**Charles Evans Hughes Lecture**
**Chief Judge Jonathan Lippman**
**November 30, 2015**

It is a delight to be here tonight. Thank you, District Attorney Cy Vance, for that lovely and kind introduction. You are an inspiration to district attorneys around this state and country, and I am so proud to have been your partner in the pursuit of justice for these many years. I want to thank the New York County Lawyers Association and Hughes Hubbard for sponsoring tonight's event. It is an honor and a privilege to be chosen to give the Charles Evans Hughes Lecture. Charles Evans Hughes is certainly a giant in our state and country's history, as Chief Justice Roberts so eloquently talked about just a few weeks ago. As governor, secretary of state, Chief Justice of the Supreme Court, and presidential candidate, Hughes exemplified public service and dedication to his country and was a unique persona, so respected even today.

Tonight, I want to talk about criminal justice in New York and the United States – so urgently in need of fundamental reform. I have gone around our nation and the world these past seven years speaking about the actions needed to address the desperate crisis in access to justice in civil matters, and the equally troubling injustices that occur in the criminal arena that cry out for immediate attention. In the civil context, I believe we are changing the landscape on legal services for the poor, as a thousand flowers bloom with new ideas and initiatives to provide legal representation and effective legal assistance for society's most vulnerable, who are struggling to obtain the essentials of life. And the results are encouraging. Yet, in criminal matters, even 50 years after *Gideon*, a person's liberty more often than not is determined by how much money is in his pocket; children, whose lives have barely begun, continue to be treated like adults in

our criminal justice system; suggestive police line-ups and photo identifications, and aggressive interrogations result in wrongful convictions of innocent people. A 16-year-old named Kalief Browder can find himself on Rikers Island for three years without being convicted of a crime and end up hanging himself even after being released, unable to face the toll that years in solitary confinement took on him. Public defenders in many counties in New York are toiling under untenable caseloads and lack the time and resources to vigorously represent their indigent clients, and our communities of color continue to suffer the ill effects of breakdowns in the criminal justice system, which have a disproportionate effect on them.

The realities are sobering, and once our eyes are open to these truths, it is unthinkable to shut them. This is about ensuring equal justice in our criminal justice system. We need gut wrenching and fundamental criminal justice reform, and these reforms – first and foremost – must come by way of the legislative process. As Chief Judge and head of the non-political branch of government, I am not risk averse, and I am in the unique position of being able to put bold reform proposals on the table without fear of running for election or reelection and to put administrative fixes into place within existing statutory constraints – and we have made great inroads. However, the judiciary can only go so far in our tripartite system of government, and statutory change is the ultimate solution to almost all of these problems. Elected officials, policy makers, and criminal justice stakeholders all need to realize that events here in New York and around the country have demonstrated that the criminal justice system is losing the public trust and confidence of many of our communities – and therefore is in danger of losing its very credibility.

Our elected public officials must show courage. For too long, they have been mired in ideological debates that have stifled needed change. Time after time, they have responded to crises in the criminal justice system with sound bites or by providing politically expedient answers but have not followed through with actions that have led to real solutions. Moreover, the inflexibility of both prosecutors and the defense bar on criminal justice policy matters – they seem to approach criminal justice reform in the same way they approach an adversarial court proceeding – have brought progress to a virtual standstill. District attorneys, defense lawyers, and other criminal justice stakeholders must find common ground. It is essential. New York's Criminal Procedure Law has not undergone a wholesale revision since it was enacted in 1970. Changes to the Penal Law, which was enacted in 1965, have only made it more complex and convoluted. These are obsolete codifications that have remained stagnant, while our society and our conceptions of criminal justice have considerably evolved as they should and must.

**Bail**

One area where this stagnation is strikingly evident is bail. Research has shown that money bail keeps people in jail when they otherwise could be safely released to their families and their jobs in the community while they await trial. The use of money bail does not automatically make us safer and has a negative effect on vulnerable populations. We need to take money out of the equation. Defendants should be assessed based on whether they are a threat to public safety, not based on their ability to pay. Studies by the New York City Criminal Justice Agency show that the amount of bail that defendants must pay to be released, ranging from $50 to $5000, has a

negligible effect on return rates to court. Whether bail is set high or low in that range, defendants have the same approximate return rate – around 90 percent. Effective alternatives to money bail are available, and we need to make these options accessible to judges. Evidence-based risk assessments, taken along with the professional judgment of judges, produce better safety results, lower rates of defendants who fail to appear, and lower rates of re-arrest.

