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INTRODUCTION TO THE ISSUE: ACCESS TO JUSTICE

By the Hon. Herbert P. Wilkins (ret.)



The Hon. Herbert P. Wilkins (ret.) is the former Chief Justice of the Massachusetts Supreme Judicial Court. He served on the SJC for 27 years and is currently the Huber Distinguished Visiting Professor at Boston College Law School. He was appointed by the SJC as the first chair to the Massachusetts Access to Justice Commission, established in 2005. Through Wilkins's leadership, the inaugural commission studied and made recommendations to improve the delivery of civil legal services in Massachusetts.

This issue of the *Massachusetts Law Review* is highly relevant because the Justices of the Supreme Judicial Court have recently reconstituted their Access to Justice Commission. The structure, composition, and goals of the new Commission demonstrate the dedication of the Justices and the Judiciary as a whole to the delivery of legal services, with and without the court system, to people of low income.

In recent years in Massachusetts “Access to Justice” has focused on improving assistance to low-income people in civil, as opposed to criminal, matters. Some have referred to the objective as “Civil Gideon,” a phrase that I have eschewed because it suggests to some that the movement is directed solely toward constitutionally-based solutions. The effort is not, of course, so limited. There is clearly a different aspect to access to justice in criminal proceedings, where the constitutions provide a compulsion to furnish legal assistance to an accused.

Two articles in this issue directly concern recent efforts to remove, or at least lower, barriers to access to justice. Professor Engler, a pre-eminent expert on the subject and a member of the new Commission, summarizes recent efforts, particularly in Massachusetts, to provide legal assistance in civil matters to low-income persons. The article by Allan Rodgers and Ernest Winsor, both long-time advocates for improved access to justice, makes the case for lay advocacy for those who cannot obtain a lawyer in certain hearings, both judicial and administrative. That kind of representation in well-defined circumstances is much needed and fully warranted.

The other articles on this issue show how wide-spread is the range of access to justice concerns. The piece by Jerry Cohen on secrecy presents the tension between policy concerns that warrant secrecy and individual interests that call for the availability of that information. The line-drawing is often challenging and, when the reason for a secrecy determination is not subject to judicial scrutiny,

the integrity and fairness of the process may be in question. Judge Blitzman's comprehensive discussion of the juvenile justice system and the rights (or lack of rights) of juveniles provides an ample basis for concern that we could do better. Complications hinder effective solutions because many of the problems are, in whole or in part, beyond the judicial system and any resolution requires a coordination of effort, making access to justice difficult to attain. The Willett and Rowley article shows the pro bono lawyer at his best, helping a person bereft of aid from any other source and adversely caught up in national and international interests that frustrate any effort to establish effectively that “they got the wrong guy”. *When Law Fails*, reviewed in this issue, shows how our society, and our criminal justice system in particular, has failed to provide access to justice in numerous circumstances.

The public should respond to the concerns expressed in these articles, but in large measure only lawyers (which includes judges) can do something about them.

THE TWIN IMPERATIVES OF PROVIDING ACCESS TO JUSTICE AND ESTABLISHING A CIVIL GIDEON

By Russell Engler



Russell Engler is a Professor of Law and the Director of Clinical Programs at New England Law | Boston. He directs the Public Service Project of the law school's Center for Law and Social Responsibility. He serves on the Massachusetts Access to Justice Commission and the Boston Bar Association's Project on Expanding the Civil Right to Counsel.

"Justice is not a commodity. It is the heartbeat of civil society. When Access to Justice is not available to all, we sever the basic tie that binds us: faith in fair and equal treatment under the law."

Chief Justice Margaret H. Marshall, March 25, 2006'

INTRODUCTION

The Access to Justice Commission's work involves important steps in the battle to provide legal assistance in important civil matters to all low income persons.² The prior Commission's Reports to the Massachusetts Supreme Judicial Court focus on identifying barriers to Access to Justice and proposing solutions to overcome those barriers builds inexorably on the related initiatives in the Commonwealth from the past decade. Extensive unmet legal needs and a

shortage of available legal services to meet those needs are well-documented in Massachusetts. Numerous reports identify the difficulties facing pro se litigants in our courts, as well as the challenges caused by self-representation for judges, clerks, and opposing lawyers.

The challenges for courts and litigants led to the creation of the Supreme Judicial Court's Steering Committee on Self-Represented litigants. The challenges also led to a proliferation of lawyer-of-the-day and other assistance programs in courts, as well as the development of pro se forms and assistance in the clerks' offices. The Steering Committee promulgated guidelines to help judges and launched a pilot program involving "limited scope representation." The Massachusetts Rules of Professional Conduct included Rule 6.1, regarding Voluntary Pro Bono Service, and now Rule 6.5, to facilitate Nonprofit and court-Annexed Limited Legal Services Programs. The SJC created the prior Access to Justice Commission in 2005, which held hearings around the Commonwealth leading to its Reports and Recommendations. The reconfigured Commission began its work earlier this year.

The activity in Massachusetts parallels a surge in activity nationwide regarding Access to Justice and Pro Se Litigants.³ Conferences, Websites and Reports guide the discussions occurring in jurisdictions around the country. Resolutions of the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) called for Access to Justice for those without counsel.⁴ Over twenty-five states have created Access to Justice Commissions or similar bodies, while many more have programs or committees with broad Access to Justice charges.⁵

Despite the increased efforts to remove barriers facing pro se litigants in civil cases, in at least some cases, nothing short of

1. Margaret Marshall, Chief Justice, Massachusetts Supreme Judicial Court, Address to the Massachusetts Bar Association (March 25, 2006) available at <http://www.mass.gov/courts/press/pr032506.pdf>.

2. See, e.g., *Barriers to Access to Justice in Massachusetts: A Report with Recommendations to the Massachusetts Supreme Judicial Court*, Massachusetts Access to Justice Commission, (June 2007) [hereinafter *MA AJC 1st Report*]; Third Annual Report of the Massachusetts Access to Justice Commission, (June 2008) [hereinafter *MA AJC 3rd Report*]. The Annual Reports are available online at <http://www.massaccessjustice.org/reports-of-the-commission.php>.

3. See Statutory Comment, *Access to Justice – Civil Right to Counsel – California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parities – Act of Oct. 11, 2009, Ch. 457*, 123 HARV.L.REV. 1532 (April, 2010), discussing the newly enacted California statute which provides for a civil right to counsel.

4. In a 2001 Resolution of the Conference of Chief Justices (CCJ), titled "Leadership to Promote Equal Justice," the CCJ resolved in part to "[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers." Resolution 23: Leadership to Promote Equal Justice, <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html> (last

visited April 14, 2010). In 2002, the CCJ and the Conference of State Court Administrators (COSCA) jointly resolved that "courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status." Resolution 2: In Support of a Leadership Role for CCJ and COSCA in the Development, Implementation and Coordination of Assistance Programs for Self-Represented Litigants, <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionSelfRepresentedLitigants.html> (last visited April 14, 2010). The joint resolution also endorsed COSCA's Position Paper on Self-Represented Litigation. *Id.* In 2000, COSCA addressed the general question of the obligation to assist unrepresented litigants as follows: "The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes." Position Paper on Self-Represented Litigation, Conference of State Court Administrators (2000), <http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf> (last visited April 14, 2010).

5. See, e.g., The Resource Center for Access to Justice Initiatives of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html>

representation by counsel is needed to remove those barriers. Fueled by this reality, recent years have seen a surge of activity designed to achieve the adoption and implementation of what is popularly referred to as a “Civil Gideon.”⁶ Advocates from over thirty-five states joined a National Coalition for a Civil Right to Counsel. Some advocates sought to expand the right to counsel by litigation, while others drafted statutory provisions that would create such a right. In 2006, the American Bar Association (ABA) unanimously adopted passage of a resolution urging the provision of “legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.”⁷ The Boston Bar Association was an original sponsor of the ABA provision. Both the Massachusetts Bar Association and the Access to Justice Commission, the latter having heard repeated calls for a Civil Gideon in its statewide hearings, adopted equivalent provisions. A BBA Task Force has been charged with implementing the resolutions and developing proposals for an Expanded Civil Right to Counsel. The Task Force’s report of its first year of work was distributed in September, 2008.⁸

The Access to Justice and Civil Gideon initiatives cannot be viewed as separate. The balance of this article sets forth a framework for understanding an expanded Civil Right to Counsel as a component of a coherent Access to Justice plan. Absent a representation component, Access to Justice initiatives will likely fall short of their goal of providing meaningful access to the most vulnerable litigants in the our legal system.

I. ARTICULATING THE THREE-PRONGED STRATEGY FOR ACCESS TO JUSTICE INITIATIVES

Measuring the wisdom of any proposal depends in part on understanding the problem that the approach is designed to solve. The primary problem that flows from the flood of unrepresented litigants is not that those working in the legal system are burdened and that unrepresented litigants clog the system, although those problems must be addressed as well. Rather, it is that litigants routinely are denied meaningful access to justice, forfeiting important rights due to the absence of counsel. A system of justice in which large numbers of people forfeit rights not because of the facts or governing law but because they are unrepresented is unacceptable.

Access to Justice initiatives must target the forfeiture of rights due to the absence of counsel, as reflected in a coordinated, three-pronged approach. Prong 1 involves revising the roles of the judges,

(last April 14, 2010).

6. The term “Civil Gideon” typically refers to efforts to establish in civil cases the equivalent right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny. For articles discussing a national and international perspective on establishing a civil right to counsel, see, e.g., *Special Issue, A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163-293 (July-August 2006), available at <http://www.povertyllaw.org/clearinghouse-review/issues/2006/2006-july-aug>.

7. The ABA House of Delegates adopted the Resolution on August 7, 2006, at its Annual Meeting. <http://www.abanet.org/leadership/2006/annual/> (follow hyperlink “Select Committee Report”) (last visited April 14, 2010).

8. Boston Bar Association’s Task Force on Expanding the Civil Right to Counsel in Massachusetts. For the report, see *Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, Report of the Boston Bar Association Task Force on Expanding the Civil Right to Counsel in Massachusetts (August

mediators and clerks. Prong 2 involves using, but also evaluating, assistance programs. Prong 3 involves the expanded right to counsel.

Prong 1: Revisiting the Roles of the Judges, Mediators and Clerks

The idea of revising the roles of the key players in the court system met resistance a decade ago as the courts and bar associations struggled with how to handle cases involving pro se litigants. Yet, the past decade has seen dramatic shift around the country and in Massachusetts in our approach to how key players inside the court system should be performing their roles.

Nationally, as the problems related to cases involving unrepresented litigants gained increased attention, materials collected by the American Judicature Society (AJS) and State Justice Institute (SJI), revealed that judges employed a range of techniques.⁹ Conferences, websites and other publications increasingly provided guidance to those grappling with how to play a more active role while remaining impartial.

As the century drew to a close, judicial bias against unrepresented litigants was increasingly attacked. Proposed protocols from Minnesota and Iowa urged judges to accommodate unrepresented litigants and facilitate their efforts to present their cases. In 1999, the California Commission on Judicial Performance publicly censured a judge for failing to respect the rights of pro se litigants, concluding that the judge’s behavior violated the canons related to impartiality and integrity. In 2000, a Colorado Commission on Judicial Performance issued a recommendation of “do not retain” for a judge in part based on a survey noting the judge’s “demeaning and harsh treatment of individuals appearing in her court without legal counsel.” The CCJ and COSCA Resolutions eloquently call for access to justice for those without counsel.

Articles and guidebooks reflect a range of techniques available to judges, and illustrate the manner in which judges could perform their duties ethically, but in an active way that assisted litigants.¹⁰ The 2005 AJS/SJI publication *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* concludes:

Without raising reasonable questions about impartiality, judges should exercise discretion:

- To make equitable, procedural accommodations
- To provide self-represented litigants reasonable opportunity to have cases fully heard.

Other writings, such as those of John Greacen, focused on techniques to enable clerks to provide assistance without crossing the line in and giving impermissible advice.¹¹

The role of the key players garnered attention in Massachusetts as

2008), http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf (last visited April 14, 2010) [hereinafter *Gideon’s New Trumpet*].

9. See, e.g., Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (1998), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=106> (last visited April 14, 2010).

10. Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough and Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 *Judges’ J.* 16 (Winter 2003); Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, American Judicature Society and State Justice Institute (2005), available at <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>.

11. See, e.g., John M. Greacen, “No Legal Advice from Court Personnel” *What Does that Mean?*, 34 *JUDGES’ J.* 10, (1995) (discussing the types of advice court staff may and may not give).

well, in the reports, conferences, and work of the SJC Steering Committee. In 2006, Massachusetts promulgated its landmark Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, applying all phases of the court's operation, including prehearing procedures, settlement, and trial.¹² The Massachusetts guidelines constitute the first new set of state guidelines or protocols to appear in a decade, and they reflect the sea change that occurred in the intervening time.

The Massachusetts guidelines apply to all phases of the court's operation and all the courts in the state. The guidelines recognize that the "issues and challenges presented by self-represented litigants may vary in different court departments," and judges, therefore "are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them."¹³ Regarding pre-hearing interaction, the Guidelines encourage judges to make reasonable efforts to ensure that litigants understand the trial process, and authorize judges to explain the elements of claims and defenses as they would to a jury.¹⁴ At trial, judges may provide self-represented litigants with the opportunity to present their cases meaningfully, and they may ask questions to elicit general information and obtain clarification; where all parties are self-represented, judges may have the parties stipulate to proceed informally.¹⁵ Finally, in approving settlements:

Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.¹⁶

The Commentary provides that when assessing whether a waiver of substantive rights is "knowing and voluntary," the judge may consider how the phrase is used "in the context of informed consent, i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."¹⁷

While the Guidelines serve both to acknowledge the changing judicial role and provide important guidance, they are not the only evidence that the traditional roles work well in all contexts, or that providing assistance automatically comprises impartiality. Judges in Small Claims Courts and administrative agencies are obligated to be impartial, but also to assist litigants appearing before them.

Judges in "problem-solving" courts, such as Domestic Violence Courts, Mental Health Courts, and Drug Courts must play roles that vary from the traditional model. The problem-solving role is familiar to judges in Juvenile Courts.

The need to revise the roles of key players flows from needs of the litigants—consumers of the courts—appearing without counsel in vast numbers. The underlying goal of our justice system is to be fair and just. The ethical rules shaping the roles of the players in the adversary system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of the roles frustrates rather than furthers the goal of fairness and justice. As between abandoning the goal and changing the roles, we should change the roles.

The focus on fairness and justice, in substance and not simply appearance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial, rejecting the idea that impartiality equals passivity.¹⁸ A system favoring those with lawyers, without regard to the law and facts, is a partial, not impartial, system. To avoid penalizing those without lawyers, courts must play an active role to maintain the system's impartiality.

These principles require revising our notions of the proper role of judges, requiring them to assist unrepresented litigants as necessary to ensure that all relevant information is before the court and unrepresented litigants do not forfeit rights due to the absence of counsel.¹⁹ We should similarly revise the roles of other court personnel, including court-connected mediators and clerks.²⁰ With courts full of unrepresented litigants, the roles of mediators and clerks should permit and even require them to assist unrepresented litigants to avoid the unknowing waiver of rights.

The need to alter routine behavior also applies to lawyers, who often violate ethical rules in their negotiations with unrepresented litigants.²¹ Far from curtailing or reporting such misconduct, courts promote the behavior by sending unrepresented parties into the hallway to negotiate with lawyers in unmonitored settings. The courts often rubber-stamp the resulting agreements without conducting a detailed inquiry into either the fairness of the provisions or the process that led to the agreement.²²

While philosophical and practical objections sometimes emerge in response to these proposals, it is not surprising that the trend over the past decade has been to provide more assistance to unrepresented litigants. The increased focus on the issue has revealed that judges and other court personnel throughout the country vary considerably in how they handle unrepresented litigants.²³ The plight

12. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 28, 2006) available at: <http://www.mass.gov/courts/judguidelinescivil-hearingstoc.html> (visited October 27, 2006) [hereinafter *MA Guidelines*].

13. *MA Guidelines*, *supra* note 12.

14. *MA Guidelines*, *supra* note 12, Guideline 2.1 & Commentary.

15. *MA Guidelines*, *supra* note 12, Guideline 3.2 & Commentary.

16. *MA Guidelines*, *supra* note 12, Guideline 3.4.

17. *MA Guidelines*, *supra* note 12, Commentary to Guideline 3.4 (citing ABA Model Rules of Professional Conduct 1.0(e)(2003)).

18. See, e.g., Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *FAM. CT. REV.* 36 (2002).

19. Russell Engler, *And Justice for All—Including the Unrepresented Poor:*

Revisiting the Role of Judges, Mediators, and Clerks, 67 *FORDHAM L. REV.* 1987, 2011-2031 (1999).

20. *Id.*, at 1992-1998, 2007-2011 and 2031-2040.

21. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 *CAL. L. REV.* 79 (1997).

22. *Id.* Solutions to the problem include enforcing existing ethical rules, drafting additional ethical rules, and increasing court oversight of interactions between lawyers and unrepresented litigants.

23. For a more detailed discussion of trends involving the judicial role in handling cases with unrepresented litigants, see Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 367 (2008).

of unrepresented litigants has led courts to seek ways to respond to those needs. Access to Justice initiatives, combined with the backlash against judges exhibiting bias against unrepresented litigants, have insured that the response is to seek ways to provide more help.

Prong 2: Using, But Also Evaluating, Assistance Programs

Programs across the country, including telephone hotlines, self-help centers, pro se offices, advice-only clinics and court-annexed limited legal services programs, now assist unrepresented litigants in the courts.²⁴ Massachusetts has been active in this area, fitting the picture nationally, and leading in some respects. Legal services programs have offered hotlines, pro se clinics and other forms of assistance short of full representation for decades. Lawyer-of-the-Day and other court-based assistance programs now exist in many courts in the Commonwealth handling housing and family matters. The Rules of Professional Conduct, and ethics opinions, have addressed limited legal services programs and ghostwriting. Pilot programs involving limited scope representation exist in the Probate and Family Courts, with their likely expansion to other courts as well. The expanded use of skilled lay advocates remains a constant topic of discussion.

Innovative programs that provide assistance short of full representation by counsel provide an important component in the strategy to increase access to justice. At the same time, however, it is important to evaluate the programs carefully. Evaluation tools must identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes.²⁵ Programs not affecting case outcomes may be worthwhile, but are not a solution to the problem of the forfeiture of rights due to the absence of counsel. These concerns also apply to limited assistance representation programs and the expanded use of lay advocates, additional ways of assisting those without full representation by counsel.

Prong 3: The Expanded Right to Appointed Counsel

When revising the roles of judges, mediators, and clerks and using assistance programs are insufficient, we can no longer accept the denial of access and routine forfeiture of rights as acceptable outcomes. In those instances, we must recognize and establish a right to appointed counsel in civil cases. The next section offers an approach to identifying the types of cases that are the most important starting point for an expanded right to counsel.

Three important realities shape the discussion. First, the scope of the right to counsel is directly dependent on the effectiveness of the first two prongs in the Access to Justice program. The more that judges, mediators, clerks, and assistance programs are effective in stemming the forfeiture of rights due to the absence of counsel, the smaller will be the pool of cases in which counsel is needed.

Second, many reports from across the country explore the impact of counsel in various settings that handle civil cases. The data

consistently shows that the greater the imbalance of power between the parties, the more likely it will be that extensive assistance will be necessary to impact the case outcome. The power or powerlessness can derive from the substantive or procedural law, the judge, and the operation of the forum. Disparities in economic resources, barriers, such as those due to race, ethnicity, disability, and language, and the presence of counsel for only one side can affect the calculus as well. The greater the imbalance of power, the greater the need for a skilled advocate with expertise in the forum to provide the needed help.²⁶

Finally, the status quo is not an option. Those familiar with the courts in which high volumes of unrepresented litigants appear know that, in at least some cases, litigants forfeit important rights not due to the law and facts involved, but due to the absence of counsel. We may not know exactly how large or small that pool of cases is, or how to identify it, but we know that the pool exists, and the consequences of inaction are devastating for the unrepresented litigants and their communities.

II. IDENTIFYING STARTING POINTS FOR AN EXPANDED RIGHT TO COUNSEL

The analysis above reveals the importance of moving forward on the representation component of Access to Justice initiatives. The process, however, can be daunting. Legal needs studies reveal an enormous gap in our delivery system and many compelling areas, cases and clients in need of assistance. Implementation issues, including the pros and cons of various delivery mechanisms, the way in which the expansion will interface with existing systems, and issues of cost can stall momentum for change before it begins.

As with any enormous task, making progress requires planning and moving ahead in steps that are achievable. Some concerns can be quarantined initially. They must be worked into the planning process but cannot be allowed to serve as initial roadblocks that stop all discussion and creativity. Some problems may eventually be dealbreakers, but others may prove less daunting than imagined as the process unfolds. Moving ahead requires some selective tunnel-vision.

This approach is consistent with the approach taken by the Boston Bar Association's Task Force on Expanding the Civil Right to Counsel in Massachusetts. The Task Force was created in the summer of 2007, and it was comprised of stakeholders from all sectors of the legal community concerned with expanding access to justice. The Task Force's work was enhanced by the substance of the Civil Gideon Symposium held in October 2007, which was jointly convened by the MBA and the BBA.²⁷

Over the course of its first year of work, the Task Force developed proposals for a series of pilot projects to help identify the most important starting points for expanding the civil right to counsel. The Task Force first identified key substantive areas in which basic human needs most likely were in jeopardy due to the absence of counsel. This process led to the creation of substantive committees

24. See Engler, *supra* note 19, at 1998-2007.

25. The body of evaluation materials is growing. See, e.g., Paula Hannaford-Agor and Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW AND SOC'Y REV. 419 (2001). Many evaluation initiatives rely on "customer satisfaction" inquiries: the extent to which the users believe they were helped or others in the legal system believe the program is beneficial. See, e.g., Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for*

Self-Represented Litigants, 3-5 (presented at the March 2005 Summit on the Future of Self-Represented Litigation) <http://www.ajs.org/prose/Midwest%20Notebook%20Contents/Tab%207/Paper%209.pdf>.

26. For a discussion and analysis of the studies, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37 (February 2010).

27. At the Joint MBA/BBA Civil Gideon Symposium, held in October, 2007, I illustrated the manner in which progress could occur in the face of enormous questions. I urged that we accept as a given that it is an essential component of Access to Justice that, where important rights are at stake, and nothing short of

in the areas of Family, Housing, Immigration and Juvenile Law. The substantive committees were supplemented by committees in the areas of Funding and Litigation/Research, while individual members explored legal matters affecting rights to sustenance and the collateral consequences of criminal convictions. Each of the Committees sought and obtained input from people and who were not members of the Task Force but who were familiar with the problems facing those without counsel, and the courts in which those cases are heard.²⁸

The Task Force ultimately recommended implementation of nine different pilot projects, from the four substantive areas of Family, Housing, Immigration and Juvenile Law. The report summarizes the justice gap in Massachusetts, explains the history of Civil Gideon and the operation of the Task Force, describes the details of the Committee Reports as well as the common themes that cut across the pilot projects proposed by the different committees, and discusses the next steps in expanding the civil right to counsel in Massachusetts. At every turn, the proposals for providing counsel are intertwined with notions of access to justice. As the Executive Summary confirms:

For too long, recognizing a Civil Gideon right has been resisted due to fears that do not comport with the reality of the concept. Civil Gideon, as understood by members of this Task Force, stands for the basic proposition that where a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when more limited forms of assistance will provide meaningful access to justice. No one is calling for representation where the rights at issue do not involve basic human needs.²⁹

While the approach adopted by the Task Force does not eliminate resource questions, it allows a more sensible approach to the topic. The concerns are not so imposing where categories of cases are relatively small. Even where the pool of cases is larger, other crucial components to the analysis may be included. In some instances, such as eviction defense area, the costs of providing counsel can be analyzed in comparison to the costs of homelessness that might result if counsel is not provided. Some areas might overlap with larger political initiatives to combat societal problems, such as those designed to eradicate domestic violence or homelessness. The

counsel will do the trick, that litigants must be represented by counsel. A related “given” is that, despite the heroic work of many in the public and private sector, the level of unmet needs is high enough so that we must assume that an expansion of existing resources will be necessary.

To work through the process of identifying which cases were most important and how we could expand representation, I suggested the following steps:

1. Identify likely areas in which counsel is most needed.
2. Review available data.
3. Put 1 and 2 together. (Some areas, such as small claims cases, in which counsel has a big impact, may drop back, due to the interest at stake. Others, such as eviction cases and custody cases, may move forward, but not necessarily for the entire docket, absent evidence that power imbalances seem to be extreme across the board.)
4. Identify areas of consensus.

representation piece becomes as a component of an overall strategy, not a new and separate initiative. Finally, producing a subset of cases, emerging with political consensus and proposing a tailored delivery mechanism, might increase the likelihood of obtaining funding.

III. ILLUSTRATING THE INTERRELATIONSHIP OF THE TWIN IMPERATIVES: CHALLENGES IN THE HOUSING AND DISTRICT COURTS

A brief look at some challenges to Access to Justice in the Housing and District Courts illustrates the importance of considering the representation prong within the structure of Access to Justice initiatives. Since one of the basic human needs articulated in the Task Force’s Mission Statement is shelter, at least some eviction cases would likely make the top of many lists for Civil Gideon starting points. Given the high volume of cases, the tiny percentage of tenants represented by counsel, and the much higher representation rate for landlords, the pool of cases in which power imbalances exist might be enormous. In Housing Courts, many cases are resolved with assistance of housing specialists, trained in housing matters and familiar with many of the barriers facing unrepresented litigants. All five Housing Courts have some court-based program designed to provide assistance by advocates to unrepresented litigants, short of full representation. Tenancy Preservation Projects (TPP) provide resources and services aimed at preserving extremely vulnerable families in certain settings. While most people familiar with the courts would acknowledge that even these mechanisms are not always an adequate substitute for full representation, the consensus also would be the mechanisms provide an invaluable source of assistance, and reduce the pool of cases needing counsel.

