Florida*, to all 13- and 14-year-old offenders.").

[202] *See, e.g.*, Taylor Sisk, *Local Miranda Case Reaches Supreme Court*, CARRBORO CITIZEN, Mar. 24, 2011, at 7 (quoting the public defender who represented J.D.B. in the local juvenile court); *Rights of Child Suspects Debated at High Court*, WRAL.COM (Mar. 23, 2011), http://www.wral.com/news/local/story/9317789/ ("The boy's lawyer says his treatment was unconstitutional and has argued the case all the way to the nation's highest court.").

ways in which these Supreme Court decisions could translate into long-term sustainable policy. For instance, the Ninth Circuit Court of Appeals relied on *Simmons* to hold that a seventeen-year-old student's murder confession was involuntary, based upon the inadequacy of the Miranda warnings given and the coercive nature of the police interrogation.[203] A federal district court found under *Graham* that mandatory twenty-five year consecutive terms for a juvenile convicted of non-homicides violated the Eighth Amendment, for the 307-year sentence offered "no possibility of release based on demonstrated maturity and rehabilitation."[204] A state appellate court found that *Graham*'s reasoning prohibited a long term-of-years sentence for a juvenile convicted of a non-homicide.[205] Likewise, the prosecution of teenagers in adult criminal courts has been widely impacted by *Simmons* and *Graham*, as fifteen states have changed their laws since 2005, with at least nine others actively engaged in policy reform efforts.[206] Specifically, the data shows that three states have expanded juvenile court jurisdiction so that youth who previously would have been automatically tried as

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[203] Doody v. Ryan, No. 06-17161, 2011 WL 1663551, at *33 (9th Cir. May 4, 2011).

[204] United States v. Mathurin, No. 09-21075-Cr., 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011).

[205] People v. Mendez, 114 Cal. Rptr. 3d 870 (Ct. App. 2010); *see also* Duncan v. Alabama, 925 So. 2d 245, 250–52 (Ala. Crim. App. 2005) (holding that the decision in *Simmons* was to be applied retroactively to cases on collateral review); People v. Nunez, 125 Cal. Rptr. 3d 616, 618 (Ct. App. 2011) (holding that juvenile sentences that exceed the potential lifetime of a defendant qualify as unconstitutional under the *Graham* ruling), *superseded by grant of review*, 255 P.3d 951 (Cal. 2011); *In re* Nunez, 93 Cal. Rptr. 3d 242, 256–57 (Ct. App. 2009) (holding that a state sentence of JLWOP for this particular kidnapping violated constitutional protections as previously examined in *Simmons*).

[206] CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005–2010, REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2010), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf; *see also* Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. TIMES, Mar. 5, 2011, at A1 (reporting that most of the studies concluding that older adolescents benefited more from treatment in the juvenile system than incarceration in the adult system relied on the reasoning of *Simmons*).

adults are now prosecuted in juvenile court.[207] Ten states have revised their transfer laws, making it more likely that young offenders will remain in the juvenile system instead of being waived into criminal court.[208] Four states have limited the applicability of their mandatory minimum sentencing laws by relying on the developmental differences between juveniles and adults.[209] In addition, four states have passed laws that reduce the numbers of youth who can be housed in adult jails and prisons.[210] Advances have also been made in the approach to the dispositional treatment of juvenile offenders, with one state's very successful system of small, therapeutic rehabilitation centers being replicated throughout the United States.[211] In fact, detention policy reform has gained traction despite budgetary constraints, as lawmakers, corrections officials, and agency administrators have acknowledged that redirecting funds for juvenile jails to community-based youth programs both lowers recidivism rates and saves money.[212]

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[207] CAMPAIGN FOR YOUTH JUSTICE, *supra* note 206, at 7 (listing Connecticut, Illinois, and Mississippi); *see also* NAT'L JUVENILE DEFENDER CTR., 2006 STATE JUVENILE JUSTICE LEGISLATION 207–08, 243, 294 (2007), *available at* http://www.njdc.info/pdf/2006%20State%20JJ%20Legislation.pdf.