As they currently stand, New York's bail statutes create a two-tiered system of justice, one for those with money and one for those without. Each year in New York City, nearly 50,000 defendants are jailed because they cannot make bail. I hear stories nearly every day: low-risk defendants with low-level, non-violent charges, locked away because they can't afford to pay $250. A homeless teenager who jumped a turnstile, and can't afford bail, spends weeks in Rikers. A man arrested for drug paraphernalia because he was holding a straw for his soda spends three weeks there. To what end?

In 2013, I proposed legislation for a top to bottom reform of the bail system in New York. First, when a defendant is charged with a serious offense, the proposal requires judges to consider whether the defendant poses a risk to the "safety of any person or community" – could anyone reasonably disagree with that? Unlike 46 other states and the District of Columbia, New York inexplicably does not require or even permit judges to take public safety or the dangerousness of the defendant into account. Second, the proposed legislation would also create a statutory presumption of release without bail where the judge concludes that the defendant poses no risk to public safety or legitimate risk of failure to return to court. Right now, you're in jail unless there is a reason for you to be out, or you can get a bail bondsman to spring you, in a for-profit,

money-making enterprise. And perversely, defendants charged with serious offenses who have higher bail amounts are more likely to obtain bail bonds than those accused of lesser crimes, since the bail bonds industry derives minimal profits when bail is set at a low amount. It should be exactly the opposite — you're out unless there is a public safety reason for you to be in custody, and money should not be a factor. If you're not going to hurt others or flee, why should your liberty be taken away and taxpayers have to pay $170,000 a year to lock you up? That flies in the face of the constitutional presumption of innocence.

Despite compelling logic, no real discussion by the Legislature on the subject of bail occurred until horrific events confronted us — like the Kalief Browder suicide — and a human face was put on criminal justice reform. In the face of inexcusable inaction, I announced this past October a series of reforms that we are instituting within present law. First, in misdemeanor cases, where bail is set but the defendant is unable to post bail, a designated judge in each of the five boroughs of New York City, focusing on bail, will conduct a de novo review. This is not to second guess the judges' original bail decisions, who work so hard under what are often strict time constraints and overwhelming case volumes. It is to ensure, with the benefit of more time and consideration, a fuller exploration of whether bail should be imposed, and if so, what amount. Second, in felony cases where the defendant is held on bail, judges will regularly review the strength of the prosecution's case and its continued viability and make bail modifications when appropriate. We will also be starting a pilot electronic supervision program in Manhattan Criminal Court to give judges an alternative to bail where a defendant is not an appropriate candidate for release on recognizance. Finally,

through information and training, judges will be encouraged to set alternative forms of bail that are authorized by statute but little used. In New York City, several judges in each of the five counties will make a concerted effort to use statutory alternative forms of bail, such as partially secured bail bonds. As part of the pilot program, the Vera Institute will track the progress of these cases and determine whether the bail alternatives are just as effective as cash bail and bail bonds in securing defendants' return to court. All of this again will be done within existing statutory law.

I stand firm in the belief that these efforts are crucial to the integrity of our criminal justice system and to creating a safe and fair bail system in keeping with modern and forward-looking thinking on pretrial justice. In the meantime, we continue to wait for legislative action. From New Jersey, to Arizona, to Hawaii, to Delaware, to California – people are talking about bail and taking action to foster change. New York must follow suit and change this fundamentally unfair system before another tragedy besets us.

**Raising the Age of Criminal Responsibility**

Talk about tragedies, must we lose another child before we learn that children should not be treated in the courts of New York as adult criminals? Scientific research demonstrates that the human brain is not fully formed until the age of 25. The adolescent brain is impulsive, and teenagers lack the ability to focus on the consequences of their behavior. Yet in spite of these documented findings, which have been cited by the United States Supreme Court, New York has the dubious distinction of being one of only two states whose criminal justice laws treat 16-and 17-year olds as adults.

Since 2011, I have been advocating to raise the age of criminal responsibility in New York and have proposed legislation to do exactly that. While waiting for the Legislature to act, in early 2012, we took action to establish Adolescent Diversion courts in nine locations around the state: the five boroughs of New York City, the suburban counties of Nassau and Westchester, and the upstate counties of Erie and Onondaga. The program established specialized court parts for 16-and 17-year-old defendants charged with non-violent offenses. Defendants in these courts receive a clinical assessment; age-appropriate services; rigorous compliance monitoring; and non-criminal case outcomes should they complete assigned services. The Adolescent Diversion Parts bring to these cases a rehabilitative, developmentally appropriate approach to responding to misconduct by teens — often silly and infantile but not with the same moral culpability as an adult who should know better.