A dramatically different scenario exists in the District Courts. No specialist positions exist, the TPP programs are limited by statute to the Housing Courts, and screening and assistance programs are absent as well; the diffusion of cases among sixty-two District Courts provides one of the many challenges to program development.³⁰ The pilot projects under way in the area of housing include a representation piece both for Housing Court and for District Court.³¹ It seeks to identify the most vulnerable litigants, and the scenarios in which the power imbalances between the litigants are so great that the absence of counsel is likely to lead to a denial of meaningful access to justice.³²

A Civil Gideon proposal developed in isolation would likely conclude that tenants in many eviction cases need counsel. A proposal, such as the Task Force’s proposal, that emerges as part of a broader Access to Justice analysis might be less extensive. As urged by Prong

5. Obtain estimates as to the volume of cases involved.
6. Identify existing resources.
7. Identify the best delivery mechanism where new resources are needed.

28. For a more detailed description of the Task Force’s work, see *Gideon’s New Trumpet*, *supra* note 8.

29. *Gideon’s New Trumpet*, *supra* note 8, at 2-3.

30. Not surprisingly, anecdotal evidence from many district courts reveals that some landlords seeking a quick route to evict tenants go directly to District Court, by-passing the Housing Courts where there is overlapping jurisdiction.

31. Funded jointly by the Boston Bar Foundation, the Massachusetts Bar Foundation and The Boston Foundation, the pilot projects are operating in the Northeast Housing Court and Quincy District Court.

32. The proposal would provide legal counsel for tenants in eviction cases where: (1) the case involves household members with mental disabilities where

Two, the development of an effective representation component utilizes means of assistance short of representation by counsel, such as Lawyer-of-the-Day programs and the TPP. As urged by Prong One, the courts play a more active role than the traditional role envisions, using not only clerks and specialists, but also the Judicial Guidelines, which encourage judges to handle their dockets in ways that increases access to justice for those without counsel.

Each of these components provides an opportunity for evaluation as well. The benefit of situating pilot programs in both courts allows for comparison. If the representation prong is more effective in one court than the other, that conclusion will provide insight into the shaping of an expanded civil right to counsel. The data might also suggest the need for assistance programs that can be tailored to the needs of the litigants in a given context. Assistance programs need not be uniform from court to court, as long as the results they produce reflect the provision of meaningful access to justice. The comparison might trigger an exploration of best practices among judges in eviction cases with at least one unrepresented party. Data resulting from these inquiries might lead to a vigorous disagreement as to the implications of the findings and need for change. Where, however, Access to Justice initiatives provide an inadequate level of assistance for unrepresented litigants struggling to avoid eviction and likely homelessness, a targeted Civil Gideon must be implemented.

Understanding a Civil Gideon as a component of Access to Justice might yield a different prescription for a different set of cases in the District Court: debt collection cases in Small Claims Court. Legal needs studies identify consumer cases and housing cases as crucial areas in which lower income citizens need assistance. The District Courts handle many consumer cases, including debt collection cases, through the Small Claims Courts. Roughly one-third of the eviction cases in the Commonwealth are handled in the District Courts.

The Access to Justice Commission's Reports include descriptions of some of the problems in Small Claims court.³³ An

the disability is directly related to the reason for eviction; (2) the case involves criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or (3) the judge concludes that the absence of representation for the tenant will lead to a substantial denial of justice. In the exercise of judicial discretion, judges shall consider the following factors: a) factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture and age; b) factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building; c) the affordability of the unit for the tenant, including whether the unit is in public or subsidized housing; d) whether there appears to be cognizable defenses or counterclaims in the proceeding; e) whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody; and f) other indicia of power imbalances between the parties.

The proposal would provide legal counsel for landlords where: (1) the landlord resides in the building that is the subject of the eviction proceeding; (2) the landlord owns no other interest in real property; (3) the tenant is represented by counsel; and (4) the landlord's shelter is at stake in the proceeding. *Gideon's New Trumpet*, *supra* note 8, at 12.

interdepartmental working group of the District Court examined small claims practices and issued its report in August, 2007.³⁴ The SJC announced changes to small claims procedures in August, 2009.³⁵

The Small Claims scenario would seem an unlikely candidate for a representation prong of an Access to Justice plan. The history and purpose of Small Claims Courts speaks to a forum designed for litigants to appear without counsel. The analysis above would likely push debt collection cases lower on the list in terms of the interest at stake. Monitoring the implementation of changes that are made in response to the Working Group's proposal is a more sensible first step.

Whether that will be the end of the conversation remains to be seen. Until the Working Group's recommendations are implemented and evaluated, the extent to which the problems have been ameliorated remains unclear.³⁶ Moreover, with health care and energy costs skyrocketing, a closer examination of the underlying source of debt at issue, and the consequences of judgments against some debtors, might reveal that basic needs are increasingly implicated in debt collection cases. The efficacy of proposed changes, as revealed by careful evaluation, will impact whether a representation prong is appropriate even in Small Claims Court.

CONCLUSION

The desperate plight of unrepresented litigants in the courts and the related challenges to those in the court system require a comprehensive Access to Justice plan to insure the promise of justice reaches everyone in the legal system, and not just those entering the system with power and resources. Revising our understanding of the roles of the key players in the system and continuing to develop assistance programs short of representation by counsel are crucial components of the strategy. Careful evaluation is essential as well to identify which programs effectively overcome barriers to access to justice. Where basic needs are at stake, and nothing short of representation by counsel can provide the necessary assistance, a targeted Civil Gideon is an essential component of an Access to Justice plan.

33. MA AJC First Report, *supra* note 3, at 26. The report did not address the proposals since the Commission did not have access to the working group's report, at the time its own report was written.

34. The Boston Globe's 2006 Spotlight series focused attention on problems in the Small Claims Courts facing unrepresented debtors. *Debtors' Hell*, Parts I-IV, THE BOSTON GLOBE, July 30-August 2, 2006, available at http://www.boston.com/news/special/spotlight_debt/part1/page1.html.

35. Beth Healy and Michael Rezendes, *SJC toughens rules for debt collectors: New protections for consumers over small claims*, The Boston Globe (August 7, 2009), available at http://www.boston.com/news/local/massachusetts/articles/2009/08/07/sjc_toughens_rules_for_debt_collectors/. The Press Release announcing the changes is available at <http://www.mass.gov/courts/press/pr080609.html>. (last visited April 14, 2010). For the text of the modified rules, see <http://www.mass.gov/courts/sjc/docs/Rules/trial-court-rule-III-new.pdf>. (last visited April 14, 2010).

36. A 1972 report of Small Claims Courts in Massachusetts offers a scathing view of the court, raising many issues that resonate with the concerns raised in the Globe's Spotlight series. Center for Auto Safety, Little Injustices: Small Claims Courts and the American Consumer (1972)(on file with author).

SECRETS OF GOVERNMENTS, ENTERPRISES AND INDIVIDUALS AFFECTING ACCESS TO JUSTICE

By Jerry Cohen



Jerry Cohen is a partner at Burns & Levinson LLP (Boston and Providence), a member of the Board of Editors of the Massachusetts Law Review, vice president of the Massachusetts Bar Foundation and chair of the ACLU/Mass. Science & Technology Committee. He teaches Trade Secrets at Suffolk University Law School.

The functioning of a democratic society and the cultivation of respect for law depend on transparency of operations in all branches of government. Yet some such operations require secrecy for effectiveness and fairness. Accountability of business is an ideal but allows for trade secrets and other forms of enterprise privacy. The privacy of individuals and privileges in litigation and, generally, the right to be left alone, give way to imperatives of government. This article explores the current states of these balances. Throughout, the balances are reviewed with a focus on access to justice.

There is an aspect of access to justice going beyond the usual categories of representation, filing fees, physical access to courts, language and cultural accommodation, alternative dispute resolution,

reasonable backlogs and victim assistance. Undue secrecy can hamper or wholly prevent access to justice. But some valid exercises of secrecy, including, but not limited to, evidentiary privileges and professional confidentiality, enable access to justice.

I. GOVERNMENT

State Secrets

The federal Classified Information Protection Act (“CIPA”)¹ codifies a privilege, known as “state secrets privilege,” long extant but articulated by the United States Supreme Court in 1953 in *United States v. Reynolds*,² a case regarded as symptomatic of the McCarthy era.³ In that and later cases, the privilege has raised concerns that it is arbitrarily invoked, beyond effective reach of judicial scrutiny, to quash meritorious cases.⁴ It is not a mere common law privilege but is rooted in the Constitution.⁵ That said, the privilege is not to be invoked lightly and the Executive Branch and Judicial Branch have coordinate responsibilities to invoke the privilege with care and seek the minimum restraint on litigation necessary to fulfill the purposes of privilege invocation.⁶ The usual exercise of the privilege crafted in *United States v. Reynolds*,⁷ and elaborated in the later cases and statutory codification,⁸ is that once a Cabinet officer personally reviews a discovery request and attests to her opinion that national security would be compromised by compliance, the trial court dismisses the case, unless a clear work-around is available to try the case without prejudice to the government. The privilege can apply in a civil suit against the government or between private parties where a government officer is a third party witness or document source.

1. 18 U.S.C. App. 31 §§ 1-10 (West 2010); 50 U.S.C. §§ 1801 et seq (West 2010); 5 U.S.C. § 552(a)(4)(B) (West 2010).

2. 345 U.S. 1 (1953), *reversing* 192 F. 2d 987 (3d Cir. 1952). Families of engineers killed in 1947 while testing a cutting edge variant of the B-29 airplane and associated equipment sought discovery to prove a tort claim for negligence. The Supreme Court ordered dismissal based on the government’s assertion of the state secrets privilege. 345 U.S. at 7-11.

3. The story of the case, is well told in a recent book, Barry Siegel, CLAIM OF PRIVILEGE: A HISTORY OF A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE AND THE RISE OF STATE SECRETS (Harper Collins 2008). Families of some of the crash victims tried to reopen the case 56 years later by filing a writ of *coram nobis* but their effort failed. The citations for the ultimate rejection of the claim for the sake of finality are 2004 WL 2040272 (E.D. Pa. 2004), *aff’d*, 424 F. 3d 384, *cert. denied*, 547 U.S. 1123 (2006).

4. *See, e.g.*, *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (4th Cir. 1992) (holding greater public good is to protect military secrets even where the result might be dismissal of the law suit). *See generally* Neil Klinkof, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 289 (2007); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007).

5. *United States v. Nixon*, 418 US 583, 710 (1974); *see also* *El-Masri v. United*

States, 479 F.3d 296, 303-304 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007).

6. However, not all cases of state secrets assertion escape scrutiny by the court. A recent example of scrutiny was in *Al-Haramain Islamic Fd’n v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007), a challenge to warrantless eavesdropping. There, a panel of the Appeals Court reviewed declarations of Executive Branch officials to satisfy itself that failure to honor the privilege would not undermine intelligence capabilities of the government and compromise national security. On remand the district court, on January 5, 2009, ordered the government to produce a top secret document as evidence 595 F. Supp. 2d 1077 (N.D. Cal. 2009) (CV-1:09-00109-VRW), and on Feb. 26, 2009 the Court of Appeals declined interlocutory appeal and refused to grant a stay. In *Al-Haramain Islamic Fd’n v. Bush*, (9th Cir. 2009) (09-15266). Under the district court’s order, lawyers may view the document and offer it in evidence in a closed courtroom, but may not discuss it in any insecure setting or manner. On March 31, 2010, the district court ruled for the plaintiffs, holding the warrantless wiretapping illegal and rejecting the Government’s attempt to use a state secrets assertion to quash the case. ___ F.Supp.2d ___ (N.D. Cal. 2010). A second recent example is the August 31, 2009 decision of the Ninth Circuit in *Mohamed et al. v. Jeppesen Dataplan Inc.*, 579 F.3d 943 (9th Cir. 2009) reversing a dismissal based on state secrets invocation. A rehearing en banc was ordered. 586 F.3d 1108 (9th Cir. 2009).

7. *United States v. Reynolds*, 345 U.S. 1 (1953), *reversing* 192 F. 2d 987 (3d Cir. 1952).

8. *See supra* text accompanying notes 3-6.

A bill introduced by Senators. Kennedy, Specter, Leahy, Feingold, Whitehouse and McCaskill, S. 2533, State Secrets Protection Act (“SSPA”), in the 110th Congress in 2008 and reintroduced in 2009 in the 111th Congress as S. 417,⁹ would amend 28 U.S.C. by adding a new chapter 181 (§§ 4051-4059) that would provide for *in camera* review of evidence for which the privilege is claimed.¹⁰ This goes beyond the CIPA requirement of certification by the head of an agency. SSPA would enable a court to admit a summary of the privileged information, a version of evidence with certain information redacted, a statement admitting relevant facts that the withheld information would tend to prove or other alternatives in the interests of justice and protecting national security. The federal state secrets doctrine, as currently implemented, imposes a flat ban on case proceedings compared to a more nuanced procedure for dealing with executive privilege generally. The doctrine is long overdue for the reforms indicated in the Kennedy et al. bill.

The Obama administration is backing off from excessive state secret invocation,¹¹ but not wholly. In fact, an early act of the administration was to support invocation of state secrets under CIPA standards in the case of *Mohamed et al. v. Jeppesen Dataplan Inc.*,¹² where the ACLU, acting for five former Guantánamo detainees, sought the details of use of planes of a Boeing transportation services subsidiary for extraordinary rendition (the CIA program of international transport of War on Terror detainees to outsource torture venues).¹³ The government intervened and invoked the state secrets doctrine in 2008 and the case was dismissed by the district court. In the appeal the new administration is holding to the invocation but its position was rejected.¹⁴

The State Secrets doctrine can be understood as overlapping

with executive privilege and sometimes referred to as pre-decisional privilege.¹⁵ It also overlaps with military security systems. Executive privilege is exercised in aid of separation of powers. However, at the state level, Massachusetts limits executive privilege, however labeled. The Supreme Judicial Court (SJC) provides strict limits on the development of common law privileges, leaving such role to the Legislative branch.¹⁶

The system of military secrets practiced within Department of Defense and other defense related government agencies governs secrecy practices of such agencies (and is extended to government contractors and subcontractors) under a series of Presidential executive orders. Executive Order 13,292 by President Bush on March 25, 2003, amended the last prior such order, 12,598 of President Clinton of April 17, 1995, by extending decision powers to the Vice President. The Bush order also turned the system from a regime favoring secrecy declassification to one favoring secrecy classification. The Bush order provided a longer duration of presumptive secrecy than its predecessor. The Obama administration has issued an order turning back to the Clinton balance.¹⁷

Open Government Act(s)

Descending (partially) from the lofty domains of federal state secrets, military security and executive privilege one finds the mundane business of transparency in government operations balanced against needs of governments to protect their own secrets for effective operation and to protect secrets of private persons held by the government. That balance is codified in the federal Freedom of Information Act (“FOIA”)¹⁸ and cognate state laws regarding public records.¹⁹

9. See also, H.R. 5607, 110th Cong. (2008); H.R. 984, 111th Cong. (2009). The earlier S. 2533 had a favorable Judiciary Committee report (Calendar No. 938) No. 110-442 (Aug. 1, 2008).

10. Section 4052. In contrast, CIPA § 4 permitted the Executive Branch to submit to such review but did not mandate the submission.

11. See, Attorney General Holder, Memo: *Policies and Procedures Governing Invocation of State Secrets Privilege*, September 23, 2009 available at http://www.wired.com/images_blogs/threatlevel/2009/09/ag-memo-re-state-secrets-dat-ed-09-22-09.pdf (Memo to all agencies calling for restraint and process guidelines to limit invocation of state secrets).

12. 579 F.3d 943 (9th Cir. 2009); see *supra* text accompanying note 6.

13. The CIA's program of extraordinary rendition is well told in the books: STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAMS* (St. Martin's Press 2006) and JANE MAYER, *THE DARK SIDE* 101-138 (Doubleday 2008). On his first day in office President Obama issued Executive Orders ending the torture regimens. Jan. 21, 2009 Exec. Order No. 13,492, 74 C.F.R. 4893 (2006) (ensuring lawful interrogations, including revocation of Exec. Order No. 13,440 of July 20, 2007). The Obama Administration on March 30, 2009 abandoned the War on Terror location of the Bush Administration. See Statement of Secretary of State Clinton <http://cbs/tv.com/national/hillary.clinton.secretary.2.971671.htm>. Earlier, the Obama Administration dropped the Enemy Combatant location. See Memorandum with Declaration of Attorney General Holder filed in *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFN) March 13, 2009, and his September 23, 2009 statement.

14. 9th Cir. No. 08-15693, emergency appeal of 586F. 3d 1108 (9th Cir. 2009) petition for *en banc*. See also *supra* note 6 regarding the government's position in the *Al-Haramain* case.

15. See, e.g., *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866-67 (D.C. Cir. 1980). But the Executive Branch is not wholly guarded against court compulsion to deliver documents. See *Nixon v. General Services Admin.*, 443 U.S. 425, 445 (1997).

16. *Matter of a Grand Jury Subpoena*, 430 Mass. 590, 597-98 (2000); *Babets v. Sec'y of Exec. Office of Human Services*, 403 Mass. 230 (1988); see, also, Proposed Mass. R. Evid. 501 (recognizing only as to such privileges created by Constitution and Statutes) and MASS. GUIDE TO EVIDENCE (Flaschner Jud. Inst. 2008-2009) 85-86; Cf., *General Electric Co. v. Dept Env'l Prot'n*, 429 Mass. 798 (1999) (government attorney work product not protected per se but may be protected as a matter of government deliberative privilege under MASS. GEN. LAWS ch. 66, § 10).

17. Presidential Memorandum for the Heads of Departments and Agencies re Transparency and Open Government, http://www.whitehouse.gov/the_press_office/transparencyandOpenGovernment; Transparency and Open Government, 74 (15) Fed. Reg. 4685 (Jan. 21, 2009). President Obama's Exec. Order No. 15 of January 21, 2009 revoking President Bush's prior Executive Order 13,233 of November 1, 2001, re executive privilege for Presidential (records were also a step in that direction); see also, *infra* text associated with notes 75-79.

18. 5 U.S.C. § 552(a) (West 2010). FOIA's general regimen of disclosure is subject to eight exceptions spelled out at 5 U.S.C. § 552(b), including: (1) classified information pursuant to Executive Order defined procedures, (4) trade secrets and personal information obtained from a person and privileged or confidential, and (6) personnel and medical files — disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Exception (6) is complemented at 5 U.S.C. § 552a, by a provision which proscribes misuse of information about data subjects and gives them remedies for such misuse. On his first day in office, President Obama issued a memorandum calling for greater transparency by narrower use of FOIA exceptions, reversing a course set by an October 12, 2001, memorandum of former Attorney General Ashcroft, which in turn had reversed a transparent form of FOIA implementation required in a prior October 4, 1993, memorandum by former Attorney General Reno. Yet, the Federal Aviation Administration later acted to deny data on airplane bird studies to a FOIA requester. Associated Press, Mar. 27, 2009, <http://www.foxnews.com/politics/2009/03/27/faa-wants-bird-strike-records-secret/> (last viewed March 2, 2010).

19. See, e.g., MASS. GEN. LAWS, ch. 4 § 7(26); ch. 66 § 1, ch. 66A (West 2010);

State governments have many exceptions to the transparency norm, including executive session limitations of open meeting laws,²⁰ witness protection laws,²¹ the Criminal Offender Record Information (CORI) system,²² and other laws, discussed below under the Privacy and Privilege heading.²³ Local police, state troopers and other law enforcement authorities enjoy the highest levels of such protection in investigations, and grand jury proceedings are also protected,²⁴ but ultimately the government must produce once secreted evidence if an indictment is handed down.²⁵

First Amendment Freedoms and Prior Restraints

Rights of free speech, petition and assembly are among founding principles of the United States and its states. Speech is generally protected against suppression.²⁶ Post violation restraints can be imposed under the laws summarized above, under the headings of State Secrets and Freedom of Information, to deter theft and other breaches of lawful secrecy. Prior restraint was attempted in the Pentagon Papers case without success,²⁷ but the misuse of government documents was prosecutable after the fact.²⁸ Scholars publishing computer code flaws have been attacked with efforts at prior- and post-restraints.²⁹ Most recently, the MBTA demand for an injunction to prevent MIT students from publishing substantial portions of their approach to defeating subway fare collection machine security was denied.³⁰

In sum, recent or pending developments for greater access to knowledge of government operations are restoring access to justice in courts, in politics and in the ability of enterprises and individuals to make informed decisions of daily life. However, the restoration of transparency is uneven and slow. It is important to recognize secrecy itself as a primary rather than ancillary issue in framing expectations of a just society.

940 CMR 11; 950 CMR 32.00, 33.00 (including privacy exceptions).

20. MASS. GEN. LAWS, ch. 39 § 23A, 23B (West 2010); *see, e.g.*, Dist. Attorney for the Plymouth Dist. v. Bd. of Selectmen of Middleborough, 395 Mass. 629 (1985) (applying the law).

21. MASS. GEN. LAWS ch. 263A, § 13 (West 2010).

22. MASS. GEN. LAWS ch. 6, §§ 167-178 (West 2010); *see also* MASS. GEN. LAWS ch. 94C §§ 34, 44 (West 2010); MASS. GEN. LAWS ch. 276k §§ 100 A, B, C (West 2010).

23. Section III, *infra*.

24. MASS. GEN. LAWS ch. 277, § 5 (West 2010). The secrecy requirement is rooted in the common law. *Commonwealth v. Harris*, 231 Mass. 584 (1919). *See also*, *Globe Newspaper Corp. v. Police Comm'r of Boston*, 419 Mass. 852, 865-66 (1995); *WBZ-TV4 v. Dist. Att'y for Suffolk Cty.* 408 Mass. 595, 599-600 (1990).

25. *See Commonwealth v. Edgerly*, 372 Mass. 337 (1977); *Commonwealth v. Stewart*, 365 Mass. 991 (1974).

26. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Near v. Minnesota*, 283 U.S. 697 (1931).

27. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

28. There was a viable prosecution after the fact against Daniel Ellsberg and confederates who leaked the documents to the press but the case was dismissed for prosecutorial misconduct. *See, United States v. Ellsberg*, 687 F. 2d 1381 (10th Cir. 1982); *See also, United States v. Morison*, 604 F. Supp. 2d 655 (D. Md. 1985). Relevant statutes regarding criminal law remedies for breach of secrecy of military and other government information include 18 U.S.C. § 793 (West 2010); 50 U.S.C. §§ 601 and 783 (West 2010); and 42 U.S.C. §§ 2274, 2277 (West 2010).

29. *See Bernstein v. United States Dept. of Justice*, 974 F. Supp. 2d 1288 (N.D. Cal. 1997), *aff'd*, 176 F. 3d 1032 (9th Cir. 1999), *withdrawn*, 192 F. 3d 1308 (9th Cir. 1999).

II. ENTERPRISES

Trade Secrets

Descending further down the protection ladder one finds the panoply of laws for protection of business enterprise trade secrets, primarily as a matter of state law, but including important federal adjuncts. The Uniform Trade Secrets Act ("UTSA"), effective in forty-six states and influencing the law in remaining states, including Massachusetts, provides that technology and business secrets having actual or potential value and guarded by adequate measures, can be protected against misappropriation.³¹ UTSA preempts other state tort laws of like effect but does not preempt actions based on breach of contract or criminal laws. The remedies include injunctions and award to a plaintiff of damages (proven lost profits or other damage) and defendant's profits to the extent not counted in lost profits damages assessment, with enhancement up to trebling for willful misappropriation, and attorneys' fees. Trade secret protection is supplemented by enforceability of covenants not to compete in most states, with notable exceptions.³²

Trade secrets protection at the federal level includes protection of certain data submitted by private parties voluntarily or under compulsion to federal agencies.³³ Additional laws to protect information, facilities and for copyright control include the Invention Secrecy Act,³⁴ the Economic Espionage Act,³⁵ the Electronic Communications Privacy Act,³⁶ the Stored Communications Act,³⁷ the Computer Fraud and Abuse Act³⁸ and the Digital Millennium Copyright Act.³⁹ Export control and trafficking in arms regulations prevent export of certain categories of technical data except under controlled licensing conditions.⁴⁰

Trade secrets used or sought in discovery or trial of a trade secret or covenant not to compete case or any other case (e.g., patents,

30. *Massachusetts Bay Transportation Authority v. Anderson et al.*, No. 0811364 (D. Mass. 2008) Electronic Clerk's Notes, 8/19/2008, reflecting denial of MBTA's motion and dissolving TRO.

31. 4 U.L.A. 529. Massachusetts has not adopted UTSA but provides roughly similar protection under common law (Restatement (1st) of Torts, § 757) and MASS.GEN.LAWS ch. 93 §§ 42, 42A and ch. 266 § 30(4) (West 2010).

32. *See COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY* (Malsberger, ed., BNA Books 2008). Bills filed in 2009 and now pending at the General Court (H. 1794 and 1799) would amend MASS. GEN. LAWS ch. 149 to substantially limit the enforceable scope of non-competition agreements, but would not limit enforcement of trade secret rights. California bars enforceability of such covenants. CAL BUS. AND PROF. CODE § 16,600.

33. 7 U.S.C. § 1361 (a) (b) and 135; (a) (2) (D) and 42 U.S.C. § 7607 (EPA); *see, e.g.*, 15 U.S.C. §§ 78(x) (a) and 176 (a) (West 2010) (SEC); 29 U.S.C. § 664 (West 2010) (OSHA); 21 U.S.C. §§ 33(i) and 360 (c) (West 2010) (FDA); *see, also*, MASS. GEN. LAWS ch. 4 § 7(26)(g) (West 2010) (protecting trade secrets provided by a private party to a Massachusetts government agency under a promise of protection).