[208] *See* CAMPAIGN FOR YOUTH JUSTICE, *supra* note 206, at 7, 38 (listing Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Nevada, Utah, Virginia, and Washington); *see also* NAT'L JUVENILE DEFENDER CTR., *supra* note 207, at 162–71.

[209] CAMPAIGN FOR YOUTH JUSTICE, *supra* note 206, at 7 (listing Colorado, Georgia, Texas, and Washington); *see also* NAT'L JUVENILE DEFENDER CTR., *supra* note 207, at 162–63, 165, 170.

[210] CAMPAIGN FOR YOUTH JUSTICE *supra* note 206, at 7 (listing Colorado, Maine, Virginia, and Pennsylvania).

[211] YOUTH TRANSITION FUNDERS GRP., A BLUEPRINT FOR JUVENILE JUSTICE REFORM 4–5, 9 (2d ed. 2006), *available at* http://www.ytfg.org/documents/JEHT_SecondEdition.pdf; *see also* Christine Vestal, *States Adopt Missouri Youth Justice Model*, STATELINE (Mar. 7, 2008), http://www.stateline.org/live/printable/story?contentId=288904.

[212] *See, e.g.*, Editorial, *Texas's Progress on Juvenile Justice*, N.Y. TIMES, July 9, 2011, at SR11 (reporting that Texas has moved "away from the prison model" for juveniles and toward a "less costly and more effective system" of community-based rehabilitative services); *Md. Youth Jail to Be Scaled Back*, CORRECTIONAL NEWS (May 16, 2011), http://www.correctional

Other recent state laws and court decisions reveal the limitations of the impact of *Simmons* and its progeny. For instance, one state court relied on *Graham* to hold that "sentencing a juvenile to life without parole (LWOP) for a murder he helped commit at age fourteen is *not* categorically unconstitutional."[213] Similarly, another court held that *Graham* does not apply to juveniles who receive lengthy term-of-years sentences that result in the functional equivalent of LWOP.[214] Ten other state courts have decided not to apply *Graham* to cases involving killings by juveniles, and seven have opted not to apply it when juveniles were accomplices to murder.[215] In post-*Graham* attempted-murder cases, although one state court ordered resentencing for a juvenile serving LWOP because his conduct did not "result in death," another upheld the sentence.[216] Litigation efforts to extend *Graham* to sentences of life in prison *with* the possibility of parole have generally been unsuccessful.[217] Further, some lawmakers have been unable to agree on new sentencing guidelines consistent with *Graham* for juveniles convicted of non-homicide felonies.[218] As a result, legislative impasses have gone unresolved from one session of a state's general assembly to the next.[219]

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news.com/articles/2011/05/16/md-youth-jail-be-scaled-back; David L. White, *Redirect Juvenile Jail Funds to Community-Based Youth Programs*, BALT. SUN (May 18, 2011), http://www.baltimoresun.com/news/opinion/readers respond/bs-ed-0517-juvenile-jail-letter-20110518,0,2172709.story; *see also* Richard Fausset, *Conservatives Latch onto Prison Reform*, L.A. TIMES, Jan. 28, 2011, http://articles.latimes.com/2011/jan/28/nation/la-na-conservative-crime-20110129.

[213] State v. Ninham, 797 N.W.2d 451, 456 (Wis. 2011); Todd Richmond, *Wis. Supreme Court: Teen's Life Prison Sentence OK*, WISLAWJOURNAL.COM (May 20, 2011, 8:55 AM), http://wislawjournal.com/2011/05/20/wis-supreme-court-teens-life-prison-sentence-ok/.

[214] People v. Ramirez, 123 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2011), *superseded by grant of review*, 255 P.3d 948 (Cal. 2011).

[215] Hechinger, *supra* note 9, at 424 & nn.87–88.

[216] *Id.* at 118 & nn.87–88.

[217] *Id.* at 118 & n.89.