The Adolescent Division Program is an important step in the right direction. Nevertheless, it is the Legislature that must once and for all establish that children should be treated as children — how much imagination does that take? Prosecuting adolescents and placing them in the adult criminal justice system is outrageous and heartbreaking. In New York, we write off 16- and 17-year-old criminal defendants as lost causes, with only minimal services and programs available to them. We need to implement solutions that respond to definitive research showing that adolescents are more receptive to rehabilitation than adults and can greatly benefit from treatment and support. I am grateful that Governor Cuomo also has been a strong proponent of raise the age, and I believe that change is surely coming. But we cannot wait any longer, when children every day are being denied their chance to be a part of the American

dream before their lives really even get started, as they are victimized over and over again by the adult criminal justice system.

**Grand Jury Reform**

Both bail and the age of criminal responsibility have been in the public consciousness, but let's also look at recent deadly police-civilian encounters in New York and around the country that cry out for reform of our grand jury system that dates back to the Magna Carta – eight hundred years ago. It is time to update this archaic institution before it loses all relevance. The Judiciary has proposed legislation that would require grand jury proceedings, in cases involving allegations of homicide or felony assault arising out of police-civilian encounters, to be presided over by a judge. The proposed legislation puts the ultimate responsibility for the grand jury where it belongs: with the court. The judge would be present to provide legal rulings, ask questions of witnesses, decide along with the grand jurors whether additional witnesses should be called to testify, preclude inadmissible evidence or improper questions, and provide final legal instructions before the grand jury deliberates — and most importantly, provide much needed gravitas and impartiality to the proceeding.

And the proposed legislation also addresses the critical issue of grand jury secrecy. While there are legitimate reasons for grand jury secrecy, these reasons are far outweighed by the need for transparency in cases of great public interest. The proposed legislation creates a statutory presumption in favor of the court disclosing the records of a grand jury proceeding that has resulted in no charges, in cases where the court finds that the public is generally aware that the matter is the subject of grand jury proceedings; the identity of the subject of the investigation has already been disclosed

or the subject consents to disclosure; and disclosure of the proceedings advances a significant public interest. Upon such a finding, the court would be authorized to disclose the record of the proceedings, including the charges submitted to the grand jury, the legal instructions provided in support of those charges and, critically, the testimony of all public servants and experts. The world is not going to come to an end by bringing transparency to the grand jury process. The prosecutor would have the opportunity to redact testimony that would identify a civilian witness and to move for a protective order upon a showing that disclosure would jeopardize an ongoing investigation or the safety of any witness — and the public would actually have some clue as to what the grand jury did and why it failed to take action. These changes would enhance public access to, and confidence in, the justice system and preserve the integrity of the judicial branch, law enforcement, and ultimately, the venerable, but to be quite frank, antiquated institution of the grand jury. We need change.

**Addressing Wrongful Convictions**

Other critical issues necessitate legislative reform as well. There is no greater failure in the criminal justice system than to unjustly deprive an innocent person of his or her liberty. Wrongful convictions are a matter of crucial concern to all of us. One of my first acts upon taking office as Chief Judge in 2009 was to form the New York State Justice Task Force, today co-chaired by Westchester County District Attorney Janet DiFiore and my former colleague Judge Carmen Beauchamp Ciparick, to examine the causes of known wrongful convictions in New York State and to recommend actions to reduce the likelihood of this miscarriage of justice. The Task Force is a perfect example of bringing the players in the criminal justice system together, without any political

agenda, to think out of the box about criminal justice reform. And the process has worked.

Two of the Task Force's most significant recommendations – the expansion of the State's DNA Databank and providing criminal defendants with greater access to post-conviction DNA testing – have been enacted. Three other critically important steps await immediate legislative attention: requiring video-recording of custodial interrogations by law enforcement throughout our state in the most serious cases; adopting procedural safeguards when the police conduct lineups and photo identifications; and reforming discovery laws to accelerate and broaden pre-trial disclosure of evidence in criminal cases. For example, of the numerous wrongful convictions in the United States that have been overturned based on DNA evidence, nearly 25 percent involved a false confession or false incriminating statements. These straightforward measures will drastically reduce the likelihood of false confessions and should have bipartisan support — nobody wants the real perpetrator of crime on the loose while an innocent person suffers in jail. It is a travesty of our criminal justice system — even one wrongful conviction is one too many.