34. 35 U.S.C. §§ 181 et. seq. (West 2010).

35. 18 U.S.C. §§ 1831 et. seq. (West 2010).

36. 18 U.S.C. §§ 1510, 2510-22, 2701-09, 3121-26 (West 2010).

37. 18 U.S.C. §§ 2701-11 (West 2010).

38. 18 U.S.C. § 1030 (West 2010)

39. 17 U.S.C. §12 (West 2010).

40. *See, e.g.*, 10 CFR 110, 205, 300 and 810; 15 CFR 120 and 730; 21 CFR 301 and 1311; 22 CFR 120-127; 31 CFR 501; and 50 CFR 17.21, 22, 31 and 32. The range of forbidden "exports" of data includes a ban on disclosure to foreign nationals visiting the United States or at international conclaves unless licensed in advance by the United States government.

product liability, close corporation schisms) are not immune from discovery but can be ordered produced and used at trial subject to a protective order.⁴¹ One of the particular concerns of federal courts, electronically stored information (ESI), has now found its way into a larger realm of cases in state courts with a greater diversity of needs and fewer resources available to find a workable balance.⁴²

Preservation of ESI and spoliation aspects of the rules on discovery of ESI are among the concerns of this article. The various ESI specific rules and earlier rules of general application call for preservation of records and stopping “normal” records purging operations when litigation is pending or reasonably anticipated. Sometimes counsel fail to instruct a litigation hold and sometimes counsel instruct it and the instruction is wholly or partially ignored. An opponent can only discern the timeliness of the instruction and fidelity to it with great difficulty and cost, sometimes beyond the resources of an injured person and her counsel. A discovery respondent’s refusal to produce ESI at all or in a particular requested format can be backed up by an assertion of inaccessibility (meaning inaccessible or accessible only at great cost). The party requesting discovery can then do its own testing/sampling of the data to see if the assertion is valid and seek a shifting of costs of doing so. Again, the requesting party faces a challenge that is not easily met. On the other hand, the responding party is entitled to some protection against over-reaching discovery that imposes high burdens of extracting information with little practical benefit to the requesting party beyond increasing pressure to settle a baseless claim. The difficulty for the requesting party and the judge is a lesser knowledge of what is contained in the withheld ESI. Some parts of the ESI rules seeking to mitigate cost burdens include a claw-back provision enabling retrieval of inadvertently produced privileged documents, the sampling-testing provisions, burden shifting and cost re-allocation.⁴³ Another part of the rules encouraging voluntary compliance with litigation hold and production obligations is the *in terrorem* effect of a possible sanction of an adverse inference instruction to the jury.⁴⁴ State law developments partially tracked and partially developed from the federal rule.⁴⁵

Efforts to manage discovery of electronically stored information lead to voluntary or forced narrowing of discovery rights for reasons of economy that may overly restrict discovery needs and thereby limit access to justice. On the other hand, in the absence of such restrictions, costs would limit such access to a greater degree. The power of a judge to re-allocate electronic discovery costs is too thin a reed to balance the interests.

The use and abuse of protective orders and the related procedures of sealed filings and impoundments is an art form that needs further public debate. Protective orders often involve self-serving designations of information to be protected by the producing party subject, in principle, to challenges to over-designation by the other party or parties. However, in practice, judges and magistrates often avoid involvement in such challenges. Protective orders often provide two levels of confidentiality: (a) material merely protected as confidential, and (b) attorneys-eyes-only material limited to trial attorneys and certain experts. Such orders increase the expense and difficulty of usage by requesting parties and risk gaps in understanding and proof. Such gaps can tilt the playing field at trial.

Case settlements can be conditioned on non-disclosure covenants and court orders to prevent disclosure of settlement details or of facts developed in discovery. These case settlements are much criticized for enabling continued infliction of fraud, professional malpractice, environmental damage and defective products on the public and discriminatory practices against employees and customers. Access to justice would be enhanced by forbidding such confidential settlements.⁴⁶ On the other hand, access to justice would be denied by stripping the prospect of such settlements from willing parties eager to end costly, risky, protracted litigation.

Free speech and free press are enabled to some degree by confidentiality of reporters’ sources and of caucuses producing editorial judgments. An indulgent protection against defamation liability for the press⁴⁷ and for Internet Service Providers⁴⁸ enables a vigorous public debate that goes to the essence of access to justice.

Whistle-blowers

There are cases where an internal employee or external viewer of operations of a company or government agency reports evidence of violation of law to a public protection agency or the press, i.e. blows the whistle. In such case the company or agency sometimes retaliates with one or more legal devices (suits for defamation, trade secret misappropriation, civil and criminal remedies for theft), denunciations challenging the personal stability of the whistle-blower, and/or self-help remedies (firing, demotion, withdrawal of benefits, blackballing within an industry). The retaliation is limited in part by a variety of federal laws embedded in the Age Discrimination in Employment,⁴⁹ Americans With Disabilities,⁵⁰ Civil Rights,⁵¹ Clayton,⁵² Clean Air,⁵³ Super Fund,⁵⁴ Employee Retirement and Income Security,⁵⁵ Equal Pay,⁵⁶ Unfair Labor Standards,⁵⁷ National Labor Relations,⁵⁸ Occupation Safety and Health Administration,⁵⁹ Sarbanes Oxley,⁶⁰ Toxic Substances Control⁶¹ Acts and other acts.

41. Fed. R. Civ. P. 26 and Mass. R. Civ. P. 26 (c)(7).

42. See generally Conference of Chief Justices (Richard von Dvitzend, Reporter) GUIDELINES FOR STATE TRIAL COURTS REGARDING A DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007) and National Conference of Commissioners in Uniform State Laws UNIFORM RULES RELATING TO DISCOVERY AND ELECTRONICALLY STORED INFORMATION (2007).

43. Fed. R. Civ. P. 26(b)(5)(B).

44. *Id.* at (g)(3) and Fed. R. Civ. P. 37 (2)(A)(i). See also Coleman Holdings Inc. v. Morgan Stanley & Co., Inc., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

45. On June 29, 2009 Gov. Schwarzenegger signed California’s Electronic Discovery Act (Assembly Bill 5, amending Cal. Rules of Civil Procedure 2016 and 2031) omitting the early meet-confer aspect of federal rule and circumscribing production obligations of a responding party (e.g. producing the ESI only in its original form).

46. See Arthur Miller, *Confidentiality, Protective Orders and Access to the Courts*, 105 HARV. L. REV. 427 (1991).

47. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

48. 17 U.S.C. § 512 (2000).

49. 28 U.S.C. § 623(d) (West 2010).

50. 42 U.S.C. § 12203(a) (West 2010).

51. 42 U.S.C. § 2003(a) (West 2010).

52. 15 U.S.C. § 15(a) (West 2010).

53. 42 U.S.C. § 7622 (West 2010).

54. 42 U.S.C. § 9610 (West 2010).

55. 29 U.S.C. § 1132(a) (West 2010).

56. 29 U.S.C. § 2066(d) (West 2010).

57. 29 U.S.C. § 215(a)(3) (West 2010).

58. 29 U.S.C. § 158(a)(4) (West 2010).

59. 29 U.S.C. § 660 (c) (West 2010).

60. 18 U.S.C. § 1514A (West 2010).

61. 18 U.S.C. § 2622 (West 2010).

Yet, many whistleblowers come to regret the impulses that led to informing. State laws follow the federal pattern of well intentioned measures that fall short of achieving protective goals. The Massachusetts Whistleblower Protection Act⁶² forbids retaliation only by public agencies against their employees. Court decisions have not been hospitable to whistleblowers. In *Wright v. Shriners Hospital*,⁶³ a nurse responded truly to a survey with information adverse to her hospital. She was terminated, allegedly for performance failure. Judgment for her at the trial court was reversed by the SJC. The court ruled that her acts were not within the narrow scopes of laws protecting minors, the elderly, or patients.⁶⁴ A nascent common law public policy exception was insufficient to prevent or sanction termination of this at-will employee.⁶⁵ But sufficient public policy has been found in other cases under Massachusetts law, under very limited circumstances.⁶⁶ The whistle-blower acts not only provide protection against retaliation but are supplemented by *qui tam* provisions enabling a claimant to sue in the name of a defrauded federal or state government agency and recover a portion of the damages and attorneys fees.⁶⁷

The Cloak of Corporate Attorney-Client Privilege

Issues of access to justice also arise in the context of an attorney interviewing employees of a business or other institution that is the target of pending or anticipated litigation. Lawyers for employees or consumers know well their ethical obligation not to contact a person in a way that bypasses the person's attorney (if that person has one).⁶⁸ Attorneys for target enterprises may claim to represent all employees for purposes of shielding them from interviews. The United States Supreme Court upheld such a claim in *Upjohn v. United States*.⁶⁹ That case continues as a barrier to getting information from persons who are likely very knowledgeable. However, a more nuanced approach has been developed in cases such as *Messing et al. v. President and Fellows of Harvard College*.⁷⁰ There, Attorney Messing, representing an employee of Harvard, interviewed other employees privately. Harvard's attorneys obtained a trial court sanction of \$96,000 in fines against Messing and her firm. On appeal, the Supreme Judicial Court vacated the sanction and construed the ethical standard to allow an attorney in Messing's role to interview employees of the opposing party who were not vulnerable to personal liability for any grievance of Messing's client and who had no relevant managerial responsibility or right to speak for or bind the enterprise.⁷¹ Ethics opinions and other cases have given leeway

to an attorney for a client opposing an enterprise to have *ex parte* interviews with former employees of the enterprise with limitations similar to those of the *Messing* case.⁷² Enterprises argue that limiting such interviews to an *inter partes* setting such as a deposition in the presence of counsel for the enterprise is the right way to get information; nothing is withheld by insisting on a strong bar against *ex parte* contact and that view is enforced by narrowing the exceptions to the ethical bar against such conduct.⁷³ But the reality is that the employee witnesses will be less forthcoming in that situation. Further, the *ex parte* interviews may be needed by a lawyer for an employee or consumer before a suit is filed or even as part of deciding whether to sue (a situation in which an employee client likely needs confidentiality). On the other hand, the enterprise can argue, justly, that the safety of its attorney-client communications and trade secrets should not depend on the secretly exercised discretion of counsel for an adversary or, worse, an unknown potential adversary. Over time, the cases and ethical opinions have developed a workable balance accommodating the legitimate interests of both sides.

The years 2002-2008 saw a wave of bar criticisms of Department of Justice efforts to pierce the attorney-client shield of enterprises. The effort began with memorandum of Deputy Attorney General Larry D. Thompson,⁷⁴ calling for favorable consideration of reduced sentencing, decisions not to prosecute and leniency generally for business organizations under government investigation that would waive attorney-client privilege for themselves and decline to pay legal fees of officers and directors. The converse treatment of organizations declining to do so was implied. Bar and business concern boiled up to outrage by 2005.⁷⁵ The Department of Justice backed off in a memorandum by Thompson's successor, Paul J. McNulty,⁷⁶ slightly raising the threshold of need before law enforcement insistence on such conditions of leniency. The bar and business (and Congressional friends) were not appeased. Sen. Arlen Specter (R. Pa.) introduced a bill, styled the Attorney Client Privilege Protection Act, in two sessions of Congress, but it did not pass.⁷⁷ The bills would have prohibited the practices of the Thompson-McNulty memoranda. But the Department of Justice became more circumspect in practice. A still further memorandum was issued by Mark Filip, successor to Thompson and McNulty, further limiting the reach of the previous memoranda.⁷⁸ The Department of Justice and Securities Exchange Commission (SEC) modified their enforcement manuals to prohibit its staff attorneys from prohibiting use of privilege waiver as a cooperation factor. The SEC manual also was

62. MASS. GEN. LAWS ch. 149, § 185 (West 2010).

63. 412 Mass. 469 (1992) (West 2010).

64. *Id.* at 473-74 (West 2010).

65. *Id.* at 475.

66. *Hutson v. Analytic Sciences Corp.*, 860 F. Supp. 6 (D. Mass 1994) (prediction of SJC respecting federal law as a source of Massachusetts public policy); *Shea v. Emmanuel College*, 425 Mass. 761 (1997) (report only to supervisor); *Flexner v. Tech Comm'ns Corp.*, 410 Mass. 805 (1995) (cooperation with government investigation).

67. 31 U.S.C. § 3729 et seq. (part of the Federal False Claims Act). The *qui tam* provision of the Massachusetts False Claims Act. MASS. GEN. LAWS, ch. 12, §§ 5A-5O (added by ch. 159 (H.B. No. 5300) of the General Court Second Annual Session with the appropriations for fiscal year 2010.)

68. Mass. Rule of Prof. Conduct 4.2.

69. 449 U.S. 383 (1981).

70. 436 Mass. 347 (2002).

71. *Id.* at 356-60.

72. *See, e.g.*, M.B.A. Ethics Opinion 02-03, and *Intergen N.V. v. Grina*, 2002 U.S. Dist. Lexis 5512 (D. Mass. 2002).

73. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, n. 7 (E.D. Mo.) (holding U.S. attorneys are not exempt from state ethical rules; Thornberg memorandum rejected).

74. Memorandum to Department of Justice heads of departments and United States Attorneys, *Principles of Federal Prosecution of Business Organizations*, January 20, 2003, http://www.justice.gov/dag/cftf/corporate_guidelines.htm.

75. *See, e.g.*, N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How The Adversary System of Justice is Being Destroyed*, *Washington Lawyer*, 32 (March 2005), available at <http://www.usdoj.gov/dag/dt+/business-organizations.pdf>.

76. December 12, 2006 memorandum, http://www.justice.gov/opa/pr/2006/December/06_odag_828.html. (last viewed March 2, 2010).

77. 110th Cong., S. 30; 111th Cong., S. 445.

78. *Principles of Federal Prosecution of Business Organizations*, available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

amended to prohibit asking for the waiver. Justice attorneys can do so, but only with high level approval. Thus, the struggle to shift the balance between access to justice for business and access to justice for the government and the people ended with a moderately shifted equilibrium.

Another area involving enterprise use or abuse of attorney-client privileges by enterprises is internal investigations. Self audit and reform by enterprises is an essential adjunct to regulation. But it can also lead to cover-ups of past misconduct and enable continuation. It must be understood, fundamentally, that the privilege applies to communications, not facts. But when information regarding facts is encased in after-the-fact privilege as to all communications, the facts become inaccessible secrets. To that extent access to justice is frustrated for government (the people) and private opponents. Judges are sometimes gulled by over-used privilege assertion and sometimes cut through them. Sometimes the privilege is rightly asserted and frustrated by skepticism against its applicability or a ruling that it has been waived. Waivers of privilege, whether voluntary or under duress, are often made with a hope of the court's not extending it — a hope sometimes realized, sometimes not.⁷⁹

Records Retention

Misnamed "records retention" programs (properly called records discard programs) became *de rigueur* in the 1960s and 1970s for corporations concerned about antitrust, tax and securities law investigations. Saving filing cabinet/warehouse space and cost was offered up as the rationale. Government itself joined the bandwagon, limiting records retention for itself and regulated companies. In the 1980s and 90s older electronic records were discarded to save disk storage space. Today's low cost electronic storage, compression techniques and more efficient search and retrieval methods create the need for a new rationale.

Today, many court cases and rules center on responsibilities to hold electronic information, make it available for discovery and avoid spoliation. Existing rules are being elaborated to refine burdens of storage, access and reconstruction and remedies for deemed spoliation. Such rules create a new realm of costly and delaying satellite litigation that once attended alleged Rule 11 violations and lawyer disqualification. Underfunded parties simply do not get information they want and are bedeviled by excessive information demands put upon them. Duties of counsel to confer and try to agree on short cuts that reduce burdens without prejudice to access to justice are the best a justice system can do, so far, to mitigate

the burden. As the system labors under the load, the attractions of alternative dispute resolution programs grow apace. European civil litigation systems have long managed with little or no discovery, but the United States, while limiting discovery generally,⁸⁰ has rejected the European models.

The new official rationale may, as a last resort, be a return to the longstanding true rationale — concern for individual and collective privacy. The privacy concern is increased by governments' increasing ability and will to filter massive amounts of electronic communications and storage. China requires internet service providers to hold content of communications for 60 days to enable selective access by government for purposes of detection and punishment of deemed crimes.⁸¹ In the United States administrative subpoenas for records, bypassing judicial scrutiny,⁸² are ever growing at federal and state levels. Foreign persons, individuals and governments, once content to accept the reality that the distributed network of internet communications passes via the United States to a large degree, now work to bypass the United States as network infrastructure grows elsewhere. But when that growth comes to include sophisticated intrusion methods abroad comparable to those used here, new bypasses will have to be developed, or rediscovered, for secrecy and privacy. Development of super-cryptography; narrowing exclusive circles of trusted information transmission, storage techniques and restraint from many storage and transmission entirely are possible reactions to intrusion.⁸³ All of these methods produce what may be called societal and economic inefficiencies, including a defeat of the public protection goals that inspired the intrusions in the first instance.

Science

Even the vaunted openness of science yields to temptations for secrecy (a) to protect commercial trade secrets and (b) for the benefit of researchers' reputations and to protect their research from abuse. Racing to publish a new thesis, well supported by experimental data, is the paradigm of friendly, professional competition in science. However, the need to spend time arranging funding, conducting the experiments and overcoming pitfalls and false starts limits publication speed. Ethical norms among collaborators and even among competitor-colleagues respect secrecy. Unauthorized mid-course revelations of research progress and setbacks not only jeopardize the lead researchers' being-first ambitions, but risk cluttering science with incomplete, even misleading data.

There is a counter-trend of greater openness found in the Free and Open Source (FOSS) movement regarding computer science

79. Selective waiver has been rejected in most circuits. *See, e.g.*, In re Qwest Comm'ns Int'l, Inc., 420 F.3d 1179 (10th Cir. 2006); In re Columbia/HCA Health Care Corp. Billing Practices Lit'g'n., 293 F.3d 289 (6th Cir. 2003); United States v. Mass. Inst. Tech., 129 F.3d 681 (1st Cir. 1977). But some courts will enforce an agreement between the government and a private party that a waiver limited to the government's investigation will not waive privilege as to a third (private) party. *Diversified Indus., Inc. v. Meredith*, 572 F.3d 596 (8th Cir. 1977) (*en banc*); *Saito v. McKesson HBOC Inc.*, In re IPO Security Litigation, 249 F.R.D. 457 (S.D.N.Y. 2008); No. Civ. A. 18553, 2002 WL 31657622 at *T7 (Del. Dir. 11/13/02). *See, also*, Joseph P. Savage, Jr. et al., Rule 502: A Way to Limit Privilege Waiver in Government Investigations 17(1) JL. NEWSLETTERS/BUS. CRIMES BULL/ (Sept. 2009).

80. The 1980s federal court pilot programs of reduction of expense and delay matured as a universal rule in 1998 when the Supreme Court received Congressional approval of a revised Fed. R. Civ. P. 26. Later, the rule was amended December 1, 2006, to include electronic discovery features at 26(f).

81. September 25, 2000 State Council Order No. 292, Art. 14, available at

<http://www.cecc.gov/pages/virtualAcad/explaws.php>.

82. These include but are not limited to federal administrative subpoenas under Pub. L. 95-511, 92 Stat. 1783, 50 U.S.C. Ch. 36, enacted October 25, 1978 in the post Watergate era to curb abuses, and later amended via the Patriot Act to allow greater intrusive of monitoring and search and also expanded by Executive Branch self help) and a recently enacted Massachusetts law, for expanded use of such subpoenas, MASS. GEN. LAWS ch. 276 § 1B, allowing administrative subpoenas to ISPs and phone companies for obtaining customer, content, usage and source/usage data (per ch. 205, section 4, of the Acts of 2008). This provision was an adjunct to a must-pass child protection act but was not limited to investigation of crimes against children (Jessica's Law).

83. In the 18th and 19th Centuries, the Rothschild family, financiers to kings, moved information (and funds) via family members only. Crime syndicates of the 19th and 20th Centuries used the Mafia's *omerta* code. Lawbreakers label informer colleagues as snitches, rats, canaries and other locutions not quotable in a family-friendly law review. But the law protects the informer's identity. *See, e.g.*, *Comm. v. Swenson*, 368 Mass. 260, 275-78 (1975). Punishment for the informer's

and its applications. The movement has spread to a broader sensibility of opening science and learning generally.⁸⁴ The Food and Drug Administration and National Institutes of Health are considering rules that would condition government funding on publication in no-cost, or low cost, free access channels no later than a year after first publication in high cost, limited access channels. Some universities are now publishing curricula content on line without fear of emptying their classrooms of tuition-paying students. Recently, a movement of scientists has developed to share work in progress data on the Internet.⁸⁵

III. PRIVACY AND PRIVILEGES OF INDIVIDUALS

Personal privacy expectations of various kinds are enshrined in the 4th and 5th Amendments to the United States Constitution and similar state law provisions.⁸⁶ Arguably, the 9th and 10th Amendments also protect privacy.⁸⁷ And the 14th Amendment applies most of the federal Bill of Rights protections, arguably all, to states.⁸⁸ The word “privacy” does not appear, per se, in the United States Constitution or its amendments. Privacy protection nevertheless is granted when its benefits outweigh benefits of public and private litigants’ access to information.

Further privacy protections by way of privilege or evidence disqualification are found in the common law and in state statutes relating to attorney-client communications,⁸⁹ marital and parent-child communications,⁹⁰ clergy communications,⁹¹ mediation,⁹² medical examinations and communications,⁹³ and in limitations on discovery obtainable from the Commonwealth in rape cases.⁹⁴ Absence of

the privileges can lead to abstention from recourse to the justice system and substitution of self-help remedies to abate grievances or for retribution. [I do not understand this point. For example the spousal privilege, when asserted, keeps the witness spouse from being compelled to testify. In other words, that witness is not available for trial. How would removing that privilege “lead to abstention from recourse to the justice system?”] Privileges enable and encourage access to the remedies of civil and criminal law. But in the interest of victims’ and potential victims’ access to justice, privacy gives way in connection with reporting gunshot wounds,⁹⁵ certain crimes,⁹⁶ domestic abuse,⁹⁷ child endangerment⁹⁸ and sex offenses.⁹⁹

Also, privilege or disqualification may yield when in conflict with the right of confrontation of an accused person.¹⁰⁰ Privileges and disqualifications are closely limited to the minimum necessary intrusion on the justice system for fulfilling another public purpose and to prevent abuse. Examples include the crime fraud exception to attorney-client privilege,¹⁰¹ waiver (deliberate or inadvertent),¹⁰² and miscellaneous situations (e.g. joint clients, decedent intent, etc.)

A recent Boston case presented an ironic version of protection of privacy of an extortion victim. A businessman extorted by a prostitute, who threatened to reveal her former liaisons with him, turned to the Federal Bureau of Investigation and United States Attorney to apprehend and indict her, but also persuaded the United States Attorney and ultimately the United States District Court, to approve a sentence well below the lower end of the federal sentencing guidelines range conditioned on her continuing silence.¹⁰³ The privacy interest of the victim outweighed the public interests in assessing the

own crimes is lightened for such cooperation under sentencing guidelines.

84. See, e.g., http://eu.wikipedia.org/wiki/Creative_Commons regarding the Creative Commons organization founded by Prof. Lawrence Lessig (then of Stanford Law School) to enable creators of all kinds to build legally on creations of others and develop an ideology of the “commons” in the information age.

85. Carolyn Johnson, *Out in the Open: Some Scientists Sharing Results*, *Boston Globe*, A1, 10 (Aug. 21, 2008). See also the scientific aspects at www.OpenNetWare.org.

86. See, e.g., <http://library.bldrdoc.gov/newsarc/2007//.html>; Nature Precedings, <http://precedings.nature.com>; see also, Public Library of Science, <http://www.plos.org/>; Science Commons, <http://sciencecommons.org>; Tenth Amendment Center, *Right to Privacy*, <http://www.tenthamentendmentcenter.com/2008/01/21/the-constitution-and-the-right-to-privacy/#> (last viewed March 2, 2010).

87. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (concurring opinions Justices Goldberg, Warren and Brennan).

88. In *Roe v. Wade*, 410 U.S. 113 (1973), the district court 314 F. Supp. 1217 (N.D.Tex. 1970) granted relief to plaintiff seeking an abortion on the basis of the U.S. Constitution’s Ninth Amendment transferring the state’s statutory ban, but the Supreme Court affirming declined to adopt a Ninth Amendment rationale but instead declared abortion as a fundamental right inherent in the Fifth, Ninth and/or Fourteenth Amendments (but ultimately protectable via the due process clause of the Fourteenth Amendment) or without any such anchor, the regulation of which could be subject to strict scrutiny.

89. *Suffolk Const’n Co. Inc. v. Div. of Capital Asset Management*, 449 Mass. 333 (2007).

90. MASS. GEN. LAWS ch. 233 § 20(1), (2) and (4) (West 2010). The term ‘privilege’ is used loosely in this instance. The statute bars compulsion of the spouse’s or a child’s testimony, i.e. makes such witnesses unavailable. A husband or wife might hesitate to seek court or police aid absent such protection against compelled spouse or child testimony. [This is an incorrect statement of the law. I suggest simply deleting it rather than explain the difference between spousal privileges which can be waived, and spousal communications that cannot be waived.]

91. MASS. GEN. LAWS ch. 233 § 20A (West 2010).

92. MASS. GEN. LAWS ch. 233 § 23C (West 2010).

93. It is a common law protection sought in vain in Massachusetts statutes. But the statutes do protect medical peer review, the psychotherapist-patient privilege, and social worker-client communications. See MASS. GEN. LAWS ch. 111 § 204 (a) (West 2010); MASS. GEN. LAWS ch. 233 § 20B (West 2010); MASS. GEN. LAWS ch. 112 § 135 (West 2010).