[218] *See, e.g.*, Lynda Waddington, *Juvenile Justice Bill Essentially Dead for Session*, IOWA INDEP., Apr. 26, 2011, http://iowaindependent.com/55231/juvenile-justice-bill-essentially-dead-for-session.

[219] *See, e.g.*, *id.*; Lynda Waddington, *Leaving Capitol Without*

It is useful to apply Rosenberg's framework to *Simmons*, *Graham* and *J.D.B.*, and it allows for comparison with this Article's earlier analysis of *Gault*.[220] In regard to whether incentives exist for the court system to change its approach toward juveniles and young offenders, the answer is a qualified "yes." Empirical evidence has shown that the macro-level reforms identified above could result in lower recidivism rates, improved public health, and substantial financial savings for state and local governments.[221] As discussed earlier, data shows that involvement in court proceedings leads to a higher school drop-out rate, heightened risk of continued criminality, and chronic under- and unemployment.[222] With *Simmons* as precedent, future litigation affirming that "youth" must be considered as mitigating and not aggravating could lead to fewer children being channeled into the court system, resulting in a larger population of educated, skilled workers.[223] Similarly, litigation grounded in the holding of *Graham* calling for meaningful opportunities for release could lead to an improvement in the quality of mental health and substance abuse treatment for children and adolescents who are incarcerated. This could help prevent such conditions from becoming chronic

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Addressing Juvenile Offenders Would Be "Unconscionable," IOWA INDEPENDENT, Apr. 28, 2011, http://iowaindependent.com/55394/iowa-rep-leaving-capitol-without-addressing-juvenile-offenders-would-be-unconscionable.

[220] *See supra* notes 137–42 and accompanying text.

[221] *See* Birckhead, *supra* note 187, at 1460–62 & nn.78–83; Birckhead, *supra* note 135, at 1480–81 & nn.134–37; Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 490–496 (2009).

[222] *See supra* notes 150–51 and accompanying text. "Studies show that a child who has been suspended is more likely to be retained in his or her grade, to drop out, to commit a crime, and to end up incarcerated as an adult." CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 3 (2010). "Toward the backend of the pipeline, once children become involved with the courts, they may find it increasingly difficult to reenter the mainstream education system." *Id.* at 78.

[223] *See, e.g.*, Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 253–54, 261–62, 264, 266–67 (2009).

and reduce delinquency and recidivism rates among at-risk populations.[224] In addition, government budgets would see windfalls if fewer young offenders were incarcerated for long terms of years. In contrast, if the court system fails to augment resources and improve rehabilitation programs and commitment facilities for juveniles, it will lose credibility and public confidence, and state and local economies will continue to incur significant financial costs. Just as states implemented civil rights legislation post-*Brown* only after their funding was threatened,[225] economics is likely to be the most salient incentive in the current climate.

Unlike the post-*Gault* period, during which there was intractable judicial resistance and few organizations committed to juvenile court reform,[226] today there are multiple constituencies and parallel organizations that can work in tandem with the courts to effect change. They include state legislatures;[227] advocacy organizations (non-profit, private, governmental);[228] legal academics;[229] the federal Office of Juvenile Justice and

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[224] *See* Laurie Chassin, *Juvenile Justice and Substance Abuse*, 18 FUTURE CHILD., 165, 169–71 (2008); Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 FUTURE CHILD., 143, 150–53 (2008); *see also* Michael Vitiello, *Addressing the Special Problems of Mentally Ill Prisoners: A Small Piece of the Solution to Our Nation's Prison Crisis*, 88 DENV. U. L. REV. 57, 64–65 (2010) (asserting that Justice Kennedy's opinions in *Simmons* and *Graham* suggest that he will also support mental health policy reform).

[225] *See supra* note 87 and accompanying text.

[226] *See supra* notes 132, 137–42 and accompanying text.

[227] *See, e.g.*, *supra* notes 206–10 and accompanying text.