**Indigent Legal Defense**

And things can change. Where the political will exists, our Legislature can accomplish amazing things. Look at the state legislation enacted in 2009, which capped the caseloads for indigent criminal defense providers in New York City. Working with various stakeholders, the courts were involved in critical negotiations that led to the implementation of case cap rules and the provision of funding for case caps in the Judiciary's state budget. With the case caps in place, the result has been a stark

improvement – night and day – in the time and commitment that defense providers in New York City are able to devote to their clients. Attorneys in New York City are now limited to handling no more than either 400 misdemeanors or 150 felony cases (or a proportionate combination) annually, a dramatic sea change with respect to ensuring a level playing field for indigent defendants.

New York has also established an independent State Office of Indigent Legal Services or (ILS), whose board I chair. The judiciary, the New York Association of Counties, Governor Paterson, and others were instrumental in shepherding the legislation enacting the ILS office through the Legislature. Since its inception in 2010, the office has taken concerted action to improve the quality of representation in all of New York's 62 counties. We have strengthened the process for distribution to the counties of existing state funds for indigent criminal defense, established performance standards for criminal representation, provided funds to ensure counsel at the first court appearance in over two dozen counties, and distributed funds to 45 upstate counties for reducing excessive caseloads and improving the quality of representation.

But our work cannot stop there. The quality of indigent criminal representation continues to suffer because of insufficient funding and resources. In the settlement of the class-action lawsuit, *Hurrell-Harring, et al. v. State of New York*, which challenged the constitutionality of the State's indigent defense system relating to a criminal defendant's right to meaningful and effective assistance of counsel, the State acknowledged that it bears responsibility to ensure the high and uniform quality of representation for low-income people in criminal cases — about time. While the settlement resulted in a historic admission by the State, it only provided funding for five

of the 62 counties in New York. We need the caseload caps implemented in New York City applicable throughout the state, and we need the funding to safeguard the constitutional rights of those who cannot afford representation when their liberty is at stake. Right now, attorneys at the institutional providers of indigent legal services outside the City are handling an average of 616 cases per year, well over 200 more cases than their counterparts in New York City — there can be no justice and the system fails when an overburdened defense system cannot provide a level playing field between prosecution and defense.

**Sentencing**

Lastly, the Legislature must take action on the issue of reforming our sentencing laws. I established the New York State Permanent Commission on Sentencing to comprehensively evaluate New York's sentencing laws and practices and recommend reforms to improve the quality and effectiveness of statewide sentencing policy. The principal recommendation of the commission, co-chaired by District Attorney Vance, has been legislative reform to fully eliminate indeterminate sentencing in New York. While indeterminate sentencing has been eliminated for violent felonies and other selected crimes, it should be eliminated for every crime.

With indeterminate sentencing, judges are required to impose a sentence range rather than an exact sentence for many crimes. That leaves the ultimate decision to the parole board, not judges, to decide how long a sentence offenders will serve. This makes no sense, particularly where the parole board is subject to political headwinds. Eliminating indeterminate sentencing will return judging to our judges, where it properly belongs. At the time of sentence, everyone – the judge, the prosecutor, the defense

attorney, the defendant, and the victim – should know the length of the sentence. We must have truth in sentencing, and the Commission's proposed legislation will increase certainty and predictability for crime victims and offenders and make punishment of offenders more rational and less capricious. This is after all, about justice, first and foremost.

**Conclusion**

In all of these areas, bail, raising the age, grand jury reform, wrongful convictions, indigent legal defense, and sentencing, there is a dire need and great potential for positive change that will even the scales of Lady Justice. I have pushed as hard as I can, using my pulpit as Chief Judge, for reform on all of these fronts. The pursuit of justice demands that the Judiciary confront these critical subjects, and that pursuit demands that the policy-making branches of government do the same. As I approach the end of over 40 years in public service in the judicial branch, I am proud of what we have accomplished and of all the criminal justice initiatives spearheaded by the courts to create a level playing field for rich and poor, high and low alike – where justice does not depend on the size of your pocketbook, what community you belong to, or whom you know. The judiciary that I lead remains a robust and vital branch of government, and I truly believe we have done our part.

Now is the time for the policy making branches of government, using the legislative process, to act boldly to protect public safety and the fairness of our criminal justice system — for the public good. This is the way enduring, systemic reform is supposed to and must happen, and it goes to the very heart of our public institutions – our democracy depends on it. The crisis of confidence in our criminal justice system

among our diverse communities is real, and so evident in the news of the day. It cannot be ignored. These headlines tell us that the very fabric of our society is in danger if we cannot overcome intransigent ideological differences and extricate ourselves from tough-on-crime, soft-on-crime rhetoric and gridlock, and find common ground. If we fail to do so, the very viability and fairness of the criminal justice system is surely at stake. Thank you.