94. MASS. GEN. LAWS ch. 233 § 20J5 (West 2010).

95. MASS. GEN. LAWS ch. 112 § 12A (West 2010).

96. MASS. GEN. LAWS ch. 268 § 20J (West 2010) (rape, murder, manslaughter, armed robbery).

97. It is voluntary for victims and witnesses to report but police officers must file a report. MASS. GEN. LAWS ch. 209A § 6 (7) (c) (West 2010).

98. MASS. GEN. LAWS ch. 119 § 51A (2008) (some parts became effective July 8, 2008, expire July 1, 2010 and others expire July 1, 2011).

99. MASS. GEN. LAWS ch. 6 §§ 178C-1780 (2006). See, generally, Daniel Less, *The Evolution of the Massachusetts Sex Offender Registry System*, 91 (2) MASS. L. REV. 67 (July 2008).

100. The long evolution of this balance includes *Commonwealth v. Stockhammer*, 409 Mass. 867, 880-885 (1991); *Commonwealth v. Bishop*, 416 Mass. 168, 181-183 (1993) (procedure for determining whether to over-ride privilege claim); *Herridge v. Bd. Regs’n Med.*, 420 Mass. 154, 156-57 (1995) (Stockhammer limited to criminal proceedings); *Commonwealth v. Fuller*, 423 Mass. 216 (1996) (same) and finally, *Commonwealth v. Dwyer*, 448 Mass. 122, 139-147 (2006) (setting a new protocol for invading any privilege in aid of the confrontation right after a rigorous screening of need).

101. *Purcell v. Suffolk Dist. Att’y*, 424 Mass. 109, 112 (1997).

102. *Judge Rotenberg Educ. Ctr. Inc. v. Dept. of Mental Retardation*, 424 Mass. 430 (1997).

103. http://www.boston.com/news/local/breaking_news/2009/02/blackmailing-dr.html (last viewed March 2, 2010) (“Blackmailing Prostitute Forbidden to Release Victim’s Name”). Judge Wolf, in approving the conditional sentence reduction, noted the victim privacy protection provisions of the Crime Victims Act of 2004, 48 U.S.C. § 377 (2006).

justice system generally and in weighing the issue of class/wealth discrimination where ordinary “Johns” are regularly shamed by publicity as police strive to discourage such commerce.

Enhancements of federal privacy protections in the last decade include the Health Insurance Portability and Accountability Act,¹⁰⁴ the Gramm Leach Bliley Act,¹⁰⁵ and bank secrecy acts,¹⁰⁶ with new protections pending for genetic information.¹⁰⁷ The existence of these protections promotes seeking access to vital services, including justice, without the fear of revelation of protected information. But over the last four decades technology improvements have created opportunities for private enterprises to profit by collecting and selling personal data and for governments to increase efficiency and offer greater public protection through enhanced data collection and analysis. Before and after 9/11, the ascendancy of efficiency and security over privacy had produced efforts to create a federal registry of virtually all the population. Submission to such registration would be a condition of voting, driving, access to federal buildings and benefits, domestic and international travel, telecommunication, banking and credit, taxation and employment. Ideally the information would be limited to government officers using it for proper purposes, but in practice, denying it to private adversaries can enhance access to justice in some situations and hurt it in others. There is also the fear of data subjects that if information is once collected with well balanced privacy-protective conditions or usage, the conditions will erode over time or yield immediately to new assaults. However, there are state law movements in the direction of greater privacy protection, including legislation to report data breach¹⁰⁸ and regulations governing privacy protection standards of business, promulgated by Massachusetts Office of Consumer Affairs and Business Regulation.¹⁰⁹

The ultimate publicly secured secret is the secret ballot.¹¹⁰ Access to political justice would be denied rather than enhanced by the fact or appearance of breach of such secrecy. On the other hand, a ballot system needs quality control means to find and remove error and fraud. Such means necessarily invade secrecy, hopefully in ways that do not make the voters fearful that their ballot privacy is compromised. The ballot system should involve paper and electronic validation records as supplements to electronic balloting raw counts.¹¹¹

104. Pub. L. 104-91, 110 Stat. 1998 (1996) (amending 42 U.S.C. § 1301 et seq. and authorizing the Department of Health and Human Services to adopt implementing regulations which were ultimately issued at 45 CFR part 160 and part 164, sub. 1 acts 17 and in 2002 after an extended and stormy six year period of development).

105. The Financial Privacy Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (1999) (providing financial privacy rules in 15 U.S.C. §§ 6801-09).

106. *See, e.g.* The Currency and Foreign Transaction Act of 1970, with amendments at 37 U.S.C. §§ 5311-5330 and 12 U.S.C. §§ 1818 (s), 1829 (b) and 1951-59 (West 2010).

107. *See* Mark A. Rothstein, *Keeping Your Genes Private*, SCIENTIFIC AMERICAN, (September 2008).

108. Standards for the Protection of Personal Information for Residents of the Commonwealth, MASS. GEN. LAWS ch. 93H (West 2010).

109. *Id.*

110. *See generally* MASS. GEN. LAWS ch. 50-55 (West 2010); 950 CMR 48-60. The secret ballot system is known as the Australian Ballot elsewhere and in the United States as the Massachusetts Ballot. It is now a universal practice in the United States, the country’s (and colonial predecessors’) historical oral ballot being long forgotten, except in the shrinking realm of town meetings.

Fusion Centers

Further invasion of privacy to a degree once unimaginable is developing through federal and state data fusion centers aided by the Real ID Mandate,¹¹² biometric identifiers, ubiquitous video/audio monitors and administrative agencies secret access to telecommunication channels. In the wake of the 9/11 attacks, the Department of Defense’s Advanced Research Projects Agency developed a Total Information Awareness¹¹³ project to capture nascent terrorist activity information. The project grew into an exercise of building hay stacks around needles. It was implemented in pilot programs with city police chiefs, court administrators, motor vehicle registration bureaus, district attorneys, public defenders and other state and federal stake holders. It evolved through several stages into a series of data fusion centers, under the August 2005 Global Justice Information Sharing initiative.¹¹⁴ Department of Homeland Security Fusion Center Guidelines were published.¹¹⁵ The project Guidelines encompass data acquisition uniformity from all agencies within a state regarding all people within the state and with interstate information exchanges. Private companies such as Walt Disney, Fidelity Investments, Microsoft and Archer Daniels Midland have participated as voluntary contributors of information.¹¹⁶

The data fusion centers project presents a list of audit categories in the information collection matrix including agriculture, food, water, environment, banking/finance, chemical industry, hazardous materials, criminal justice, retail, real estate, education, emergency services, energy, government, health, public health services, social services, transportation, hospitality-lodging, information — telecom, military facilities, defense industry, postal-shipping, private recovery and public works.¹¹⁷ Two of the categories, health and education, include day care centers, preschools, colleges and universities, technical schools, mental health facilities, physician patient information, local hospitals, private emergency medical services and veterinarians.¹¹⁸ Perhaps it goes too far to invade the privacy of the family dog.

The Department of Homeland Security reported, in September 2006, participation [in what] by thirty eight state and local Information Fusion Centers (including the Massachusetts Fusion Center) with three hundred eighty million dollars in federal grants. Privacy

111. *See, e.g.* National Committee for Voting Integrity, <http://votingintegrity.org> (last viewed March 2, 2010).

112. Department of Homeland Security, *Real ID Rule*, http://www.dhs.gov/files/laws/gc_1172765386179.shtm (last viewed March 2, 2010).

113. Department of Defense, *Total Information Awareness Update*, <http://www.defense.gov/releases/release.aspx?releaseid=3625> (last viewed March 2, 2010). Operations of the program as implemented by Defense Advanced Research Projects Agency per se were discontinued by Congressional directive in 2003, but clones of the program persist in other agencies.

114. Global Justice, *Justice Information Sharing*, <http://it.ojp.gov/default.aspx?area=globalJustice> (last viewed March 2, 2010).

115. Justice Information Sharing, *Fusion Centers and Intelligence Sharing*, <http://www.it.ojp.gov/default.aspx?area=nationalInitiatives&page=1181> (last viewed March 2, 2010).

116. Electronic Privacy Information Center, *Information Fusion Center on Privacy*, <http://epic.org/privacy/fusion/> (last viewed March 2, 2010).

117. Appendix C to Dept. of Homeland Security Fusion Center Guidelines, *available at* <http://epic.org/privacy/fusion/default/html>.

118. *Id.*

protections within the information infrastructure amount to little more than lip service.

Secrecy of membership lists of organizations and donors can be vital to protection of rights of speech, assembly and petition and have been protected.¹¹⁹ Communications between individuals, as part of organization activity or otherwise, are normally regarded as within this privacy range. But the 2005-2006 amendment of the Foreign Intelligence Surveillance Act (FISA), as part of the Patriot Act of 2001,¹²⁰ allowed for a continuing broad reach of administrative subpoenas and subpoena-like “national security letters,”¹²¹ and government storage of the acquired information without notice to targeted persons. States also use administrative subpoenas.¹²²

Recently, the United States Supreme Court upheld Indiana’s voter identification statute.¹²³ This was followed by moves in other states to create similar barriers to counter alleged dangers of fraud.¹²⁴ Exaggeration of the fraud dangers, fear of voting proclivities of disadvantaged people and excessive counter-measures may have limited access to political justice. Further privacy invasive federal and state measures¹²⁵ are expected to bring America closer to a national identification card, absence of which would make one a Captain from Köpenick.¹²⁶

IV. SECRECY AND LYING; DENIABILITY OF FACTS AND EVASIONS OF LAW REFORM

Secrecy and privileges often present an uncomfortable impression of aiding lies of omission. Judges will suppress and sanction comment on invocation of a privilege in a criminal case but the jury wonders what the witness is trying to hide and limiting or curative instructions do not always limit or cure. Secrecy is also invoked as a band-aid approach to larger issues of discrimination. CORI limits access to records of minor offense convictions after a given time and this enables a person to live down a past indiscretion free of stigma. But that person still has to answer employment, insurance, and public office eligibility questionnaires at later dates, and the ability to say “no record” is of little help. At times of great discrimination against racial minorities and gay people, persons who could effectively “pass” as white or straight were tempted to do so and sometimes did. The United States military, “don’t ask, don’t tell” policy evades the need for confrontation and reform. Public policy can often require that insurance companies live up to their broad

risk-spreading *raison d’être* by not excluding or penalizing people with genetic dispositions or blood types, and sometimes laws so provide.¹²⁷ More often, laws stop at suppressing the collection of such information.

Two remarkable books by Harvard ethics lecturer Sissela Bok of some three decades ago, “Lying & Moral Choices in Public and Private Life” (Pantheon Books 1978), and a follow up book, “Secrets: On the Ethics of Concealment and Revelation” (Pantheon Books 1982), show well the correlation of secrecy/privacy and lying. In *Lying* Dr. Bok sets out a taxonomy of lying issues from mortal sin analysis,¹²⁸ to white lies, including, *inter alia*, justifications, protective and paternalistic lies, and lying to liars. *Secrets* explores, *inter alia*, secrecy, power and accountability, confessions, moral choice, secret societies, whistle blowing and investigative journalism. Like this article, it traverses the downslope from secrets of state, through business/professional secrecy to privacy. One example from *Secrets* gives a chilling *deja vu* moment—a description of a strategy in Lyndon B. Johnson’s 1964 re-election campaign. Johnson presented himself as a peacemaker and attributed war-mongering to opponent Barry Goldwater, while hiding planned escalation of the Vietnam War for the duration of the election season.¹²⁹ This prefigured the forty years later run-up to the Iraq invasion by a later Commander-in-Chief of another political party. A pattern of such deception in national, state and local elections breeds the cynical view to pass up elections since “Most politicians are so similar that it doesn’t matter who gets elected.”¹³⁰ A greater degree of sunshine in government even at the risk of some loss of “efficiency” of government operations would increase effectiveness of electoral justice. It would also assure a greater degree of public consensus before drastic actions, even deter some actions, and would, overall, improve the quality of collective and individual decisions.

In this age, even the sacrosanct duty of lawyer confidentiality yields to demands of justice system effectiveness. The lawyer’s duty of confidentiality goes well beyond the realm of evidentiary privilege. The Model Rule of Professional Conduct promulgated by the American Bar Association in the 1980s and its predecessors, the Code of Professional Responsibility of the 1970s and the Canons of Ethics of 1911, and the common law, mandated an extremely rigorous lawyer protection. But the Massachusetts Rules of Professional Conduct, as adopted by the Supreme Judicial Court in 1998 and

119. N.A.A.C.P. v. Patterson, 357 U.S. 449 (1958).

120. Pub. L. 107-56, §§ 201-225 (2001) (containing a four year sunset that was substantially extended in 2005); see Pub. L. 109-177 (2005).

121. These letters to ISPs, phone companies, libraries and other holders of information, enable federal agencies to take information concerning single or multiple targets and forbid the information providers from informing the targets of the taking. Section 505 of the USA Patriot Act, 18 U.S.C. § 2709.

However, in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), a portion of the Patriot Act forbidding a recipient of a national security letter from discussing it with anyone was held unconstitutional.

122. See, e.g. Jessica’s law (discussed under Enterprises/Records Retention, *supra*, n. 82) — a piece of 2008 Massachusetts legislation targeting child molesters that also included a general power of public protection agencies to access internet service provider and phone company records and forbidding notice to targets, mostly without warrants or other judicial gate keeping.

123. *Crawford v. Marion County Election Bd*, 553 U.S. 181 (2008)

124. *Id.*

125. See *supra* text accompanying note 82; See also Department of Homeland Security, *Real ID Final Rule*, http://www.dhs.gov/files/laws/gc_1172765386179.shtm (last viewed March 2, 2010) (regarding Department of Homeland Security,

forcing a unified national drivers’ license program on all states); Electronic Privacy Information Center, *National ID and the Real ID Act*, <http://epic.org/privacy/identity-cards/> (last viewed March 2, 2010) (reporting pushback by some states).

126. In 1906 Germany, Wilhelm Voigt, who had recently been released from prison and without adequate identity papers to travel or work, pretended to be a Prussian officer, commandeered soldiers and occupied Köpenick City Hall to get an identity card. A play and several movies celebrated the event, satirizing the stereotypical authoritarian Germany of the time (and later). The Kaiser was amused by the incident and pardoned Voigt. Less amusing are today’s dependencies on remembering passwords, avoiding card loss and otherwise protecting oneself against identity theft and maintaining access authorizations.

127. See, e.g., MASS. GEN. LAWS ch. 151B, §4 (19) (West 2010). For other examples of control of health data collection see MASS. GEN. LAWS ch. 66A, § 2, ch. 111, § 70E.

128. SISSELLA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1979). The work’s Appendix has excerpts of works by Augustine, Agricola, Bacon, Grotius, Kant and other philosophers/theologians and applies their teachings throughout to various forms of lying.

129. *Id.* at 170-75.

130. *Id.* at 175.

as subsequently amended, go well beyond the traditional contours of the crime-fraud exception to allow and even require lawyers to reveal client confidences.¹³¹

Lawyers and accountants also have duties under federal securities laws to report violations of law of their clients or at least to make a noisy withdrawal.¹³² Arguably, those duties produce a new lawyer duty to give a Miranda warning to clients at the outset of an engagement. Reporting duties are not new for accountants because their split obligations to the client and the public are inherent in the Certified Public Accountant appellation. Perhaps clients of lawyers had too much confidentiality protection and the time has come to adjust the perspective of a lawyer's societal role.

V. CONCLUSION

We began with the highest level of state secrets and coursed down to the precious segments of privacy left to individuals, with a variety of legislative, executive and business secrets in-between. At each level we find assertions of an access to justice interest hampered unduly by excesses or inflexibility of the particular system of secrecy protection, and, conversely, proponents of secrecy asserting excessive intrusion by government, enterprises or individuals. The obvious resolution is to trim down the excess and add some flexibility to achieve proper balance. In doing so the trimming and adding must not engender a burden of complexity that itself could hamper access

to justice. Recognize, too, that in some instances access to justice can be promoted by a limited but reliable system of secrecy that encourages people to seek such access rather than shun it. These are the bill-by-bill and rule-by-rule obligations of legislators and executive branch officers and case-by-case obligations of judges.

Generally, governments deserve less secrecy protection than they now have, individuals deserve more and, in-between, enterprises should have less secrecy to the extent they are extensions or *de facto* surrogates of government or affected with a public interest, but should have more secrecy (privacy) to the extent they are extensions of personal striving.

Dr. Bok concluded *Secrets* saying (in 1982):

But why accept this course [decreasing personal privacy] as inevitable and decreasing access to government information as inevitable. We need not hasten to give up hard-earned freedoms through indifference or panic. The very hostilities and technological advances that threaten security also challenge us to reassess the complex role of secrecy in containing or escalating their danger. Such a re-examination can spur collective uses of information for genuine security, and help avert spreading governmental controls over secrecy and openness that prove injurious to nations and stifling for the free choices of individuals in their own lives.¹³³

131. Mass. R. Prof. C Rules 1.6(b), 3.3, 4.1(b) and 8.3.

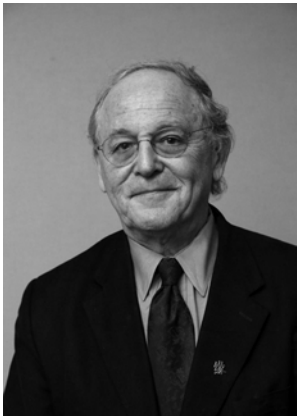
132. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (West 2010) (SEC

implementing rules appear at 17 CFR Part 205).

133. SISELLA BOK, *SECRETS*, 285 (1982).

ACCESS TO JUSTICE IN JUVENILE COURT

By the Hon. Jay D. Blitzman



The Hon. Jay D. Blitzman was appointed as an Associate Justice of the Massachusetts Juvenile Court in June of 1996 and appointed as First Justice of the Middlesex County Juvenile Court in May of 2008.

This article addresses procedural concerns regarding access to legal services and systemic service delivery issues affecting children and families. I address access to justice issues in terms of legal entitlements and court context while attempting to frame larger questions concerning the relationship of the systems that affect practice and the administration of justice. My focus is on reporting without resolving in the hope that the endeavor will contribute to an understanding of the complexity of the subject and stimulate discussion.

THE GAULT REVOLUTION AND ITS IMPLICATIONS

“The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts”¹ This critique, comparing the prosecutorial arm of the Inquisition to juvenile court practice might appear hyperbolic, but as the United States Supreme Court concluded in *In re Gault*, 387 U.S. 1 (1967), the trauma inflicted upon children detained for indeterminate periods, ostensibly for treatment, was palpable. Prior to 1967, children removed from parents upon allegations that they were not being adequately cared for, or were deemed to be “wayward” or “incorrigible” and youth accused of crime were treated similarly. *In re Gault* graphically depicts a system designed with the noblest of intent. But, over time, the houses of refuge and shelter to treat and care for children “devolved” into training schools and other large locked facilities. Court procedure was characterized by the lack of due process. History proved that

the absence of substantive standards did not necessarily result in the careful, compassionate and individualized treatment that had been originally envisioned.² In concluding that the “condition of being a boy does not justify a kangaroo court,”³ the *Gault* court quoted Justice Brennan’s observation in *Kent v. United States* that “[t]here is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁴

Francis Gerard Gault had been committed to the Arizona Industrial School at age fifteen for an indeterminate period until age twenty-one for making a telephone call of the indecent adolescent variety.⁵ Gault did not have an attorney and there was no fact-finding or trial; the mere allegation sufficed. The judge acted as the inquisitor, although it was never even established what was said during the offending telephone call.⁶ An adult charged with comparable conduct would have faced a maximum jail sentence of sixty days or a fine between five and fifty dollars.⁷ The *Gault* court recognized the inherent danger of focusing on treatment and assessment prior to adjudication at the expense of due process. The court decreed that juveniles have the basic due process rights of notice, appointment of counsel if indigent, the right against self-incrimination, confrontation and cross-examination, and the right to have a record of the proceedings from which a meaningful appeal could be taken.⁸

Writing for the *Gault* majority, Justice Fortas wrote that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁹ In spite of such soaring rhetoric, the parameters of due process protection at issue in *Gault* were limited to the adjudicatory phase of juvenile proceedings. The crucial issues of pre-trial detention and disposition were not reached.¹⁰

Justice Black forcefully observed in his concurrence that “[w]here a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then . . . confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.”¹¹

Dissenting in part, Justice Harlan argued that juvenile due

1. *In re Gault*, 387 U.S. 1, 18 (1967) (quoting Dean Pound, *Foreward to YOUNG, SOCIAL TREATMENT IN PROBATION & DELINQUENCY*, at xxvii (1937)).

2. *See id.* at 18.

3. *Id.* at 28.

4. *Id.* at 28 (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)). In *Kent* the U.S. Supreme Court had decreed that youth could not be summarily transferred for serious offenses to adult criminal courts without a modicum of due process. For further discussion of *Gault*, see Jay D. Blitzman, *Gault’s Promise*, 9 BARRY L. REV. 67 (2007).

5. *Gault*, 387 U.S. at 4.

6. *Id.* at 4-9.

7. *Id.* at 8-9.

8. *Id.* at 31-58.

9. *Id.* at 13.

10. The majority explained: “[w]e do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile ‘delinquents.’ For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.” *Id.* at 13.

11. *Id.* at 61 (Black, J., concurring).

process protections should be limited to notice, appointment of counsel if indigent, and maintenance of a written record.¹² Justice Stewart, in his dissent, wrote “[t]he inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts.”¹³

Some scholars believe that the court may have been moving in the direction of affording the full panoply of due process protections to juveniles, but that “[t]ime ran out on Justice Fortas before he could carry any further plans to fruition.”¹⁴ In 1968, Justice Fortas, who also wrote the majority opinions in *Kent*¹⁵ and *Tinker*,¹⁶ was nominated to succeed Earl Warren as Chief Justice, but in April of 1969 resigned following the revelation that while sitting on the Court he had accepted a fee from a former client who was under federal investigation for securities fraud.¹⁷ The belief that *Gault* heralded a due process revolution in juvenile justice was chilled four years later in *McKeiver v. Pennsylvania*.¹⁸ In *McKeiver*, a reconstituted court with new justices replacing a number of the members of the Warren Court held that trial by jury in the adjudicative stage was not a constitutional requirement. Commentators have posed the rhetorical question: “While passing harsh judgment on the efficacy of the juvenile justice system, does *McKeiver* also seek to resurrect images of the benevolent, paternalistic juvenile court judge, which *Gault* had rejected only four years earlier?”¹⁹

In choosing not to adopt a bright line rule applying the Fourteenth Amendment to delinquency proceedings, the *McKeiver* Court allowed each state the discretion to define the contours of its juvenile system. Under *McKeiver*, each state determines whether or not juveniles are entitled to trial by jury and the manner in which decisions are made as to whether juveniles accused of violent crime should be tried as adults. The right to be treated as a juvenile or

a child is statutorily conferred and can be statutorily abrogated.²⁰ Consideration of access to juvenile court services and related systems must be viewed in a national context as we effectively have fifty-one different approaches to the problem.²¹ The *parens patriae*-due process debate of the *Gault* justices reverberates to this day.

JUVENILE JUSTICE IN MASSACHUSETTS

The modern Massachusetts juvenile court has extended *Gault*'s due process protections and has made great strides in ensuring that the vision of Justices Fortas and Black is more than aspirational. In 1992, Massachusetts created a statewide juvenile court.²² Prior to 1992, there were daily juvenile sessions in Boston, Springfield, Worcester and Bristol, compared to sessions one or two days a week generally in the District Court system. Since 1992, the Juvenile Court has made significantly reduced case backlog in care and protection cases²³ and has developed a juvenile court clinic system that is a national model.

Recognizing the consequences of juvenile and youthful offender adjudications, Massachusetts is one of roughly ten states that afford juveniles the right to jury trials in all delinquency cases.²⁴ This right also applies in Massachusetts to Children In Need of Service (CHINS) cases.²⁵ Juveniles between the ages of seven and seventeen who are accused of being delinquent and face the possibility of commitment to age eighteen to the Department of Youth Services (DYS) for violating town by-law or state statute have the right to a six person jury.²⁶ Juveniles accused of being youthful offenders in the Massachusetts “trial first” system who face a minimum indeterminate commitment to DHS until age twenty-one, or can receive the same sentence an adult could receive, including life imprisonment, have the right to a twelve person jury.²⁷ The Massachusetts Rules of Criminal Procedure expressly apply to all delinquency and

12. *Id.* at 72 (Harlan, J., concurring in part and dissenting in part).

13. *Id.* at 79 (Stewart, J., dissenting).

14. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN & THE LAW, DOCTRINE, POLICY & PRACTICE 1105 (3d ed. 2007).

15. *See supra* note 4.

16. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (upholding the right of students to wear black armbands in school protesting the war in Vietnam as legitimate expression of First Amendment rights and holding that students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate).

17. ABRAMS & RAMSEY, *supra* note 14.

18. 403 U.S. 528 (1971).

19. ABRAMS & RAMSEY, *supra* note 14, at 1123.

20. *See, e.g., Commonwealth v. Quincy Q.*, 434 Mass. 859, 865 (2001) (“A State that elects to commit to its judiciary the responsibility of determining whether [an individual] will be tried as a juvenile or an adult . . . must observe only the constitutional due process right of essential fairness.”) (*quoting Commonwealth v. Wayne W.*, 414 Mass. 218, 223 (1993)); *see also Kent*, 383 U.S. at 557; *Breed v. Jones*, 421 U.S. 519, 537 (1975) (“[T]he [U.S. Supreme Court] has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.”).

21. For an analysis of each state’s juvenile justice system, see National Center for Juvenile Justice, NCJJ State Juvenile Justice Profiles, <http://www.ncjj.org/stateprofiles/> (last visited Apr. 15, 2010).

22. *See MASS. GEN. LAWS ch. 211B, § 1(2008)*; MASS. GEN. LAWS ch. 218, § 57 (2008).

23. The Juvenile Court is also in the process of drafting a Standing Order to address the problem of “rolling trials” in abuse and neglect cases with the goal

of facilitating reunification or permanent placement. *See Adoption of Rhona*, 57 Mass. App. Ct. 479 (2002).