[228] *See, e.g.*, Pat Nolan & Jody Kent Lavy, *Children Deserve Second Chances*, DAILY KOS (May 24, 2011), http://www.dailykos.com/story/2011/05/24/979004/-Children-Deserve-Second-Chances?detail=hide&via=blog_795818 (noting that the Campaign for the Fair Sentencing and Youth calls for *Graham* to be extended to felony murder).

[229] *See, e.g.*, Anthony Barkow, Op-Ed., *Every Child Deserves a Second Chance*, HUFFINGTON POST (May 24, 2011), http://www.huffingtonpost.com/anthony-barkow/every-child-deserves-a-se_b_866501.html (calling for *Graham* to be extended to every young person convicted of a serious crime); Jeffrey James Shook, Op-Ed., *Pennsylvania Locks Away Too Many Juveniles Forever*, PITTSBURGH POST-GAZETTE (May 22, 2011), http://www.post-gazette.com/pg/11142/1148022-109-0.stm (calling for *Graham* to be applied to homicide crimes); Mark Osler, Op-Ed., *Michigan's Juvenile Crime Laws*

Delinquency Prevention;[230] and professional organizations such as the American Academy of Child and Adolescent Psychiatry.[231] Likewise, litigation that draws an analogy between juvenile court and mental health commitments to invoke the "right to treatment" doctrine could result in settlement agreements or court orders directing state lawmakers to expend funds on indigent defense services, residential mental health and drug treatment for adolescents, and so forth.[232] In short, while there

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Need to Be Revisited, DETROIT NEWS (May 17, 2011), http://detnews.com/article/20110517/OPINION01/105170308/Michigan%E2%80%99s-juvenile-crime-laws-need-to-be-revisited (calling for an end to Michigan's mandatory transfer and sentencing provisions that allow for JLWOP).

[230] *See, e.g.*, *supra* note 152 and accompanying text.

[231] *See Policy Statement: Juvenile Life Without Parole: Review of Sentences*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2011), http://www.aacap.org/cs/root/policy_statements/juvenile_life_without_parole_review_of_sentences (calling for offenders serving JLWOP sentences to have an initial review of their sentences within five years of sentencing or by age twenty-five, whichever comes first, and recommending that it includes a review of educational and court documents as well as a comprehensive mental health evaluation); *see also* H. Ted Rubin, *The Legal Defense of Juveniles: Struggling but Pushing Forward*, JUV. JUST. UPDATE June/July 2010, at 1, 2, 12 (lauding the work of the MacArthur Foundation Research Network, which has funded multi-year research programs to inform practitioners and policy makers, and the National Juvenile Defender Center, which trains defense lawyers, provides technical assistance, and improves access to counsel for juveniles); *Advocacy: Juvenile Justice*, CHILD WELFARE LEAGUE AM., http://www.cwla.org/advocacy/juvenilejustice.htm (last visited Oct. 14, 2011); Lynn Arditi, *ACLU Seeks Federal Probe of Truants Lockup*, PROVIDENCE J. (Apr, 22, 2011), http://www.projo.com/news/content/ACLU_FEDS_INVESTIGATE_04-22-11_2ONMKJE_v12.1863f41.html (reporting that the ACLU has filed a class-action lawsuit and taken steps to urge federal OJJDP officials to investigate the unlawful detention of truant juveniles in the state's training school); *Programs & Campaigns*, CHILD. DEF. FUND, http://www.childrensdefense.org/programs-campaigns/ (last visited Oct. 14, 2011).

[232] *See, e.g.*, Nelson v. Heyne, 491 F.2d 352, 358–59 (7th Cir. 1974) (finding that juveniles have the right to treatment under Indiana law); MANFREDI, *supra* note 15, at 180–81 & n.3 (citing Rouse v. Cameron, 373 F.2d 541 (D.C. Cir. 1966)); Andrew D. Roth, Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH L. REV. 286, 290–92 (1985) (discussing the right to treatment doctrine and its potential applicability to juvenile cases).

are clear limitations to the degree of change that *Simmons* and its progeny are likely to generate, the possibilities are endless—although they are admittedly only possibilities.