24. *See* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILDREN, FAMILY & STATE: PROBLEMS & MATERIALS ON CHILDREN & THE LAW 805 (5th ed. 2005) (*citing* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 582 (1998)). *See also* Javier M. Vasquez, *Appropriate Treatment for Juvenile Offenders: Juvenile Justice System v. Jury System*, 1 BARRY L. REV. 185, 207 n.208 (2000) (collecting statutes of sixteen states allowing for jury trials, although some only allow for same in special circumstances); Linda A. Szymanski, *Juvenile Delinquents’ Right to a Jury Trial*, NCJJ SNAPSHOT, vol. 7, no. 9 (National Center for Juvenile Justice, Sept. 2002) (stating that thirty states have no right to a jury trial, ten provide for a jury trial, and eleven provide for a jury trial in special circumstances).

25. MASS. GEN. LAWS ch. 191, § 39E (2008).

26. MASS. GEN. LAWS ch. 191, § 56(e) (2008).

27. *See* MASS. GEN. LAWS ch. 119, § 55B (2008), and St. 1996, c. 200, § 5, amending MASS. GEN. LAWS ch. 119, § 58. *See also* MASS. GEN. LAWS ch. 119, §§ 54, 56(e) (2008). Prior to the 1996 amendment, juveniles who had attained the age of fourteen and were accused of offenses that threatened or resulted in the infliction of serious bodily harm, or were committed to the Department of Youth Services and accused of a felony could be subjected to a pre-trial transfer hearing to determine juvenile or adult trial venue. In 1996, the state’s transfer statute, MASS. GEN. LAWS ch. 119, § 61, was abolished and the Youthful Offender statute was enacted. *See* St. 1996, c. 200. Juveniles who have attained the age of fourteen and are accused of murder are automatically tried in the Superior Court; the Juvenile Court retains jurisdiction in all other cases and upon prosecutorial motion, juveniles can be indicted as alleged youthful offenders under the transfer hearing criteria or if they have been accused of an enumerated firearm offense. *See* MASS. GEN. LAWS ch. 119, §§ 54, 72B, 74 (2008).

youthful offender proceedings.²⁸ Massachusetts is also apparently in a minority of states explicitly to provide for bail in juvenile cases.²⁹ Massachusetts also limits continuances between court appearances for detained juveniles to fifteen days.³⁰ The Massachusetts adjudicatory model and treatment of youth committed to DYS has had appreciable success as the recidivism rate has declined significantly since 1996.³¹

Massachusetts has also embraced the ethical model of client-directed advocacy in delinquency and child welfare cases, to be contrasted with the law guardian best interest model favored in some jurisdictions.³² Some have hailed this model as one of enfranchisement and empowerment consistent with *Gault* and have praised Massachusetts for its adherence to it.³³

The scope of the Massachusetts Juvenile Court's subject matter jurisdiction and the complexity of the cases it handles belie the pernicious "kiddy court" perception that has pervaded legal culture. As noted, juveniles can face indeterminate commitment in delinquency cases and the imposition of state prison sentences in youthful offender proceedings. In status offense CHINS cases,³⁴ children can be removed from their families and placed in the temporary custody of the Massachusetts Department of Children and Families (DCF) for six-month periods. Adjudication in a care and protection proceeding can result in a child being placed in the permanent care and custody of the DCF and being freed for adoption.³⁵ These proceedings are called termination of parental rights cases, a phrase that is chillingly evocative of the stakes that are implicated in such proceedings. Although Juvenile Court judges hear significant numbers of cases involving a singular allegation of abuse, shaken baby cases for example, the majority of care and protection trials

involve the exploration of patterns of conduct and familial relationships over time. Criminal and delinquency trials usually focus on the reconstruction of an isolated event; abuse and neglect trials often involve multiple parties and extensive testimony from an array of social workers, guardians *ad litem*, court appointed investigators and expert witnesses.

ACCESS TO COUNSEL

When juveniles and families arrive at the court, it is essential that there be qualified attorneys to represent them and handle their cases. Access to effective legal services for children and families is a condition precedent to any meaningful discussion of access to justice. In *Lavallee v. Justices in Hampden Superior Court*,³⁶ the petitioning indigent criminal defendants alleged that as a result of the chronic under-funding of the assigned counsel system there was an insufficient number of certified bar advocates available to accept assignments. The Massachusetts high court concluded that the petitioners were "being deprived of their right to counsel under art. 12 of the Massachusetts Declaration of Rights, a deprivation that has resulted in severe restrictions on their liberty and other constitutional interests."³⁷ In the current fiscal climate in which level funding is the goal of every agency, it is naïve to advocate for increases in state spending. When the legislative and public debate concerning salaries for district attorneys, public defenders, and bar advocates resumes, however, it is important that the discussion include a greater focus on child welfare cases as well.

The compensation debate concerning appointed counsel requires consideration of the realities of juvenile and child welfare cases and the reliance Massachusetts places on the bar advocate system.

28. MASS. R. CRIM. P. 1(b) (providing that the criminal rules apply in all delinquency and youthful offender proceedings).

29. See MASS. GEN. LAWS ch. 276, § 58 (2008) (the state's bail statute); MASS. GEN. LAWS ch. 119, § 67 (2008) (providing in pertinent part that "[n]othing contained in this section shall prevent the admitting of such child to bail in accordance with law").

30. MASS. GEN. LAWS ch. 119, § 68 (2008) (providing that a detained juvenile be returned to court within fifteen days).

31. See Blitzman, *Gault's Promise*, *supra* note 4, at 81 n.117 (citing ROBERT TANSI, MASS. DEP'T OF YOUTH SERVS., 2006 JUVENILE RECIDIVISM REPORT (Oct. 10, 2006)); ROBERT TANSI ET AL., MASS. DEP'T OF YOUTH SERVS., 2009 JUVENILE RECIDIVISM REPORT (Dec. 17, 2009). In the most recent study, Massachusetts has a 29% one-year juvenile recidivism rate, *id.* at 3, contrasted with national figures in excess of 50%. Twenty-nine percent of the 386 subjects discharged in 2005 and chosen for the study were convicted of an offense within one year of discharge from DYS. *Id.* This compares with a 26% rate for the 2004 discharges; a 32% rate for the 2003 discharges; and a 31% rate for the 2002 discharges. *Id.* There has been a generally favorable trend in recidivism rates over the past six years. *Id.* The recidivism rate peaked in 1996 at 49% -- the high water mark for juvenile arraignments prior to a decline of over 25% since. *Id.* at 8 fig.1. The annual numbers of juveniles arraigned on delinquency charges has declined over the last three years. See *id.* at 6; ROBERT TANSI ET AL., MASS. DEP'T OF YOUTH SERVS., 2008 JUVENILE RECIDIVISM REPORT 6 (Dec. 22, 2008); ROBERT TANSI & JESSICA SANTICCIOLI, MASS. DEP'T OF YOUTH SERVS., 2007 JUVENILE RECIDIVISM REPORT 6 (Dec. 4, 2007).

32. See MASS. R. PROF. C. 1.14(a) (addressing representation of those with diminished capacity, including minors); see also Care & Prot. of Georgette, 439 Mass. 28 (2003) (in termination of parental rights case in which attorney represented siblings with divergent interests, the SJC referred issues of ethical standards relating to representation of children and clients with a disability to its standing committee on professional responsibility; *Georgette* also includes discussion of national debate concerning ethical role of attorneys in child welfare and juvenile proceedings); Katherine Hunt Federle, *The Ethics of Empowerment:*

Rethinking the Role of Lawyers In Interviewing and Counseling the Child Client, 64 FORDHAM L. REV. 1655, 1680 (1996); and *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 Nev. L.J. 592 (2006).

33. See FIRST STAR & THE CHILDREN'S ADVOCACY INSTITUTE OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, A CHILD'S RIGHT TO COUNSEL -- A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 7, 20-22 (2d ed. 2009) (Massachusetts received an "A+" in the report in part for its model of client driven child advocacy in abuse and neglect cases), available at http://www.cachildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf (last visited May 13, 2010). However, there is currently a Federal class-action lawsuit challenging the adequacy of the Massachusetts foster care system. As described by the Office of the Child Advocate, "[o]n April 15, 2010, Children's Rights, an out-of-state advocacy group, filed a class action lawsuit in federal court on behalf of 8,500 children in Massachusetts foster care. The lawsuit (known as Connor B. v. Patrick) seeks widespread reforms, claiming that the Department of Children and Families (DCF) violates the constitutional rights of children by placing them in dangerous and unstable situations once removed from their families' care." Office of the Child Advocate, *Lawsuit Targets Massachusetts Foster Care*, <http://www.mass.gov/childadvocate/> (last visited May 16, 2010). A copy of the complaint can be found at http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf (last visited May 16, 2010).

34. See MASS. GEN. LAWS ch. 119, §§ 39E *et seq.*, inserted by St. 1973, c. 1073, § 5 (preceding the 1974 enactment of the federal Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended at 42 U.S.C. §§ 5601 *et seq.*)), which created the Office of Juvenile Justice and Delinquency Prevention within the U.S. Department of Justice).

35. See MASS. GEN. LAWS ch. 119, §§ 24 *et seq.*; MASS. GEN. LAWS ch. 210, § 3 (2008).

36. 442 Mass. 228 (2004).

37. *Id.* at 232.

Although bar advocate representation may not have been envisioned as full time legal work, the Juvenile Court Department relies largely on the private bar advocate system in the majority of cases as staff attorneys from the Committee for Public Counsel Services (CPCS) handle a relatively small percentage of cases involving indigent children and families. CPCS staff attorneys represent clients in delinquency cases in Suffolk³⁸ and Worcester counties. The Juvenile Defenders Network, based in the Roxbury Youth Advocacy Project, provides training, support and consultation for bar advocates statewide. CPCS also has the authority to represent youth accused of being youthful offenders throughout the state.

In the aftermath of *Lavallee*, the Legislature authorized increases in bar advocate funding, although the revised rates still make it difficult for qualified attorneys to remain dedicated in the field.³⁹ The Legislature has also authorized significant increases in CPCS District Court staffing (although CPCS does not have the authority to designate positions for Juvenile Court assignment within regional offices). CPCS recently opened an office that accepts appointments in Worcester Juvenile Court. In August of 2009, CPCS followed up on a 1987 report by the Massachusetts Bar Association (MBA) Commission On the Unmet Legal Needs of Children that recommended statewide attention to child and juvenile representation,⁴⁰ and announced the creation of a statewide Youth Advocacy Department.⁴¹ As of October 2009, the Roxbury Youth Advocacy Project and the Worcester unit became part of this new department.⁴²

In the child welfare context, the CPCS Children and Family Law (CAFL) Division maintains training and oversight responsibility of bar advocates who represent indigent children and parents in abuse and neglect and status offense cases. CAFL attorneys now represent clients directly in seven offices.⁴³ Nevertheless, the overwhelming majority of care and protection and CHINS case representation remains delegated to bar advocates.

CIVIL GIDEON⁴⁴

Massachusetts has extended *Gault's* due process protections of appointed counsel to child welfare cases. Children are appointed counsel in abuse and neglect allegations, as are indigent parents. Children are appointed counsel in status offense cases and parents also have a right to counsel in these matters if a change of custody is contemplated.⁴⁵ The Boston Bar Association Task Force on

Expanding the Civil Right to Counsel reports that youth do not have access to legal counsel in important contexts.⁴⁶ The report discusses, for example, access to post-adjudicatory legal services for parole violations.⁴⁷ Detained and incarcerated adults have access to jail and prison legal service programs that include Massachusetts Correctional Legal Services (now known as Prisoners' Legal Services) and law school clinical programs. Bar advocates, who represent the majority of detained juveniles, close their cases at the point of adjudication because they will not be reimbursed for subsequent representation through the private counsel division of CPCS. The increased sensitivity to the importance of these issues has been enhanced by the development of the civil *Gideon* movement.

In August of 2006, the American Bar Association's House of Delegates unanimously recommended that "federal, state, and territorial governments . . . provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."⁴⁸ The Massachusetts Bar Association (MBA) and Boston Bar Association (BBA) have endorsed this civil *Gideon* concept as aspirational. Given the constitutional and statutory entitlements to appointed counsel in criminal, delinquency and child welfare cases, allocation of limited resources is a crucial issue. This does not, however, preclude fashioning creative solutions to address topics on a case-by-case basis when "basic human rights" are implicated.

In 2007, the Supreme Judicial Court (SJC) Access to Justice Commission, chaired by former SJC Chief Justice Herbert Wilkins, reported that the subject of youths facing revocation of conditional grants of liberty requires "immediate attention." The Juvenile Subcommittee of the Boston Bar Association Task Force on Expanding the Civil Right to Counsel cited this language in its recent report.⁴⁹ The subcommittee recommended that when a child is committed to DYS, appointed counsel should continue as the attorney of record for the juvenile until he is discharged from DYS custody at age eighteen or twenty-one. Under the recommendation, counsel would be required, as in child welfare cases, to have quarterly contact with the client, to appear at revocation hearings, and to consult with the client prior to any waiver of the right to a hearing.⁵⁰ These recommendations could possibly be implemented internally by CPCS subject

38. Representation provided by the Roxbury Youth Advocacy Project.

39. The current hourly rate for bar advocates accepting Superior Court appointments is \$60.00 per hour (\$100.00 per hour in murder cases); the bar advocate rate in care and protection cases is \$50.00 per hour. MASS. GEN. LAWS ch. 211D, § 11 (2008).

40. REPORT OF THE GOVERNOR'S/MASSACHUSETTS BAR ASSOCIATION'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN 16-18 (1987) (citing deep problems with respect to the adequacy of representation of children and concluding that the only appropriate remedy is creation of a statewide program backed by social service support).

41. Memorandum from William J. Leahy, Chief Counsel, Comm. for Pub. Counsel Servs., to CPCS Staff (Aug. 19, 2009) (on file with author).

42. See *id.*; see also Youth Advocacy Department, <http://www.youthadvocacy-project.org> (last visited May 4, 2010). Currently an effort is underway as part of the state budget process to fund the creation of new units.

43. The original pilot projects in Springfield and Salem have been augmented by offices in Boston, Brockton, Lowell, Pittsfield and Worcester. See Committee for Public Counsel Services, Index of CAFL Offices, http://www.publiccounsel.net/Practice_Areas/cafl_pages/cafl_offices.html (last visited May 4, 2010).

44. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

45. *In re Hilary*, 450 Mass. 491 (2008).

46. BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 20 (Sept. 2008) (hereinafter GIDEON'S NEW TRUMPET), available at <http://www.bostonbar.org/prs/reports/Gideon-sNewTrumpet.pdf> (last visited May 12, 2010).

47. Youth who have been committed to DYS for indeterminate terms until age eighteen in delinquency cases, or to age twenty-one as the result of youthful offender adjudications, can be released to the community by DYS prior to discharge. These "releases" are termed conditional grants of liberty and are analogous to parole for adults. See *id.* at 18.

48. AMERICAN BAR ASSOCIATION TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE ABA HOUSE OF DELEGATES ON RESOLUTION 112A (approved Aug. 7, 2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (last visited May 12, 2010).

49. REPORT OF JUVENILE SUBCOMMITTEE OF BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING CIVIL RIGHT TO COUNSEL § I, at 4 (Mar. 10, 2008) (on file with author) (hereinafter JUVENILE SUBCOMMITTEE REPORT).

50. *Id.*

to decisions regarding private counsel funding.

The final report entitled *Gideon's New Trumpet: Expanding The Civil Right to Counsel In Massachusetts*, by the BBA Task Force on Expanding the Civil Right to Counsel, was released in September 2008⁵¹ (the BBA Task Force appointed subcommittees in the areas of juvenile, family, housing and immigration law⁵²). The BBA Task Force concluded that “[w]ithout access to counsel, DYS committed youth who face revocation [of grants of conditional liberty] risk unwitting forfeiture of constitutional, appellate and administrative rights.”⁵³ The BBA Task Force recommended that “with the support of the CPCS and the stated commitment by DYS to engage in discussion, planning and training regarding this matter . . . a CPCS administrative position be created to identify lawyers to represent youths facing revocation of grants of conditional liberty and to oversee their training.”⁵⁴ The BBA Task Force also recommended that CPCS “recruit a fellowship attorney to do direct representation, training and creation of legal information materials for youth and DYS.”⁵⁵ The projected three-year pilot project costs are \$80,000 per year.⁵⁶

In the child welfare context, a new guardianship statute will affect practice in juvenile and probate courts.⁵⁷ Article V of the Massachusetts Uniform Probate Code (UPC), with an effective date of July 1, 2009,⁵⁸ governs guardianships of minors, incapacitated adults and conservators. The law provides that after a guardianship petition is filed the court shall appoint counsel for a child if the child requests an attorney, someone requests counsel on their behalf, or if the court decides that the child’s interests are not adequately protected.⁵⁹ The law entails the creation of a new entitlement to counsel in Probate and Family Court, and that department is currently considering promulgation of rules to inform the decision-making process as to when counsel should be appointed.

PUBLIC EDUCATION AND ACCESS TO JUSTICE

The orthodoxy of discourse regarding access to justice issues is generally limited to court process and analysis of the scope of legal entitlements. One of the most important systems affecting youth development and public safety, however, is our schools. Discussions of access to juvenile justice should include consideration of whether youth have meaningful access to public education. This entails adopting a more global perspective, which requires consideration of

the larger systems that affect children and families, as well as working on the development of creative partnerships at the local level that can be adapted or replicated.

Nationally, “among white men in their early thirties (age 30-34), 13% of high school dropouts had prison records by 1999. . . . The impact of prison on young men with little schooling was even greater among African American men. In 1999, an astonishing 52% of African American male high school dropouts had prison records by their early thirties (age 30-34).”⁶⁰ Massachusetts is not immune from the national crisis surrounding public education. In 2009, “[s]ixty-six percent of the [Massachusetts Department of Correction] population who reported an educational level, reported completing 11th grade or less.”⁶¹ This is a pay now or pay later process with adverse public safety consequences. “On average [nationally], each high school dropout now costs taxpayers more than \$292,000 in lower tax revenues, higher cash and in-kind transfer costs, and incarceration costs, relative to the average high school graduate.”⁶²

In seeking to address the issue of school exclusion and re-entry, the BBA Task Force on Expanding the Civil Right to Counsel adopted subcommittee recommendations concerning school suspension and expulsion by recommending access to counsel in school disciplinary hearings.⁶³ Many of the BBA Task Force’s recommendations are incorporated in “An Act to Help Students Stay in School,” currently under review in the Massachusetts House of Representatives.⁶⁴

School principals may initiate suspension or expulsion proceedings in certain circumstances, which include weapon and drug possession and assault on school staff.⁶⁵ Students may be suspended for an indefinite period pending a felony complaint, and expelled for a conviction or adjudication of a felony if the continued presence of the student is detrimental to the general welfare of the school.⁶⁶ A schoolyard or cafeteria assault and battery with a dangerous weapon, to wit shod foot, is a felony.⁶⁷ Juvenile court records of arrest can be sealed but not expunged.⁶⁸ Unless a student is a special education student, an expelled student has no right to alternative education. Many school districts provide alternative education, but the quality of such programs varies widely.

The Juvenile Subcommittee of the BBA Task Force provides supporting data to document the scope of the problem.⁶⁹ In the 2002-2003 school year, there were a total of 1,949 reported school

51. GIDEON’S NEW TRUMPET, *supra* note 46.

52. *Id.* at 7.

53. *Id.* at 20.

54. *Id.* at 19-20.

55. *Id.* at 20.

56. *Id.* app. 9.

57. See the new MASS. GEN. LAWS ch. 190B, known as the Massachusetts Uniform Probate Code (UPC), which replaces, among other statutes, MASS. GEN. LAWS ch. 201. See St. 2008, c.521, §§ 9, 21.

58. MASS. GEN. LAWS ch. 190B, §§ 5-101 to 5-507, inserted by St. 2008, c. 521, § 9, effective July 1, 2009, *id.* §44.

59. MASS. GEN. LAWS ch. 190B, § 5-106(a) (effective July 1, 2009).

60. BRUCE WESTERN, VINCENT SCHIRALDI & JASON ZIEDENBERG, EDUCATION & INCARCERATION 6 (Justice Policy Inst., Aug. 28, 2003).

61. MASS. DEP’T OF CORRECTION, JANUARY 1, 2009 INMATE STATISTICS, at v (May 2009).

62. Arne Duncan, U.S. Sec’y of Education, Lawmakers Who Lead, Remarks to the National Conference of State Legislatures (Dec. 10, 2009), <http://www2.ed.gov/news/speeches/2009/12/12102009.html> (last visited May 16, 2010).

ed.gov/news/speeches/2009/12/12102009.html (last visited May 16, 2010).

63. GIDEON’S NEW TRUMPET, *supra* note 46, at 3-4, 17-20.

64. An Act to Help Students Stay in School, H.R. 3435, 186th Sess. (Mass. 2009). The Act would enact a cap on the length of all student exclusions, limit the application of “zero-tolerance” policies to more serious infractions, mandate a written explanation when a student is excluded for more than ten school days, provide a right of appeal to the Commissioner of the Massachusetts Department of Elementary and Secondary Education once an exclusion decision is made on the school district level, and mandate that school districts keep and provide detailed statistics on exclusions in their schools.

65. MASS. GEN. LAWS ch. 71, §§ 37H, 37H½ (2008).

66. MASS. GEN. LAWS ch. 71, § 37H (2008).

67. See MASS. GEN. LAWS ch. 265, § 15A(b) (2008); Commonwealth v. Ulysses H., 52 Mass. App. Ct. 497, 501-02 (2001).

68. Commonwealth v. Gavin G., 437 Mass. 470 (2002) (concluding that a Juvenile Court judge does not have authority to order expungement of court and probation records of arrest but may allow the statutory remedy of sealing pursuant to MASS. GEN. LAWS ch. 276, § 100B).

69. JUVENILE SUBCOMMITTEE REPORT, *supra* note 49, § II, at 1-2.

exclusions in Massachusetts.⁷⁰ This represented a 47% increase in the number of total reported exclusions from the 1999-2000 school year.⁷¹ There was also a 26% increase in the number of students who were excluded more than once during a school year between 2000 and 2002,⁷² and students of color represented 24% of student enrollment, but 60% of the student exclusions.⁷³ “Over 53% of the 1,949 total reported school exclusions represented just five school districts: Springfield, Boston, Worcester, Lawrence and Holyoke.”⁷⁴ In addition, there was “[a]n almost 88% increase from school year 2000 to 2002 in the number of school exclusions that spanned an entire academic year (180 days). The average number of days of exclusion was approximately 57 days, averaging a third of an entire school year.”⁷⁵ As the Juvenile Subcommittee reported, “[t]he high number of exclusions in Springfield, Boston, and Worcester are directly correlated with low student achievement. These districts, which exclude a disproportionate number of children, also report dropout rates that exceeded the state average, very low four-year graduation rates, and extremely low proficiency on the MCAS.”⁷⁶

The BBA Task Force proposes the creation of a pilot project “that will provide representation to students in school exclusion proceedings in school districts which have high numbers of school exclusions, high numbers of dropouts, low rate[s] of MCAS proficiency, low numbers of graduates, high enrollment of low income students whose first language is not English, high rates of juvenile incarceration, and few existing advocacy resources.”⁷⁷ In *Goss v. Lopez*,⁷⁸ the Supreme Court held that the Ohio high school students’ right to a public education was a property interest protected by the due process clause and the students were entitled to notice and an opportunity to be heard prior to school exclusion. Many of the families whose children are subject to suspension and expulsion proceedings are unaware of their rights or lack the resources to retain an attorney. The BBA Task Force proposal seeks to redress this problem. The proposed budget for the school exclusion project is \$160,000 per year with “funding [to] be sought from foundations with particular

interests in youth and education.”⁷⁹ Additionally, it is worth noting that CPCS already has the authority to reimburse bar advocates who have been appointed in delinquency cases for representing youth in related suspension and expulsion proceedings.

Time out of school is the greatest predictor of school drop out.⁸⁰ There is also a growing body of evidence suggesting that school drop out and exclusion is directly related to what has been characterized as the “school-to-prison pipeline.”⁸¹ This problem has profound implications in any discussion of race and class in America, and its solution may well be a public safety imperative. Data collection is an important juvenile justice issue, but in the school context, we already have an empirical basis that supports the inference of a direct relationship between youth who fail to graduate high school and the cases we see in our juvenile court system. A child who is not in school is much more likely to end up in the juvenile justice system. This is particularly true for children of color. The research also suggests that there is a correlation between school failure or dropout and disproportionate minority confinement (DMC). Children of color comprise the majority of youth who do not graduate from high school and the disproportionate representation of children of color in our juvenile detention facilities throughout the country has been well documented. “In fact, the racial disparities within the two systems are so similar -- and so glaring -- that it becomes impossible not to connect them.”⁸² In Massachusetts, “[a]lthough the actual number of detained and committed youth fell between 1998 and 2007, minority youth continued to account for slightly more than 20% of the . . . population ages 10 to 16 and approximately 60% of those youth detained and committed.”⁸³

Nationally, approximately 68% of state prison inmates in 1997 had not completed high school.⁸⁴ A 2003 article relates that 75% of youths under age eighteen in adult prisons have not passed the tenth grade, an estimated 70% of the juvenile justice population suffers from learning disabilities, and 33% read below the fourth-grade level.⁸⁵ “The single largest predictor of later arrest among adolescent females is having been suspended, expelled, or held back

70. MASSACHUSETTS DEPARTMENT OF EDUCATION, STUDENT EXCLUSIONS IN MASSACHUSETTS PUBLIC SCHOOLS: 2002-2003, at 1 (June 2004) (hereinafter STUDENT EXCLUSIONS), available at <http://www.doe.mass.edu/infoservices/reports/exclusions/0203/full.pdf>. The 2002-2003 school year appears to be the last year for which the Massachusetts Department of Education compiled such a report. See Massachusetts Department of Education, Student Exclusions, <http://www.doe.mass.edu/infoservices/reports/exclusions> (last visited Apr. 29, 2010).

71. JUVENILE SUBCOMMITTEE REPORT, *supra* note 49, § II, at 1.

72. STUDENT EXCLUSIONS, *supra* note 70, at 1.

73. JUVENILE SUBCOMMITTEE REPORT, *supra* note 49, § II, at 1. As noted by the Juvenile Subcommittee, “[a]n exclusion is defined by the [Massachusetts] Department of Education as a punishment or removal from school permanently, indefinitely or for more than 10 consecutive school days.” *Id.* at 1 n.1.

74. *Id.* at 2.

75. *Id.*

76. *Id.*

77. GIDEON’S NEW TRUMPET, *supra* note 46, at 20.

78. 419 U.S. 565, 572-84 (1975).

79. GIDEON’S NEW TRUMPET, *supra* note 46, at 20. The proposed funding would be used to support the existing Education Law Project in Boston and the creation of pilot projects in Springfield and Worcester. *Id.* at 36 n.72.

80. See, e.g., Colneth Smiley, Jr., *Expelled Kids Face Long Odds: Schools Give Students as Young as 13 Cold Shoulder*, BOSTON HERALD, October 21, 2007, at 9.

81. See, e.g., NEW DIRECTIONS FOR YOUTH DEVELOPMENT, ISSUE NO. 99,

DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE (Johanna Wald & Daniel J. Losen eds., Jossey-Bass 2003); see also Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1914, 1942-1943 (2008); NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2008), available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf (last visited May 13, 2010).

82. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 81, at 11.

83. ROBIN L. DAHLBERG, AMERICAN CIVIL LIBERTIES UNION, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT & BEFORE ADJUDICATION 14 (May 2008) (hereinafter LOCKING UP OUR CHILDREN), available at http://www.aclu.org/pdfs/racialjustice/locking_up_our_children_web_ma.pdf. In assessing 2003 detention data, this ACLU study reports that thirty-three states had a smaller percentage of their adolescent population residing in detention facilities than did Massachusetts; on the other hand only eight states had a smaller percentage of their adolescents residing in correctional facilities than did Massachusetts. The authors acknowledge that because of a lack of reliable juvenile arrest data disaggregated by race and ethnicity they decided to focus on pre-adjudication decision-making. A subsequent study will address key contacts in the process, including the schools and police.

84. Wald & Losen, *supra* note 82.

85. *Id.*

during the middle school years.⁸⁶ Students in high-poverty, high-minority school districts are particularly vulnerable. “Not surprisingly, they experience lower rates of high school graduation, lower levels of academic achievement, and higher rates of college attrition.”⁸⁷ Demographic information in the foster care setting reveals an equally alarming DMC picture.⁸⁸ The problem is one of epidemic proportion that requires analysis. “In 2006, for example, 82% of the students enrolled in Springfield’s public schools were youth of color. During the same year, a reported 40% of all juvenile arrests in the City of Springfield were made by police officers assigned to patrol the city’s schools.”⁸⁹ “[I]n 2005, 79% of the students enrolled in Holyoke’s public schools were youth of color, and approximately one-quarter of all juvenile arrests were school based.”⁹⁰ These numbers are troubling from public safety and DMC perspectives.

The scope of these problems and their connection to public safety has been recognized nationally by law enforcement. In Birmingham, Alabama, for example, where students in the public school system are predominantly African-American, local law enforcement officials have concluded that “high dropout rates are contributing to violent crimes and murders, and that educating children earlier can help reduce the crime rate.”⁹¹ Birmingham’s Chief of Police and the District Attorney for Birmingham’s Jefferson County are members of Fight Crime: Invest In Kids, a national anti-crime organization comprised of 4,000 law enforcement officials and violence survivors. In recommending that it is time to fully fund pre-kindergarten and Head Start programs, Fight Crime believes that increasing graduation rates in Alabama by ten percentage points would prevent 76 murders and 2,093 assaults in Alabama each year. According to Jefferson County Sheriff Mike Hale, “[i]t is a proven fact that dropout rates directly correlate with crime statistics. We have to find a way to keep our young people in school.”⁹² The New York Times reported on November 11, 2009 that Birmingham has also decided to use a graduated sanction policy prior to making arrests for school-based conduct as an alternative to the zero tolerance model previously employed.⁹³

Recognizing and addressing truancy before dropout occurs is important. Studies have underlined the correlation between truancy and the onset of delinquent behavior. A Massachusetts study reported that CHINS youth in the school offender category are the most likely (72.3%) to be arraigned within three years for delinquent or adult criminal behavior.⁹⁴ A Massachusetts child who is declared a CHINS case due to truancy is 47% more likely to be arraigned within three years for delinquent or criminal behavior than if he were in school.⁹⁵ From this perspective keeping kids in school improves public safety and saves the many thousands of dollars that are otherwise paid annually per child for detention and later commitment.⁹⁶ Nearly two thousand students drop out of public school in Boston each year alone.⁹⁷ In Massachusetts, a more aggressive policy regarding the filing of truancy CHINS petitions could play a positive role in reducing drop out rates.

These issues are exacerbated in urban settings by the dropout rates of special education students, including those with emotional and behavioral disorder (EBD). Seventy-three percent of all students with EBD who drop out are arrested within 3-5 years.⁹⁸ Nationally, African-American students “are nearly three times . . . more likely than whites to be identified as mentally retarded and nearly twice as likely to be identified as [emotionally disturbed].”⁹⁹ In the 1998-1999 school year, over 2.2 million youth of color were provided special educational services in the United States. Post-high school trajectories for minority students with disabilities are strikingly different than those for white children. “Among high school students with disabilities, about 75 percent of African American students, as compared to 47 percent of white students, are not employed two years out of school. Slightly more than half (52%) of African Americans, compared to 39 percent of white young adults, are still not employed three to five years out of school. In this same time period, the arrest rate for African Americans with disabilities is 40 percent, as compared to 27 percent for whites.”¹⁰⁰

Fifty-six years after *Brown v. Board of Education*,¹⁰¹ children of color overwhelmingly populate our urban schools. “Many school

86. *Id.*

87. Wald & Losen, *supra* note 82, at 9.

88. ABRAMS & RAMSEY, *supra* note 14, at 435. The DMC juvenile and child welfare discussion entails looking at the roles played by race and class. See, e.g., Shay Bilchik, *Addressing Disparity and Disproportionality: Lessons from Child Welfare and Juvenile Justice*, Presentation at Second Annual Conference of Massachusetts Juvenile Detention Alternatives Initiative (Sept. 22, 2009), available at [http://cjjr.georgetown.edu/pdfs/SBPres/MA092209\]DAI.pdf?dml_slot=148&_last](http://cjjr.georgetown.edu/pdfs/SBPres/MA092209]DAI.pdf?dml_slot=148&_last) (last visited May 13, 2010); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

89. LOCKING UP OUR CHILDREN *supra* note 83, at 17 (footnote omitted).

90. *Id.* (footnote omitted).

91. Staci B. Brooks, *Law Enforcement Chiefs: Dropout Rates Contribute to Crime*, al.com, Aug. 20, 2008, http://blog.al.com/spotnews/2008/08/law_enforcement_chiefs_dropout.html (last visited Apr. 26, 2010).

92. Fight Crime: Invest in Kids, *Birmingham Law Enforcement: Dropout Rates Fueling Violent Crime*, Aug. 20, 2008, <http://www.fightcrime.org/state/alabama/news/> (follow hyperlink to article) (last visited Apr. 26, 2010).

93. Editorial, *The Trouble With ‘Zero Tolerance,’* N.Y. TIMES, November 11, 2009, at A30 (noting that in Birmingham and elsewhere, “[s]chool officials who want to back away from the failed zero tolerance policy are looking to a far-sighted model developed in Clayton County, Ga.”).

94. CITIZENS FOR JUVENILE JUSTICE, CHINS REPORT CARD: THE UNFINISHED AGENDA 3 (2000) (citing OFFICE OF THE COMMISSIONER OF PROBATION,

IN JEOPARDY AND AT RISK: CHINS CASES IN MASSACHUSETTS (Nov. 1998)).

95. *Id.*

96. See Leslie Kaufman, *A Home Remedy for Juvenile Offenders*, N.Y. TIMES, February 20, 2008, at B1 (noting that some states and counties in New York State have been experimenting with intensive in-home and community therapeutic interventions for children with significant criminal records, that New York City hopes to save millions of dollars a year by embarking on this road in the hopes of reducing recidivism, and that annual community treatment at roughly \$17,000 per child costs a fraction of the annual expense of keeping a child in secure detention, which can cost \$140,000 to \$200,000 per year).

97. Beth Daley, *Conference Tackles Issues of Dropouts*, THE BOSTON GLOBE, Sept. 30, 2007, at B1.

98. David Osher, Darren Woodruff & Anthony E. Sims, *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 93, 97 (Daniel J. Losen & Gary Orfield eds., Civil Rights Project at Harvard Univ., Harvard Education Press 2002).

99. Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUALITY IN SPECIAL EDUCATION, *supra* note 98, at 15, 25.

100. Donald P. Oswald, Martha J. Coutinho & Al M. Best, *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, in RACIAL INEQUALITY IN SPECIAL EDUCATION, *supra* note 98, at 1.

101. 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational

systems remain racially divided today. More than two-thirds of African American and Hispanic children still go to schools having an African American and Hispanic majority; many white children still go to schools with all or mostly white student bodies.¹⁰² As the result of demographic patterns and court rulings limiting efforts to integrate schools,¹⁰³ we have returned to the era of separate and unequal.

Professor Charles J. Ogletree, Jr. discusses this reality in his book *All Deliberate Speed*.¹⁰⁴ He notes that there is no escaping the reality that a high percentage of children of color live in impoverished school districts. Professor Ogletree summarizes that “[o]nly 15 percent of segregated white schools are in areas of concentrated poverty; over 85 percent of segregated black and Latino schools are” and that “[o]ver 37 percent of black and Latino students attend 90-100 percent minority schools.”¹⁰⁵ Professor Ogletree fears that, “[d]espite the perceived advances made by the courts, Boston schools are falling back into a pattern of segregation. In the past decade, thousands of white students have left the Boston public elementary schools. The percentage of white students in the schools reached an all-time low in 2000.”¹⁰⁶

Efforts to redress disparities in school district funding have been debated since *San Antonio Independent School District v. Rodriguez*.¹⁰⁷ In *McDuffy v. Secretary of the Executive Office of Education*,¹⁰⁸ the SJC held that the executive and legislative branches of the Commonwealth have a constitutionally imposed duty to provide all public students with an adequate education¹⁰⁹ and both branches were failing in this regard.¹¹⁰ Due to the school-funding scheme, based primarily on local property taxes, students in less affluent school districts were receiving fewer educational opportunities and a lower quality education than students in more affluent communities.¹¹¹ The court found that the Commonwealth had failed in its duty to provide all students with an adequate education, but did not craft a specific remedy opting instead to afford the legislative and executive branches an opportunity to redress the problem.¹¹² Shortly after the decision, the Education Reform Act was passed.¹¹³ The law incorporated a formula to be used in determining local aid and established measures of accountability for teachers and school districts. The complexity of the funding issue was recently revisited in *Hancock v. Commissioner of Education*.¹¹⁴ In a concurrence to that per curiam decision, the Chief Justice of the SJC (joined by two other Justices) concluded that although disparities still exist between schools in more affluent and poorer neighborhoods, some improvement had

facilities are inherently unequal.”).

102. JAMIN B. RASKIN, *WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS* 189 (3d ed. 2008).

103. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007) (concluding that both the Seattle, Washington, and Jefferson County, Kentucky, school districts unlawfully assigned students to schools based primarily on race).

104. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004).

105. *Id.* at 261.

106. *Id.* at 263.

107. 411 U.S. 1 (1973).

108. 415 Mass. 545 (1993).

109. *Id.* at 606.

110. *Id.* at 614.

111. *Id.* at 614-17.

been made since the 1993 Education Reform Act.¹¹⁵ In January of 2010, the Massachusetts Legislature enacted another education reform bill, which provides incentives for dramatically increasing the number of charter schools and gives superintendents in the underperforming school districts greater authority to make personnel decisions designed to improve school performance.¹¹⁶ The act did not address the adequacy of the foundation formula for providing aid to local school districts that had been challenged in *Hancock*.

As noted above, “[t]he pipeline to prison reflects systemic problems in education, mental health and other human services.”¹¹⁷ In an atmosphere of growing fiscal austerity, solving the problems will require thoughtful allocation of limited resources and a candid reassessment of the fragmentation that has precluded meaningful inter-systemic cooperation as schools and state agencies guard limited budgets.

ALTERNATIVE APPROACHES

Given the landscape outlined above, and the gravity of the fiscal crisis, commentators have proposed alternatives to business as usual school models. We have to learn how to do more with less and be creative in developing inter-disciplinary partnerships. For example, community-based colleges and universities with schools or departments of education can be recruited to develop work-study or internship and programs to tutor local school children. This would be cost effective and likely would help keep children in schools and out of courts. We must also educate ourselves about adapting cost effective initiatives. For example, “[s]ettings that feature smaller student to faculty ratios encourage greater student investment in the school community and have proven effective in reducing dropout rates and improving academic outcomes.”¹¹⁸ The principal of the Putnam Vocational Technical High School in Springfield notes that, “for years, students may have felt they were just numbers, when teachers and administrators know you by name . . . school becomes personal again.”¹¹⁹

The concept of student enfranchisement does not have to be limited to smaller schools. In February 2007, the Los Angeles Unified School District Board of Education enacted a district-wide school discipline policy in an attempt to redress the cycle of thousands of suspensions and subsequent arrests annually. The model is strength-based and features developmentally appropriate interventions and graduated sanctions and provides for accountability.¹²⁰ This initiative may play a role in addressing the school-to-prison pipeline problem in one of the country’s largest school districts.

112. *Id.* at 618-21.

113. Education Reform Act of 1993, St. 1993, c. 71. The Act established a foundation formula for allotting local school aid and the Massachusetts Comprehensive Assessment System (MCAS).

114. 443 Mass. 428 (2005) (per curiam).

115. *Id.* at 433 (Marshall, C.J., concurring).

116. An Act Relative to the Achievement Gap, S. 2247, 186th Sess. (Mass. 2010). See St. 2010, c. 12.

117. David M. Osher, Mary Magee Quinn, Jeffrey M. Poirier, & Robert B. Rutherford, *Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE*, *supra* note 81, at 106.

118. Blitzman, *Gault’s Promise*, *supra* note 4, at 98.

119. *Id.* (citing Stephanie Reitz, *Mentoring, Alternative High Schools on Rise to Reduce Dropouts*, THE BOSTON GLOBE, Oct. 29, 2007, at Education/K-12).

120. See Los Angeles Unified School District Policy Bulletin, Discipline Foundation Policy: School-Wide Positive Behavior Support (Jan. 23, 2007). The

An exciting initiative has been developed in Clayton County, Georgia.¹²¹ In 2003, Clayton County community leaders came together to address concerns about the number of youth being sent to juvenile court by schools. “Due to zero-tolerance policies in Atlanta-area schools, the Clayton County Juvenile Court had become deluged with referrals from school police. Between 1993 and 2003, referrals jumped from about 200 to more than 1,100 each year. School-based referrals were almost a quarter of all juvenile court referrals, overburdening the system and criminalizing student behavior.”¹²² Stakeholders were brought together by Clayton County Judge Stephan Teske to discuss the problem. The result was a protocol that includes guidelines for training school resource officers, a school-based education program and graduated sanctions that entail warnings and citations prior to arrest. The initiative provides opportunities to explore systemic collaboration and improve communication by sharing different perspectives outside of the context of often polarizing court cases. Since the implementation of the program, school-based referrals have decreased by 52%, referrals for affrays are down by 87% and referrals of African-American youth have decreased by 46%. The administration of justice was improved by screening out a significant number of cases from the court system while probation officer caseloads dropped by 80%, thereby enabling supervision to be focused more appropriately on high-risk cases.¹²³ “An important lesson from Clayton County is that new sources of funding were not needed to reduce racial disparities, rather it required local leaders to come together and think about the best way to use existing resources more efficiently.”¹²⁴

The Newtown Middle School in Newtown, Pennsylvania has adopted a restorative practices model that has resulted in drastic change in school-based behavior; over a three-year period, detentions have dropped by 82% and suspensions are down by 59%.¹²⁵ “Restorative practices place responsibility on the students themselves . . .”¹²⁶ The model features the teaching of basic social skills and problem solving talk-it-out strategies to lower tension in schools. “At the core of restorative practices is the belief that people will make positive changes when those in positions of authority do things with them, rather than to them.”¹²⁷ Ted Wachtel, founder of the International Institute for Restorative Practices, explains that “[p]eople accept decisions more readily if they have input.”¹²⁸ Boston’s Social

Justice Academy in Hyde Park has developed a restorative justice model that features healing circles and conflict resolution. Innovative partnerships with prosecutorial and educational input that can divert appropriate cases from the court system while keeping schools safe merit consideration.

DISPROPORTIONATE MINORITY CONFINEMENT (DMC) AND DATA COLLECTION

Decision-making regarding programmatic development should have some empirical basis. Of note, the Clayton County, Georgia project referenced in the preceding section required extensive data collection and discussion to ascertain the nature and scope of the problem. Anecdote should inform but not overwhelm or govern the process. Further, collection of data is required by the mandate of the Juvenile Justice and Delinquency Prevention Act (JJDP Act)¹²⁹ that each state gather data on ethnicity and race or risk losing federal money.

While court professionals have to consider their practices, all stages of the continuum should be scrutinized: “When racial[ly] ethnic disparities do occur, they can be found at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youth are processed through the justice system.”¹³⁰ Points of contact include community-based service providers, police, the Department of Education, state agencies including DCF and DYS, and the courts.

DMC analysis also requires consideration of the child welfare system and its inter-relationship to juvenile justice because the same families are often involved in both worlds. A growing body of research documents the national over-representation of minority children, particularly African-American children, in the child welfare system relative to their proportion of the entire population.¹³¹ According to Robert Hill, minority children are not only over-represented nationally in the child welfare system, but the system also treats them differently from white children. “Hill finds ‘overwhelming evidence about the existence of racial disparities’ . . . Children of color are more likely to be removed from their families, receive fewer vital services and lower financial support, remain in care for longer periods of time, and are less likely to be reunified with parents.”¹³²

protocol’s development was supported by the ABA Children’s Rights Litigation Committee’s Dignity In School Campaign.

121. *Clayton County Reduces School-Based Referrals of African-American Youth by 46%*, JDAI NEWS (Juvenile Detention Alternatives Initiative, a project of the Annie E. Casey Foundation), July 2006, at 7. Judge Teske from Clayton County, accompanied by the county’s chief probation officer and school police resource officer appeared in October 2008 at a monthly court-school meeting in Lowell, Massachusetts to share their experiences. At these monthly meetings, we have discussed development of a tutoring program, joint court-school training on school offender child in need of service cases (CHINS) and diversion discussions. The Lowell school-court meetings have become part of the Middlesex County JDAI program and outreach between court professionals and school resource officers through the Boston Juvenile Court is a component of the Suffolk County JDAI initiative.

122. *Id.*

123. Judge Stephan Teske & Chief Probation Officer Adolphus Graves, of Clayton County, Georgia, Presentation at Juvenile Court-School meeting, Lowell, Massachusetts (Oct. 2, 2008).

124. NEELUM ARYA & IAN AUGARTEN, CRITICAL CONDITION, AFRICAN-AMERICAN YOUTH IN THE JUSTICE SYSTEM 33 (Campaign for Youth Justice, Washington, D.C., Oct. 2008) (Race and Ethnicity Series Policy Brief Vol.2), available

at http://www.campaignforyouthjustice.org/documents/CFYJFS_CriticalCondition_001.pdf (last visited May 12, 2010).

125. Caralee Adams, *The Talk It Out Solution*, SCHOLASTIC ADMINISTRATOR (Nov./Dec. 2008), available at <http://www2.scholastic.com/browse/article.jsp?id=3750554> (last visited May 13, 2010).

126. *Id.*

127. *Id.*

128. *Id.*

129. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended at 42 U.S.C. §§ 5601 *et seq.*).

130. ABRAMS & RAMSEY, *supra* note 14, at 1000 (quoting HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS & VICTIMS: 2006 NATIONAL REPORT 188 (OJJDP 2006)).

131. *Id.* at 419 (citing RICHARD P. BARTH ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: TOWARD EXPLAINING THEIR DISPROPORTIONATE INVOLVEMENT IN COMPARISON TO THEIR NUMBERS IN THE GENERAL POPULATION, Executive Summary 148-50 (Dec. 31, 2000), and DOROTHY ROBERTS, SHATTERED BONDS, vii-viii, ix-x (2002)).

132. *Id.* at 420 (citing ROBERT B. HILL, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 34 (2006)).

Analysis of data compiled by Massachusetts DCF should provide a window into the Massachusetts experience regarding these issues. With the development of the MassCourts system, we have an opportunity to capture court information concerning age, race/ethnicity and gender. Problems concerning definition of minority groups are not insurmountable; other jurisdictions seeking to comply with JJDP Act requirements have relied on self-identification and confidentiality is protected as names of youth in a database are not disseminated.

Data collection at each contact point will address JJDP Act requirements regarding DMC issues, and also inform an understanding of other issues such as detention and rate of commitment.¹³³ An added problem, as recognized by the Massachusetts Office of the Child Advocate, is that while such data is often collected, it is not always shared between agencies, thereby eliminating much of its utility.¹³⁴ A system of data sharing and collaboration will allow all involved in the juvenile justice system a greater understanding of the current issues affecting children within the system and how to better treat and adjudicate them.

DETENTION

Our detention and committed population has changed dramatically over the last decade. Nationally juvenile violent crime rates peaked in 1994¹³⁵ and are said currently to be below the levels of the early 1980's. Nationally, between 2004 and 2005, the juvenile violent crime rate, as measured by arraignments, rose slightly, as did like figures for adults, while juvenile arrests fell overall by some 3%.¹³⁶ In Massachusetts, arraignment numbers peaked in 1996 and then declined by almost 25% before leveling off in 2006.¹³⁷ In Massachusetts 17,974 juveniles were arrested and 12,710 youths were arraigned in 2008 and in 2009 the total number of youths arraigned further declined to 10,704.¹³⁸ Between 1996 and 2006, the number of probation violation hearings for so called technical violations, i.e., violations not alleging commission of new offenses, rose by almost 70%.¹³⁹ During the same period, the number of youth held in DYS detention almost doubled and the number of females detained

almost tripled.¹⁴⁰ Between 1996 and 2002, DYS commitments until age 18 pending bail rose from 2,451 to 3,278.¹⁴¹ Overall, however, in 2008, the number of youth detained in DYS detention declined to 4,459.¹⁴² Approximately 20% of the 2008 detained population were 14 years of age or younger and 56% of the total were there on nonviolent alleged offenses.¹⁴³ The current, March 2010 detention number is approximately 3,900.¹⁴⁴ Given these numbers, the growing surmise is that probation violations have become one of the largest causes of DYS commitment.

A subset of the detention population consists of youth held prior to arraignment. Massachusetts General Laws ch. 119, § 67, addresses pretrial release pending arraignment in the juvenile context and reflects the differences in the adult and juvenile systems. Chapter 119, § 67, requires police to notify an on-call probation officer when an arrest is made. The probation officer is then empowered to make a recommendation as to whether the juvenile should be detained prior to arraignment. The detention recommendations apply to children between the ages of fourteen and seventeen, supporting the argument that younger children cannot be detained prior to arraignment.¹⁴⁵ These issues are currently being discussed by communication with key stakeholders, including the court, probation, the bail commissioner, DYS, and the advocacy community.¹⁴⁶

Another component of the DYS population is comprised of youths who are held on bail for violating conditions of pre-trial release pursuant to section 87 of chapter 276 of the General Laws.¹⁴⁷ The debate concerning setting affirmative conditions of release at arraignment reflects the classic *parens patriae* vs. due process debate as advocates argue that status offense conditions of release can be addressed through the CHINS process and that children should not be held because of frustrations with the lack of services provided by DCF and the Massachusetts Department of Mental Health (DMH) for children who cannot be returned to their homes.

Thoughtfully assessing the composition of the DYS detention population has been a focus of DYS Commissioner Jane E. Tewksbury, who is actively involved with the Juvenile Detention Alternatives Initiative (JDAI). The initiative, funded by the Annie

133. Minnesota recently enacted juvenile justice data collection legislation (H.F. 702 and S.F. 561) to undertake similar data collection efforts. See 2009 MINN. LAWS ch. 132. Minnesota requires that its local jurisdictions develop a clearer picture of the demographic makeup of the system and create plans to reduce DMC. Massachusetts Senate Bill No. 940, An Act To Improve Juvenile Justice Data Collection, pending before the legislature, has similar goals. S. 940, 186th Sess. (Mass. 2009).

134. OFFICE OF THE CHILD ADVOCATE, ANNUAL REPORT 2008, at 3 (2009), available at http://www.mass.gov/childadvocate/about/annual_report.pdf (last visited May 13, 2010).

135. Blitzman, *Gault's Promise*, *supra* note 4, at 71.

136. ABRAMS & RAMSEY, *supra* note 14, at 998-99.

137. Blitzman, *Gault's Promise*, *supra* note 4, at 71 & n.32, 86 & n.144 (citing juvenile arraignment numbers in MASSACHUSETTS JUVENILE COURT, 2006 FISCAL YEAR REPORT (2006)).

138. Presentation at Second Annual DYS Statewide JDAI Conference (2009) (reporting that approximately 9,000 boys and 3,000 girls were arraigned in FY 2008, and 7,690 boys and 3,014 girls were arraigned in FY 2009).