VI. CONCLUSION

With states facing staggering budgetary shortfalls and lawmakers increasingly willing to make deep cuts to the criminal justice system,[233] it is tempting to overstate the significance of successful Supreme Court litigation, rather than focus on such intractable matters as the elimination of treatment programs for young offenders.[234] Yet, while legal victories from *In re Gault* to *J.D.B. v. North Carolina* are worthy of being labeled "landmark," it is critical to remember that rarely do "rights triumph over politics."[235] Sustainable policy reform often requires departing from the status quo, creating new models rather than merely dismantling old ones, and making short-term investments in order to reap long-term benefits—none of which is easy or popular during hard economic and culturally divisive times.

One promising example may be found in the Civil Citation Initiative in Miami, Florida, a program in which children who commit minor misdemeanors are referred to targeted intervention services rather than arrested and exposed to the juvenile justice system.[236] The initiative—developed by a coalition of community

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[233] *See, e.g.*, *N.C. Legal Defenders Say Cuts Threaten Basic Legal Rights*, FOX CHARLOTTE (May 13, 2011), http://www.foxcharlotte.com/news/local/121786543.html?m=y&smobile=y; Jennifer Fernandez, *Budget Cuts Could Slow Down Courts*, NEWS & REC. (Greensboro, N.C.) (Apr. 23, 2011), http://www.news-record.com/content/2011/04/22/article/budget_cuts_could_slow_down_courts.

[234] *See, e.g.*, Mark Wilson, *As Economy Falters, Rehabilitative and Substance Abuse Programs Get the Axe*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/(S(2k2z3c45l4t02gug2ul2wlzm))/displayArticle.aspx?articleid=21343&AspxAutoDetectCookieSupport=1 (stating that juvenile offenders are "among the hardest hit groups affected by recent budget cuts" to rehabilitative programs) (last visited Oct. 14, 2011).

[235] ROSENBERG, *supra* note 15, at 430.

[236] *See generally* MIAMI-DADE CNTY. JUVENILE SERVS. DEP'T, CIVIL CITATION INITIATIVE BROCHURE, *available at* http://www.miamidade.gov/jsd/library/CivilCitationBrochure.pdf.

activists, police officers, lawyers, and teachers—has significantly lowered recidivism rates, and the Miami-Dade community has seen a thirty percent drop in juvenile arrests.[237] As a result, the program has led to increased public safety and taxpayer savings and has been identified as a national model.[238] With this lesson in mind, proponents of significant social reform must continue to focus their attention on legislatures and, perhaps most importantly, on political action.[239] As Gerald Rosenberg has stated, "[p]olitical organizing, political mobilization, and voter registration may not be glamorous . . . but they are the best if not the only hope to produce change—not as a fallback position, not as a complement to a legal strategy, but as the strategy itself."[240] In this way, with litigators working in tandem with both lawmakers and activists, the hope for juvenile justice reform in the twenty-first century will not be hollow.

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[237] *Id.*; *Attorney General Eric Holder Speaks at the National Association of Counties Legislative Conference*, U.S. DEP'T JUST. (Mar. 7, 2011), http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110307.html; *Our Opinion: Juvenile Justice Reform*, TALLAHASSEE DEMOCRAT, May 6, 2011, (Opinion).

[238] ABA Criminal Justice Section, Dialogue on Strategy to Save States Money, Reform Criminal Justice & Keep the Public Safe 34–36 (May 6, 2011) (unpublished seminar materials), *available at* http://www.americanbar.org/content/dam/aba/events/criminal_justice/dialogpacket.authcheckdam.pdf. *See generally Juvenile Services: Civil Citation*, MIAMI-DADE COUNTY, http://www.miamidade.gov/jsd/civil_citation.asp (last updated June 9, 2011); *Protecting Public Safety Without Juvenile Arrests*, ISSUE BRIEF (Advocates for Children & Youth, Md.), July 2010, *available at* http://www.acy.org/upimages/Effective_Diversion.pdf.

[239] ROSENBERG, *supra* note 15, at 430–31.

[240] *Id.* at 431.