139. Blitzman, *Gault's Promise*, *supra* note 4, at 86. According to 2008 Office of the Commissioner of Probation statistics, 26% of the DYS detention population is held on probation violations and approximately 67% of that figure is held for technical violations.

140. *Id.*

141. *Id.*

142. Jane E. Tewksbury, Commissioner, Mass. Dep't of Youth Servs., Massachusetts Juvenile Detention Alternatives Initiative (2007-2008) (presentation materials, on file with author) (hereinafter JDAI 2007-2008).

143. *Id.* In 2006, 45% of youth detained by DYS had been charged with misdemeanors. LOCKING UP OUR CHILDREN, *supra* note 83, at 18.

144. Jane E. Tewksbury, Commissioner, Mass. Dep't of Youth Servs., Presentation at Boston University School of Law, Community Courts Class (Mar. 3, 2010).

145. See BARBARA FEDDERS & BARBARA KABAN, DO YOU KNOW WHERE THE CHILDREN ARE: A REPORT ON MASSACHUSETTS YOUTH UNLAWFULLY HELD WITHOUT BAIL I, 7 (Sept. 2006) (citing MASS. GEN. LAWS ch.119, § 67). MASS. GEN. LAWS ch.119, § 67 (2008), provides that a child may be detained when "the arresting officer requests in writing that [the child] be detained and . . . the court issuing a warrant for the arrest of [the child] directs in the warrant that such child shall be [detained], or, [when] the probation officer shall so direct." See also RODERICK L. IRELAND, JUVENILE LAW § 1.22, at 154 (2d ed. 2006) ("The general provision in § 67 requiring release if certain requirements are met is subject to a proviso, whereby a child between fourteen and seventeen may be detained pending a court appearance in certain circumstances"). Fedders and Kaban argue that over 500 youth under the age of fourteen were detained prior to arraignment in 2004.

146. JDAI 2007-2008, *supra* note 142.

147. *Jake J. v. Commonwealth*, 433 Mass. 70, 71 (2000), permits judges to set affirmative conditions of pre-trial release in juvenile cases provided that the conditions are agreed to by the parties. Advocates have argued that conditions

E. Casey Foundation, has developed pilot projects nationwide to address problems of detention and DMC.¹⁴⁸ The average detention stay in DYS exceeds 20 days,¹⁴⁹ and most detained youth are not committed.¹⁵⁰ A substantial percentage of the detention population is held for property offenses or status offense type of conduct.¹⁵¹ The initiative has also become a centerpiece of the agenda of the Massachusetts Child Advocate and the Office of the Child Advocate.¹⁵² Gail Garinger, the Massachusetts Child Advocate, notes that “youth are often unnecessarily or inappropriately detained at great expense, with long-lasting negative consequences for both public safety and youth development.”¹⁵³ She also stresses that there is a need to focus on juveniles who are unnecessarily or inappropriately detained and to gain more insight into racial disparities throughout the juvenile justice system.¹⁵⁴ Some observers believe that initiatives like JDAI show that community-based supervision of young, nonviolent offenders, tailored to each child’s general needs, rather than incarceration, can best decrease youth crime rates, while placing fewer children in lock-up, with the added bonus of lessening the strain on overburdened budgets.¹⁵⁵ DYS detention rates declined by 9% in counties in which JDAI first established trial programs, although it is too early to tell if JDAI is directly responsible, or if the decline is attributable to the Hawthorne effect.¹⁵⁶

Limited DYS dollars should be focused on public safety and default risks instead of making the agency the default social service

of release, such as attending school without incident, that are not related to the charge criminalize status offense behavior and are not related to the bail statute’s focus on the likelihood of appearing in court (MASS. GEN. LAWS ch. 276, § 58 (2008)), or dangerousness (MASS. GEN. LAWS ch. 276, § 58A (2008)). In striking down the criminal application of a juvenile curfew ordinance, the SJC recently held that “[t]he criminal prosecution of a minor, with its potential for commitment to DYS, is an extraordinary and unnecessary response to what is essentially a status offense.” *Commonwealth v. Weston W.*, 455 Mass. 24, 39 (2009).

148. In Massachusetts, Suffolk and Worcester Counties have been JDAI pilot sites since February 2007. The initiative was expanded to Middlesex and Essex Counties in November 2009.

149. Dep’t of Youth Servs., *DYS Detention Trends 2006-2009*, Presentation to JDAI Statewide Steering Committee (Mar. 25, 2010) (materials on file with author).

150. JDAI 2007-2008, *supra* note 142.

151. *Id.*

152. OFFICE OF THE CHILD ADVOCATE, *supra* note 134, at 19-20.

153. *Id.*

154. *Id.*

155. See Editorial, *Locking Up Fewer Children*, N.Y. TIMES, Aug. 14, 2009, at A18. For example, the Annie E. Casey Foundation reports that JDAI strategies enabled Cook County, Illinois, to reduce its detained youth population and thereby avoid the construction of a new \$24 million juvenile detention facility. Annie E. Casey Foundation, Results from the Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternative-Initiative/JDAIResults.aspx> (last visited May 17, 2010).

156. Tewksbury, *supra* note 144. The Hawthorne effect is a well-documented phenomenon where persons subject to observation improve their performance simply because they are being watched. See Rob McCarney et al., *The Hawthorne Effect: A Randomised, Controlled Trial*, 7 BMC MED. RESEARCH METHODOLOGY, art. no. 30, at 2 (2007), <http://www.biomedcentral.com/1471-2288/7/30> (last visited May 12, 2010).

157. Fox Butterfield, *Concern Rising Over Use of Juvenile Prisons To ‘Warehouse’ Mentally Ill*, N.Y. TIMES, Dec. 5, 2000, at A16 (noting that the Coalition for Juvenile Justice estimates that 50% to 75% of teenagers in the juvenile justice

provider. Observers such as Fox Butterfield believe this is exactly what has occurred in the mental health context, as statistics have shown that a large percentage of children who enter juvenile justice via the child welfare system have mental health and/or substance abuse problems.¹⁵⁷ Adolescent females are more likely to be detained for the purpose of keeping them safe or providing services.¹⁵⁸ The well-intended national consensus to de-institutionalize, which included closing Massachusetts DMH facilities and juvenile units, was ostensibly premised on re-directing funds into community-based mental health resources. Unfortunately, this has not occurred. As a result, the continuum of care has been compromised and there are a limited number of beds to address the chronic cases where hospitalization is truly required.¹⁵⁹ Cases involving allegations of violent crime, in which bail has been set or findings of dangerousness have been made, pose particular concern.¹⁶⁰

INTER-AGENCY COORDINATION AND COST SHARING

While we often think of access to juvenile justice as taking place in the “juvenile court system,” the term “system” may fail to accurately capture the fragmentation that sometimes characterizes service delivery. Additionally, many of the children and families with issues before the juvenile court system are, or should also be, involved with an assortment of community-based service providers and state agencies. Thus, it is not uncommon for youth to be involved in status offense and delinquency proceedings or for their families to be

system have diagnosable mental health disorders or problems); see Steve Twedt, *U.S. Detention Centers Becoming Warehouse for Mentally Ill Youth*, PITTSBURGH POST-GAZETTE, July 15, 2001, at A13 (noting that over 40% of juvenile justice centers report that children with mental health issues stay in detention longer than others as placements cannot be found for them; that one in every ten centers reported that 80% of their residents had a diagnosable psychiatric problem; and that 172 centers averaged slightly more than five emergency psychiatric hospitalizations each year with some reporting almost one per week); Solomon Moore, *Mentally Ill Offenders Stretch Limits of Juvenile Justice*, N.Y. TIMES, Aug. 10, 2009, at A1 (reporting that in several states, due to cuts in mental health care budgets, juveniles are increasingly being tried as juvenile offenders in order to receive services); Editorial, *New York’s Disgrace*, N.Y. TIMES, Aug. 25, 2009 (noting that psychiatric services at many New York juvenile prisons are “shamefully inadequate” with abuses in medications and lack of “proper monitoring or clear therapeutic goals”).

158. FRANCINE T. SHERMAN, DETENTION REFORM & GIRLS: CHALLENGES & SOLUTIONS 10-12 (Annie E. Casey Found., Pathways to Juvenile Detention Reform Series No. 13, 2005); FRANCINE T. SHERMAN, USING JDAI STRATEGIES TO REDUCE THE DETENTION OF GIRLS (Annie E. Casey Found., JDAI Practice Guide No. 5, forthcoming 2010).

159. With the closing of the Taunton State Hospital Adolescent Unit, there is now one state hospital unit for adolescents at Westborough State Hospital with 30 beds. There are also locked Intensive Rehabilitation Treatment Programs (IRTP) at Centerpoint in Tewksbury (13 beds for males), the UMass Transitions unit in Worcester (15 co-ed beds), the Cohannet Academy in Taunton (15 beds for females) and the BU unit at the Lindeman Center in Boston (14 beds). There are also locked Behavior Rehabilitation Treatment (BIRT) units at UMass Connections (15 beds for higher functioning, behaviorally challenged youth), and the Merrimac Center, located on the grounds of Tewksbury State Hospital (15 beds for cognitively limited behaviorally challenged children). The Chauncy Hall IRTP at Westborough is staff secure (12 beds). Memorandum from Rebecca Pries, Executive Director of Adolescent Court Services, Middlesex County Juvenile Court Clinic (Oct. 6, 2008) (on file with author). As of June 2010, all beds located at Westborough will be transferred to Worcester State Hospital.

160. See, e.g., Laura Crimaldi, *Tewksbury Escapee Back in DYS Lockup*, BOSTON HERALD, May 13, 2010, at 5; Milton J. Valencia, *Teenage Escapee Has a History of Fleeing Programs*, BOSTON GLOBE, May 12, 2010, at B6.

engaged in care and protection proceedings. Estimates of detained youth with special education or learning disabilities exceed 65%, and probation intakes report a similar percentage documenting substance abuse problems. Further factored into this calculus is the significant percentage of youth with major mental health problems. Regardless of the point of entry, a child should be entitled to receive appropriate treatment. The gold standard or paradigm is to treat children in the community with wrap around services employing such techniques such as multi-systemic therapy (MST).

There is a real danger, however, that the current fiscal crisis will exacerbate the tendency of agencies to guard limited budgets, further the compartmentalization of services to children and families and inhibit meaningful inter-agency collaboration or cost-sharing in appropriate cases. Actors within the system must be more thoughtful than ever about how to allot increasingly limited resources and maximize inter-agency coordination so that regardless of point of entry, every child receives appropriate supportive services.

The old Massachusetts Office for Children¹⁶¹ featured an interdepartmental team that allowed for case referrals involving youth and families in multiple systems. While the team could not mandate cost sharing, such resolutions were not uncommon.¹⁶² There are also interesting current developments that address service coordination and delivery. *An Act Relative to Children's Mental Health*, enacted in 2008, is designed to assist in identifying and treating mental illness in children statewide by improving screening.¹⁶³ In the aftermath of *Rosie D. v. Romney*,¹⁶⁴ Massachusetts is rolling out the Children's Behavioral Health Initiative (CBHI) in an attempt to integrate the services provided to children by several state agencies into a collaborative, "comprehensive, community-based system of care."¹⁶⁵ This proposal is designed to provide that children who receive state-sponsored health insurance under MassHealth and are diagnosed with a "serious emotional disturbance" will receive an expanded range of services.¹⁶⁶ The CBHI integrates the services provided by a number of community-based service providers and state agencies and arranges the level of care to be provided on a continuum, ranging from Family Support and Training (FST) to Mobile Crisis Intervention (MCI), so that each eligible child and his or her family receive the appropriate care.¹⁶⁷ Mobile Crisis Intervention features a team oriented seventy-two hour emergency response for youth in crisis, such as a child manifesting suicidal ideation.¹⁶⁸ The paradigm

or goal of the CBHI is provision of "wraparound" community and family based support if possible, with coordination of services and referrals through regional Community Service Agencies (CSA).¹⁶⁹

CROSS-COURT ISSUES

Addressing systemic access to juvenile justice requires assessing issues in context. While there are salient differences, the Juvenile Court and the Probate and Family Court departments deal with related issues and have a degree of concurrent jurisdiction. Because families may be involved with both departments contemporaneously, there is a need to know what each is doing in cases. In hearing a care and protection case, for example, a Juvenile Court judge should be aware of Probate and Family Court guardianship and custody orders prior to entering an order that might conflict with previous rulings on related subject matter. Similar issues exist with respect to Superior and District Courts. For example, in assessing allegations of domestic violence that have resulted in the filing of a criminal complaint, the Juvenile Court needs to be aware of any condition of release that has been ordered in another venue, including District Court restraining orders and custody orders involving children that may have been issued as part of that process. Some of these issues may be obviated when all the courts are linked by the MassCourts system. Interdepartmental consolidation of cases in either the Juvenile Court or Probate and Family Court when parties are struggling with related issues in divorce, custody and abuse and neglect cases has already helped. Periodic or selective cross-court training on topics that affect our practice might also be helpful. Topics might include domestic violence, substance abuse, and child development. There is also a need to continue to address the issue of cultural competence training in all trial court departments. This endeavor includes ensuring access to appropriate interpreter services and community outreach.¹⁷⁰

While there is overlap in important areas in trial court jurisdiction, there are also significant differences. The Probate and Family Court and the District Court have the authority to issue restraining orders. Given the reality that most termination cases are filed in the Juvenile Court, and the prevalence of allegations of domestic violence,¹⁷¹ perhaps it is time to consider affording the Juvenile Court similar authority in the context of pending abuse and neglect cases. As of May 10, 2010, the Juvenile Court has the authority to issue

161. "Since 1994, the Legislature has renamed the Office for Children, first, as the Office of Child Care Services, see [MASS. GEN. LAWS ch.] 28A, § 3, and, later, as the Department of Early Education and Care. [MASS. GEN. LAWS ch.] 15D, § 2." *Commonwealth v. Power*, 76 Mass. App. Ct. 398, 400 n.2 (2010).

162. CHINS REPORT CARD, *supra* note 94, at 7.

163. St. 2008, c. 321 (codified in part at MASS. GEN. LAWS ch. 6A, §§ 16P-16S). The act also allows a Juvenile Court judge to refer a child in a complex case involving services from multiple state agencies to a geographically-based interagency review team to address service issues. MASS. GEN. LAWS ch. 6A, § 16R (2008).

164. 410 F. Supp. 2d 18 (D. Mass. 2006).

165. Mass. Office of Health & Human Servs., Children's Behavioral Health Initiative, Overview, http://www.mass.gov/?pageID=eohhs2terminal&L=4&L0=Home&L1=Government&L2=Special+Commissions+and+Initiatives&L3=Children%27s+Behavioral+Health+Initiative&sid=Eohhs2&cb=terminalcontent&f=masshealth_government_overview_child-bh-hlth-intiative&csid=Eohhs2 (last visited May 12, 2010).

166. Children's Behavioral Health Initiative, Exec. Off. of Health & Human Servs., *A Guide for Staff Who Work With Children and Families* 20-24 (Apr. 2010), in JUVENILE DELINQUENCY & CHILD WELFARE LAW: CONFERENCE 2010,

at 81, 100-103 (Mass. Continuing Legal Educ. 2010) (hereinafter MCLE 2010 JUVENILE CONFERENCE) (materials from conference held in Boston on May 5, 2010), available at <http://www.mass.gov/Eeohhs2/docs/masshealth/cbhi/cbhi-guide.pdf> (last visited May 12, 2010).

167. Children's Behavioral Health Initiative, *Overview of the New MassHealth Behavioral Health Services for Children and Youth*, at 9-17 (Apr. 27, 2010), in MCLE 2010 JUVENILE CONFERENCE, *supra* note 167, at 67-71.

168. MCLE 2010 JUVENILE CONFERENCE, *supra* note 167, at 6.

169. *Id.* at 5. See generally John VanDenBerg et al., *History of the Wraparound Process* (2003), reprinted in MCLE 2010 JUVENILE CONFERENCE, *supra* note 167 at 75.

170. Gaye Gentes, Manager of the Massachusetts Office of Court Interpreter Services, has developed an excellent Power Point slide presentation entitled *Lost and Found In Translation* (Mar. 2009, on file with author) that provocatively explores the demands faced by interpreters who must convey the essence of legal concepts that may have no analog in other cultures. In Hmong, for example, the concept of an arraignment requires thirty-four words of explanation. *Id.* (slide no. 23).

171. See, e.g., *Care & Prot. of Lillith*, 61 Mass. App. Ct. 132 (2004) (concerning prevalence of domestic violence matters in Juvenile Court, and requiring

civil harassment prevention orders¹⁷² when it is alleged that three or more acts of “willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property” have occurred. The Legislature has also enacted an anti-bullying statute that requires mandatory reporting to school administrators and development of prevention and intervention programming.¹⁷³

Immunitization of witnesses presents an example of a cross-court issue affecting juvenile justice. In delinquency and youthful offender allegations, witnesses cannot be immunized directly in the Juvenile Court. In some cases this compromises the ability of the Commonwealth to take cases to trial or for alleged victims to be heard. The law authorizes a judge of the SJC, the Appeals Court, or the Superior Court to immunize a witness upon motion.¹⁷⁴ Witnesses in juvenile proceedings can be given transactional immunity in the Superior Court, but only if there is a related case pending in that court.¹⁷⁵

OPEN THE DOORS

The juvenile court system has evolved dramatically since the pre-*Gault* star chamber era described by Dean Pound. One of the significant changes in this process has been the movement to lift the veil of secrecy that has traditionally characterized closed delinquency¹⁷⁶ and child welfare proceedings. Proponents of maintaining the traditional model of closed sessions fear that opening the doors will stigmatize juveniles in delinquency cases and compromise rehabilitative opportunities, adversely affect children and witnesses in abuse and neglect cases, and limit the degree of candor in clinical and guardian *ad litem* reports and evaluations concerning issues of privilege and confidentiality. The argument for opening the doors is exemplified by the resolution that was passed by the National Council of Juvenile and Family Court Judges (NCJFCJ) in July of 2005 in favor of presumptively open hearings in dependency cases.¹⁷⁷ The resolution states that “open court proceedings will increase public awareness of the critical problems faced by juvenile and family courts and by child welfare agencies in matters involving child

protection, may enhance accountability in the conduct of these proceedings by lifting the veil of secrecy which surrounds them, and may ultimately increase public confidence in the work of the judges of the nation’s juvenile and family courts.”¹⁷⁸ Perhaps it is time to open the doors, or at least take a peek inside. Educating the public about the complexity of the subject matter and the gravity of juvenile court decision making could raise accountability and defuse “kiddy court” perceptions.

Minnesota stands out for its approach. The Minnesota Supreme Court Foster Care and Adoption Task Force concluded that a closed system allows abuses and lack funding to go unnoticed and uncorrected: “In effect, the very confidentiality that was meant to protect children ends up harming them by keeping abuses in the system and the effects of lack of funding a secret.”¹⁷⁹ Minnesota may be the only state that has attempted to evaluate the results of opening juvenile child protective sessions. Minnesota, in conjunction with the National Center for State Courts (NCSC), concluded in 2001 that opening sessions in their pilot project had led to a slight but noticeable increase in attendance at child protection proceedings, closing sessions was requested or required infrequently, and that opening hearings and requests for records had not had much of an effect on court proceedings.¹⁸⁰ Protective orders were issued rarely and subsequent appeals of such orders occurred with even less frequency. Open hearings did not result in documented direct or indirect harm to any parties with the exception of one case in Hennepin County.¹⁸¹ The evidence also indicated that initial media interest in open hearings has waned, and fears that opening the doors would chill filings were not empirically justified as filings actually increased in eight of the twelve pilot counties.¹⁸²

Seventeen states have varying degrees of open dependency proceedings and in all but one, Oregon, there is judicial discretion by rule or statute to close selected proceedings and limit access to privileged material.¹⁸³

With respect to delinquency hearings, as of 2004, fourteen states allow access, twenty-one states limit access, one state is not presumed open or closed, and fifteen states are generally closed to the

Juvenile Court judges to make written findings to support conclusions regarding domestic violence).

172. An Act Relative To Harassment Prevention Orders, St. 2010, c. 23 (codified at MASS. GEN. LAWS ch. 258E). As of May 10, 2010, petitions for harassment prevention orders may be filed and heard in the Superior Court, Boston Municipal Court, or respective divisions of the Juvenile Court or District Court departments having venue over the plaintiff’s residence, where there are allegations of three or more acts of “willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property.” To obtain a harassment prevention order there is no requirement of showing a family or dating relationship. The Juvenile Court has exclusive jurisdiction of cases in which both parties are below the age of seventeen. Relief includes no contact and stay away orders. Violations may result in issuance of criminal or delinquency complaints.

173. St. 2010, c. 92.

174. MASS. GEN. LAWS ch. 233, § 20E (2008).

175. Commonwealth v. Austin A., 450 Mass. 665 (2008).

176. See, e.g., Hon. Gordon A. Martin, *Open the Doors: A Judicial Call To End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393 (1995); William McHenry Horne, *The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment*

Analysis, 39 IND. L. REV. 659, 675-76 (2006).

177. National Conference of Juvenile & Family Court Judges, NCJFCJ 68th Annual Conference, Resolution No. 9 (adopted July 20, 2005) (on file with author).

178. *Id.*

179. MINNESOTA SUPREME COURT FOSTER CARE & ADOPTION TASK FORCE FINAL REPORT 120 (Jan. 1997).

180. NATIONAL CENTER FOR STATE COURTS & MINNESOTA SUPREME COURT STATE COURT ADMINISTRATOR’S OFFICE, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS, FINAL REPORT VOL. 1, at iii (Aug. 2001).

181. *Id.* at iv.

182. *Id.* at iv-v.

183. Memorandum, Barton Child Law & Policy Clinic, *Open or Closed: An Overview of the Current Opinions and Realities of Opening Juvenile Court Dependency Proceedings*, at 6 (2006) (“The states with presumably open and judicial discretion to close are Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Texas, Utah and Washington. In Oregon juvenile proceedings are open as a matter of constitutional right.”).

public.¹⁸⁴ Many jurisdictions, including Massachusetts, have open transfer hearing and youthful offender sessions.¹⁸⁵ In the aftermath of the *Care and Protection of Sharlene*¹⁸⁶ Massachusetts amended General Laws ch. 119, § 38 by opening up do not resuscitate hearings (DNR) to the public.¹⁸⁷ All other aspects of care and protection hearings remain closed.

CONCLUSION

Consideration of access to juvenile justice entails discussion of questions of legal access to services as well as exploration of the relationship of court process to other systems. It is my hope that framing the issues in a broader context will contribute to critical thinking regarding the administration of justice and development of collaborative initiatives that utilize existing resources in order to protect public safety and improve outcomes for children and families.

184. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS & VICTIMS: 2006 NATIONAL REPORT 108-09 (National Center for Juvenile Justice 2006) (published in cooperation with the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice).

185. See *id.*; Martin, *supra* note 178, at 395-96; MASS. GEN. LAWS ch. 119, § 65 (2008) (access to juvenile hearings); *id.* § 60A (access to juvenile records).

186. 445 Mass. 756 (2006). Justice Spina suggested in his concurring opinion that MASS. GEN. LAWS ch. 119, § 38, be amended given the public interest in do not resuscitate proceedings. 445 Mass. at 774-75 (Spina, J., concurring). The statute was subsequently amended. See St. 2008, c. 176, § 89. His opinion, however, did not advocate opening care and protection proceedings generally.

187. St. 2008, c. 176, § 89.

PRISONERS AT GUANTÁNAMO: IS THERE ANY REAL RELIEF A COURT CAN GIVE?

By P. Sabin Willett and Samuel R. Rowley



P. Sabin Willett is a partner at Bingham McCutchen in Boston. He is experienced in complex commercial disputes and the representation of lenders and other institutional creditors in lender liability cases and complex Chapter 11 disputes, as well as general commercial litigation. Since 2005, he has been active in the firm's work attempting to restore the rule of law at Guantanamo Bay, Cuba.



Samuel R. Rowley is an associate at Bingham McCutchen in Boston. He concentrates his practice in general commercial litigation, as well as bankruptcy and antitrust litigation. Since 2006, he has been a member of Bingham's Guantanamo team.

INTRODUCTION

They were always pawns. United States–Chinese diplomacy sent them to Guantánamo in the aftermath of 9/11. Years later, the Bush Administration's desperate rearguard,¹ waged in the courts to deflect public scrutiny from its detention program, stranded them there. The military conceded long ago that it caught them by mistake, and they won a judgment ordering their release. They have become famous. Articles about them have appeared in newspapers from Qatar to Oslo, on Wikipedia and in *The Washington Post*.

And yet, as this article goes to press, five Uighurs remain America's prisoners² at Guantánamo, imprisoned there far longer than any prisoners of war in the nation's history have been held before. They have embarked on the ninth year of an imprisonment. Their isolation was so complete in earlier years that they could not then be sure whether there was a judgment at all, or even a court to have given it. They passed through hope to despair to hope again, when companions at last left the prison, and then at last to disbelief.

Guantánamo has given birth to a thousand policy questions. In the Uighurs they find human expression. Against whom is America at war? How do we treat prisoners of that war? Which branch of our government has the war power? And for all the highly-charged debate, a central question for lawyers is whether *habeas corpus* has any meaning

or is merely a scholar's idyll. Where the President holds an innocent without lawful basis, have our courts any power to set him free?

For Bingham McCutchen, as for so many law firms in the Commonwealth, it began with a handwritten cry for help. A note from the prison led to a crash course in military law, *habeas corpus*, and the politics of central Asia. The road led further than we could have imagined in March, 2005, when we filed the first Uighur petition.³ The litigation grew as dense and tangled as any we have ever seen in any court, for any client. The Justice Department was a fierce adversary; its power to control information and timetable was daunting, its appetite for piecemeal review ravenous.

The Uighurs' homeland is little known to Americans. China's far-western province of Xinjiang lies along the ancient Silk Road near the Khazak border. Natives of this region are called "Uighurs," and refer to it as "East Turkistan." A largely Muslim population whose ancestors migrated from the west, the Uighurs' language and culture have Turkic roots, and Uighurs have clashed with Han Chinese immigrants from the east. Since the Maoists came to power in 1949, Uighurs have felt severe political and religious persecution by the Beijing government. The United States has long condemned their oppression by China.⁴

Our clients struggled to make a living before they fled from China in 2001, many leaving behind families. One would later tell a military

1. The former Chief of Staff to Secretary of State Colin Powell recently testified that "it became apparent to me as early as August 2002, and probably earlier to other State Department personnel who were focused on [Guantánamo], that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all. . . . I recall conversations with serving military officers at the time, who told me that many detainees were turned over for the wrong reasons, particularly for bounties and other incentives." Declaration of Colonel Lawrence B. Wilkerson (Ret.), *Hamad v. Bush*, Civ. No. 05-1009 JDB, ¶ 9 (D.D.C. 2010) (Because the court dismissed this *habeas* case as moot on April 1, 2010, see Order, *Hamad v. Bush*, Civ. No. 05-1009 JDB (D.D.C. Apr. 1, 2010) (dkt. no. 123), the Wilkerson Declaration was never filed.). Colonel Wilkerson continued,

"If hundreds of innocent individuals had to suffer in order to detain a handful of hardcore terrorists, so be it. That seemed to be the philosophy that ruled in the Vice President's Office." *Id.* ¶ 11b.

2. The government has long referred to the Guantánamo population as "detainees," invoking a less permanent resonance than "prisoners." As "prisoners" more accurately fits the facts, we use the term in this article.

3. *Qassim v. Bush*, 382 F. Supp. 2d 126 (D.D.C. 2005).

4. U.S. Dep't of State, *Country Reports on Human Rights Practices—2004—China*, § 1(c) (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>. See also, e.g., Amnesty International, *China Report 2005*, available at <http://web.amnesty.org/report2005/chn-summary-eng> (China "continues to brutally

panel that he left to escape Chinese “torture and too much pressure on the Uighur people,” concerned about economic oppression and enforced abortions.⁵

Some traveled to Pakistan, but the regime was friendly with Beijing and refugees without valid passports or visas risked deportation to Chinese prison. Others sought to make their way to Turkey, where jobs were rumored to be plentiful. Under Taliban rule prior to the U.S. invasion, in 2001, Afghanistan was mired in chaos. Refugees working their way across Central Asia, including many Uighurs, sought shelter there because they could do so with no visa or passport. With a porous border and an anarchic state, Afghanistan provided a temporary refuge from forced return to China, while Uighurs tried to obtain travel documents to enter other countries. Many Uighurs took up residence in a Uighur village near Jalalabad—later termed by the government a “camp”⁶—hoping that they would not be forcibly returned to China. The Uighur “camp” existed prior to the Taliban takeover of Afghanistan, and it appears that neither Arabs nor Afghans stayed there. In return for food and shelter, the Uighur men did odd construction jobs and manual labor. No evidence has ever surfaced that any of the Guantánamo Uighurs intended harm to Americans. The Uighurs had no affiliation with Al Qaida, nor with any military force; America, with its promise of religious freedom, represented a hope and dream to many of them.

Just days after the 9/11 atrocities, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or those who harbored such organizations or persons.”⁷ The Authorization for the Use of Military Force (“AUMF”) empowered the President to respond robustly to the 9/11 attacks, but its definition of the “enemy” was narrow: the “enemy” were those, and only those, who attacked the country on 9/11, or gave sanctuary to the attackers. The President sought, and Congress expressly withheld a broader authority to wage a generalized and global war against all terrorist organizations. The President’s first draft of the AUMF provided “[t]hat the President is authorized to use all necessary and appropriate force... to deter and pre-empt any future acts of terrorism or aggression against the United States.”⁸ Congress rejected it.⁹ A congressional “consensus quickly developed that the authority should be limited to

suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations.”)

5. *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008).

6. Throughout the *Parhat* litigation, which we describe below, the government has referred to the arrangement of a few boarding houses bisected by dirt tracks where the Uighurs sought shelter as a “military training camp.” The government contended that because the village contained a single Kalashnikov rifle, albeit in a country where Kalashnikovs outnumber the male population, and the Uighurs freely admitted that they learned to assemble and disassemble the weapon, and some learned to fire it, the village constituted a military training camp. While the court in *Parhat v. Gates* did not deem the village a “military training camp,” it did refer to it as a “camp.” 532 F.3d at 837. We therefore adopt that term as well.

7. Authorization for the Use of Military Force, 115 Stat. 224 (Sept. 18, 2001).

8. Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002).

9. *Id.*

10. *Id.* at 74.

11. *Id.* at 74-75.

12. Military Order of November 13, 2001, Detention, Treatment, and Trial of

those responsible for the September 11 attacks, and to any country harboring those responsible.”¹⁰ This led to the text of the AUMF.¹¹

Exercising his delegated authority, the President determined that al Qaida launched the attacks, and that Taliban-controlled Afghanistan harbored al Qaida.¹² Neither President Bush nor President Obama has ever determined that Uighurs played any role in the 9/11 attacks.

The Afghanistan War began in October 2001. The Uighurs fled the U.S. bombing campaign, crossing back into Pakistan,¹³ where they fell into the hands of bounty hunters. The U.S. distributed leaflets throughout northeastern Afghanistan and western Pakistan, promising substantial bounties for “terrorists.” One leaflet said:

Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists. You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.¹⁴

Locals were quick to oblige, and hundreds of “terrorists” were turned in for cash. Victims of this commerce often were foreigners without friends or tribal ties, or those against whom there was an inter-tribal grudge. In November or early December 2001, Pakistani villagers lured the Uighurs to a mosque, where they were surrounded and arrested by Pakistani security forces.¹⁵ The Pakistanis turned eighteen Uighurs over to the U.S. military. The Uighurs were sent to a prison camp at the U.S. air base at Kandahar. There they learned that the United States paid a \$5,000 bounty for each of them.¹⁶ The U.S. transported the Uighurs to Guantánamo in May, 2002, but that seemed more a function of military bureaucracy than design. It quickly appeared that their capture was a mistake; our clients advised that soon after arrival, they were told by interrogators that it was all a mistake and they would soon be released. Early “interrogations” focused on what countries might provide safe refuge.

In the summer of 2002, everything changed. As an international diplomatic crisis swirled around Saddam Hussein’s regime in Iraq, Iraqi Foreign Minister Naji Sabri in August raced to Beijing to urge the People’s Republic of China to oppose a U.S.-led invasion.¹⁷ U.S.

Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833.

13. *Parhat*, 532 F.3d at 837.

14. Available at <http://www.psywarrior.com/afghanleaf40.html>. See also Mark Denbeaux *et al.*, *The Guantánamo Detainees: the Government’s Story* at 2-3 (2006), available at http://law.shu.edu/publications/guantanamoReports/detainees_then_and_now_final.pdf (“Denbeaux I”) (up to 86% of Guantánamo detainees may have been handed over to the United States in return for a bounty); *Guantánamo Detainees Say Arabs, Muslims Sold for U.S. Bounties*, USA TODAY, May 31, 2005, available at http://www.usatoday.com/news/world/2005-05-31-bounties_x.htm (reporting that certain Guantánamo detainees testified to CSRT that they had been sold to American forces for bounties ranging from \$3,000 to \$25,000).

15. This information was obtained from statements made by Ahmat Adel—one of the Uighur companions who was released from Guantánamo and sent to Albania in 2006—during Adel’s CSRT proceeding. These statements can be found in the unclassified transcript of his CSRT proceeding at pages 001235-36.

16. This information was obtained from statements made by Abu Bakker Qassim—also a Uighur who was released from Guantánamo and sent to Albania in 2006—during Qassim’s CSRT proceeding. These statements can be found in the unclassified transcript of his CSRT proceeding at page 001220, available at http://www.dod.mil/pubs/foi/detainees/csrt_arb/000300-000399.pdf.

17. See generally note 20, *infra*.

Deputy Secretary of State Richard Armitage sought Chinese support for U.S. war plans. Chinese diplomats skillfully played one against the other, but Mr. Armitage gained the advantage. Chinese President Jiang Zemin assured President Bush two months later in Crawford, Texas, that the Chinese would acquiesce in American war plans. But China had demanded concessions. The list included Taiwan, trade regulations, and one additional demand. China wanted its Uighur dissidents branded by the U.S. as “terrorists.”

On August 26, 2002, in a conference room in Beijing, Mr. Armitage gave the point. Speaking to the press moments later, he acknowledged that in his meeting with Chinese officials, he had discussed placing the East Turkestan Islamic Movement (“ETIM”)¹⁸ on a list of international terrorist groups.¹⁹ In September, ETIM was added to the official State Department list of “terrorist organizations.” (Curiously, ETIM was *not* designated as a “terrorist organization” for U.S. immigration purposes. Following August, 2002, Uighurs continued to be a favored group as to applications for political asylum in the United States.²⁰) In addition, the Chinese obtained leave to come to Guantánamo and harshly interrogate the Uighur prisoners. Following those interrogations, relations between our clients and their U.S. captors soured.

COMBATANT STATUS REVIEW TRIBUNALS

For over two years after bringing them to Guantánamo, the government continued to hold the Uighurs without a hearing of any sort. In 2003, a colonel concluded that “based on the information available at this time, it appears unlikely that Parhat [one of the Uighur companions] will be determined to be an individual subject to the President’s military order of 13 Nov. 2001. I recommend the release of Parhat under a conditional release agreement.”²¹ The memo continued, “CITF believes that further investigation is unlikely to produce new information relevant to this case.”²²

The June, 2004 Supreme Court decisions in *Hamdi v. Rumsfeld*²³ and *Rasul v. Bush*²⁴ created a new political imperative. The Supreme

Court ruled that Guantánamo prisoners had the right to challenge the legality of their detention in federal court.²⁵ So in July, the Department of Defense created so-called Combatant Status Review Tribunals (“CSRTs”), which were military panels closely controlled by the Pentagon. Regulations (the “CSRT Procedures”)²⁶ were hastily issued. They defined “enemy combatant” as:

an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²⁷

The CSRT Procedures also established a “non-adversarial proceeding,” to “determine whether each detainee” at Guantánamo “meets the criteria to be designated as an enemy combatant.”²⁸ Prisoners were denied counsel, denied the opportunity to confront their accusers or see the evidence against them, denied a neutral fact-finder, and subject to a presumption that the evidence supporting the enemy combatant classification was “genuine and accurate.”²⁹

Because the AUMF included no express detention power, the only detention authority delegated to the President was the implicit power recognized under the laws of war.³⁰ The Department of Defense had no constitutional power to expand the President’s military detention power by promulgating an overbroad definition of “enemy combatant,” for the Constitution confers on Congress, and Congress alone the power to name the enemy.³¹ It is a cornerstone of military law, both domestic and international, that a government may “detain,” so as to prevent return to the battlefield, “combatants:” persons who join “the military arm of the enemy government.”³² Military detention power over civilians is far narrower. It exists only where the civilian actually and directly participates in the international armed conflict authorized by Congress.³³ The government never accused the Uighurs of participating in hostilities against the United States.

18. Soon after 9/11, China began exploiting the U.S.-led “war on terror” by asserting that Uighur political dissidents were “terrorists.” In October, 2001, a Chinese Foreign Ministry spokesman declared that, as “a victim of international terrorism,” China hoped that “efforts to fight against East Turkistan terrorist forces should become a part of the international efforts and should also win support and understanding.” See Human Rights Watch Report, *Devastating Blows, Religious Suppression of Uighurs in Xinjiang: II*, available at <http://hrw.org/reports/2005/china0405/4.htm>. The Chinese government initiated an active diplomatic and propaganda campaign against “East Turkistan terrorist forces.” In particular it urged that there existed a terrorist organization known ETIM, and that Uighur political dissidents were members of ETIM. The Chinese would apply this label indiscriminately to any Uighur suspected of political dissidence. Chinese authorities did not distinguish between peaceful political activists, peaceful separatists, and those advocating or using violence. *Id.* The United States did *not* believe, however, that ETIM was a terrorist group. On December 6, 2001 (about the time Petitioners came into U.S. custody), U.S. State Department Coordinator for Counter-terrorism Francis X. Taylor said, following talks in Beijing, that “the U.S. has not designated or considers the East Turkistan organization as a terrorist organization.” September 11, 2001: Attack on America: Press Conf. of Ambassador Francis X. Taylor, Beijing, China (Dec. 6, 2001), http://www.yale.edu/law-web/avalon/sept_11/taylor_003.htm.

19. Transcript of Deputy Secretary of State Richard Armitage Press Conference—Conclusion of China Visit (Aug. 26, 2002), available at <http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0208d&L=us-china&H=1&O=D&P=75>.

20. The State Department designated ETIM as a terrorist organization under Executive Order 13224 but not as a Foreign Terrorist Organization for immigration purposes (under the Immigration and Nationality Act).

21. *Parhat*, 532 F.3d at 837 (quoting CSRT Decision, encl. 2, at 2).

22. *Parhat*, 532 F.3d at 837.

23. 542 U.S. 507 (2004).

24. 542 U.S. 466 (2004).

25. *Rasul*, 542 U.S. at 483; see also *Hamdi*, 542 U.S. at 509.

26. *Parhat*, 532 F.3d 837.

27. *Id.* (quoting CSRT Order at 1).

28. Gordon England, Secretary of Navy, Memorandum re Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba (July 29, 2004) at Encl. 1(B), available at <http://defenseink.mil.news/Jul2004/d20040730comb.pdf>.

29. See CSRT Procedures at Encls. 1(F)(5), 1(F)(8), 1(C), 1(G)(11), available at <http://defenseink.mil.news/Jul2004/d20040730comb.pdf>.

30. The power to name the enemy in warfare is constitutionally delegated to Congress. U.S. CONST. art. I, § 8, cl. 11; see *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

31. An executive agency’s power is limited by Congressional delegation. *Louisiana Public Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); *Railway Labor Executive Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994 (*en banc*)).

32. *Hamdi*, 542 U.S. at 519; see also *In re Quirin*, 317 U.S. 11, 37-38 (1942).

33. The Supreme Court has always recognized this distinction. It is why *Hamdi*, alleged to have carried a Kalashnikov against U.S. troops on an Afghan battlefield, was subject to military detention, *Hamdi*, 542 U.S. at 522 note1, and Miligan, the Confederate sympathizer who conspired with the enemy and sought the overthrow of the government during wartime, but did not engage in battlefield

The military convened a CSRT for each Uighur, and the “evidence” was essentially the same as to each. Remarkably, five CSRT panels found that the Uighur in question was not an “enemy combatant.” The remaining Uighurs were classified as “enemy combatants,” although the material facts were indistinguishable from those of the five found not to be enemy combatants.

Huzaifa Parhat’s case illustrates. His CSRT convened on December 6, 2004.³⁴ Parhat’s own interview and testimony comprised the only evidence concerning the circumstances of his background and capture.³⁵ He testified that he had gone to Afghanistan solely to join the resistance against China, and stated that he regarded China alone, and not the United States, as his enemy.³⁶ The tribunal did not find Parhat “to be an individual who was part of or supporting Taliban or al Qaida forces,”³⁷ but based its enemy combatant determination on the theory that Parhat was allegedly affiliated with ETIM.³⁸ The Tribunal acknowledged that “no source document evidence was introduced to indicate... that [Parhat] had actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners.”³⁹

The enemy-combatant finding was pretextual, designed to deflect judicial scrutiny then anticipated after the Supreme Court’s ruling in *Rasul*. The tribunal stated that Parhat “does present an attractive candidate for release” and “urge[d] favorable consideration for release... and also urge[d] that he not be forcibly returned to the People’s Republic of China because he will ‘almost certain be treated harshly if he is returned to Chinese custody.’”⁴⁰

HABEAS CORPUS

The core proposition of the Great Writ⁴¹ is that the Executive has the burden to demonstrate positive law authorizing imprisonment. That burden arises under the common law of *habeas corpus* that long predated our Constitution and exists independently of it. “*Habeas corpus* is,” as the Supreme Court explained, “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.”⁴² Where the Executive cannot demonstrate a lawful basis for imprisonment, the court must order release, and the Executive must comply. “The question is,” wrote Chief Justice Marshall, “what authority has the jailor to detain him?”⁴³ The Framers viewed freedom from

activity, was not. *Ex parte Milligan*, 71 U.S. 2 (1866).

34. *Parhat*, 532 F.3d at 837.

35. *Id.*

36. *Id.*

37. *Id.* (quoting CSRT Order at 1).

38. See note 17, *supra*.

39. *Id.* (quoting CSRT Decision, encl. 2, at 3).

40. *Id.* at 838 (quoting CSRT Decision, encl. 2, at 2, 4).

41. What was the writ? “[L]iterally, a scrap of parchment, about one or two inches by eight or ten inches in size, directing the jailer to produce the body of the prisoner along with an explanation of the cause of the prisoner’s detention.” Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 598 (2008).

42. *Rasul*, 542 U.S. at 473 (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 note 2 (1945)).

43. *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806). See also 1 W. Blackstone, *Commentaries on the Laws of England* at 132-133 (1765) (In order to make imprisonment lawful, there must be a written warrant that “express[es] the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner...[I]t is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.”).

unlawful restraint as fundamental to liberty, and they regarded the writ as a vital instrument to secure that freedom.⁴⁴ The writ has been acknowledged and used by our courts from the beginning of the Republic, as it had been by English courts long before.⁴⁵

By protecting the writ through the Suspension Clause, particularly as “one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights,”⁴⁶ the writ invests in the judiciary a real check against Executive power. The Suspension Clause “ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty,” and “protects the rights of the detained by affirming the duty and the authority of the Judiciary to call the jailer to account.”⁴⁷

The first actions by Guantánamo detainees challenging their detention were brought in February, 2002. The District Court dismissed the cases for lack of jurisdiction, and the Court of Appeals for the District of Columbia Circuit affirmed.⁴⁸ In *Rasul*, the Supreme Court granted *certiorari* and reversed, holding that the jurisdiction of the *habeas* statute extends to Guantánamo.⁴⁹ It remanded the cases to the district court and directed that court to “consider in the first instance the merits” of the petitions.⁵⁰

The government moved to dismiss again, contending that although there was jurisdiction to hear the claims, the prisoners had no substantive rights. Judge Richard J. Leon granted motions to dismiss cases before him.⁵¹ Judge Joyce Hens Green denied motions to dismiss and held the detainees had stated good claims for release.⁵² Early in 2005, the cases before judges Leon and Green were consolidated, and went up on appeal to the D.C. Circuit.

In February, 2005, Judge Green issued a second order, staying the petitioners before her “pending resolution of all appeals in *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).” All of the other district judges would later adopt those stays, halting all progress in *habeas* cases during appeals that would consume more than three years.

KIYEMBA V. BUSH: THE 2005 HABEAS CORPUS PETITION

The first Uighur *habeas* case, *Qassim v. Bush*, was filed in March, 2005.⁵³ On July 29, 2005, Huzaifa Parhat and eight other Uighurs

44. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008).

45. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

46. *Boumediene*, 128 S. Ct. at 2244.

47. *Id.* at 2247.

48. See *Al Odah v. United States*, 321 F. 3d 1134, 1145 (2003).

49. 542 U.S. 466, 473 (2004).

50. *Id.* at 485.

51. See *Khalid v. Bush*, 355 F. Supp.2d 311 (D.D.C. 2005). The cases before Judge Leon involved Bosnians, represented by a team led by Boston partners Stephen Oleskey and Rob Kirsch, from the Boston office of the firm now known as WilmerHale. One of the petitioners, Lahkdar Boumediene, eventually would become the named petitioner in *Boumediene v. Bush*, 553 U.S. 723 (2008). Those appeals have been variously captioned *Al Odah v. Bush* and *Boumediene v. Bush*. For clarity, we refer to that appellate litigation, as it proceeded through the D.C. Circuit and the Supreme Court, as *Boumediene*.

52. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

53. See *Qassim v. Bush*, 382 F. Supp. 2d 126 (D.D.C. 2005). In May 2006, just before oral argument on appeal of the district court’s denial of their *habeas* petitions, the government transferred five of the Uighurs to Albania. *Qassim v. Bush*, 466 F.3d 1073, 1074-75 (D.C. Cir. 2006). One later obtained asylum in Sweden, while the other four have lived peacefully—although they have struggled to make

(the “Kiyemba Petitioners”⁵⁴) filed a Petition for Writ of *Habeas Corpus*.⁵⁵ The government immediately moved to stay, arguing that the D.C. Circuit’s appellate review in *Boumediene* would resolve whether federal courts had jurisdiction over *habeas* petitions filed by Guantánamo detainees. In September, the Kiyemba Petitioners moved for a preliminary injunction to prevent the government from transferring the Uighurs to an unsafe place—such as China—absent thirty-days advanced written notice. The district court granted the preliminary injunction. It also granted the government’s request for a stay.⁵⁶ For the next year, the procedural wrangling continued. The government appealed the thirty days’ notice portion of the district court’s September order. The Kiyemba Petitioners cross-appealed the stay.

A year and a half after Parhat initially brought his petition, in February 2007, the D.C. Circuit decided *Boumediene*, ruling that on the basis of intervening legislation (the Military Commissions Act of 2006), petitioners had no *habeas* rights to vindicate.⁵⁷ The D.C. Circuit dismissed the *Kiyemba* appeals as moot soon after.⁵⁸ On September 20, 2007, the district court dismissed Parhat’s *habeas* petition without prejudice, citing its lack of jurisdiction based on *Boumediene*.⁵⁹ It appeared that the Great Writ would afford the Uighurs no remedy. They remained at Guantánamo.

THE UIGHURS’ CONFINEMENT

Although military authorities in 2003 and 2004 had concluded that the Uighurs should be released, the conditions of their confinement became, over time, much harsher. Until 2006, many of the Uighurs were held in Camp 4, where they lived communally in a bunk house, ate together, and had access to a small outside area.⁶⁰ But in late 2006, most of the Uighurs were sent to the “tomb above the ground,” as the notorious Camp 6 prison has been called by the prisoners. There they endured an isolation regimen harsher than that of almost any federal prison.⁶¹ Each was isolated in a small, solid-walled cell. He passed twenty-two hours a day alone, without natural sunlight or air, without companions, conversation, or activities of any kind. For two hours out of twenty-four, he might be shackled and led to the “rec area,” a 3 x 4 meter space surrounded by two-story concrete walls and topped with wire mesh. These two hours afforded their only chance to glimpse sunlight. The odds were poor, for rec time regularly happened at night, often after midnight. Rec time was also the Uighurs’ only opportunity to speak with another human being.⁶²

The conditions of the Uighurs’ solitary confinement in 2007-08 would be unthinkable under the regulations provided by the service field manuals for the confinement of the enemy.⁶³ A well-developed body of law regulates the imprisonment of prisoners of war (known

as “EPWs”) under Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), and the Military Police Internment/Resettlement Operations (the “Field Manual”) No. FM 3-19.40. Affording EPWs social interaction is *required*. “Except in extreme circumstances, in the best interests of the individual, EPW/RP will not be interned in correctional facilities housing military or civilian prisoners.”⁶⁴ “EPW will be interned in camps according to their nationality and language. *They will not be separated from other prisoners belonging to the Armed Forces with which they were serving at the time of their capture*, except with their consent.”⁶⁵ The enemy prisoner of war’s lot abounds with social activity: he eats communally, FM 3-19.40 Ch. 4-66, he may have a job, he may pursue social leisure activities; he may plant gardens, play musical instruments, read newspapers.⁶⁶ The Field Manual even contains a POW camp layout that makes graphically clear that prisoners are to live communally.

That even a guilty or violent prisoner must be afforded human contact is a staple of all civilized incarceration regimes. Under the Third Geneva Convention, “[p]risoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.”⁶⁷ The Uighurs’ conditions would later improve in 2008, as described below, but for much of their captivity, the government imposed on the Uighurs a regimen of isolation and cruelty unheard of in penal or military law, notwithstanding that they were not convicted, nor even accused terrorists, but rather individuals the military had captured by mistake.

THE DETAINEE TREATMENT ACT PETITION

Following the Supreme Court’s decision in *Rasul*,⁶⁸ Congress twice raided the Great Writ. It first passed the Detainee Treatment Act of 2005 (the “DTA”). The DTA amended 28 U.S.C. § 2241 by stripping courts of jurisdiction over *habeas* petitions filed by Guantánamo detainees.⁶⁹ But six months later, in *Hamdan v. Rumsfeld*, the Court held that jurisdiction-stripping had not applied retroactively.⁷⁰ In response, Congress hastily enacted the Military Commissions Act of 2006 (the “MCA”). The focus of the MCA was to deprive Guantánamo prisoners charged with war crimes of basic rights due under the Uniform Code of Military Justice, and to dilute the substantive definitions of war crimes. But the MCA also denied federal courts jurisdiction to consider *habeas* applications by detainees determined to be enemy combatants, including petitions already pending.⁷¹ This tangle of new legislation left the Uighurs with no remedy other than

a living—in Albania since 2006.

54. Jamal Kiyemba was the “next friend” to one of the nine Uighur Petitioners; that is, another prisoner who sought release on their behalf.

55. Petition for Writ of *Habeas Corpus*, *Kiyemba v. Bush*, No. 05-1509 RMU (filed July 29, 2005).

56. *Kiyemba v. Bush*, No. 05-1509 RMU, Memorandum Order (Sept. 13, 2008) (dkt. no. 8).

57. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007).

58. *Kiyemba v. Bush*, D.C. Cir. Nos. 05-5487 and 05-5489 (March 22, 2007).

59. *Kiyemba v. Bush*, No. 05-1509 RMU, Memorandum Order (Sept. 20, 2007).

60. See January 20, 2007 Declaration of Sabin Willett, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 22, 2007), ¶¶ 27-29.

61. See *Locked Up Alone—Detention Conditions and Mental Health at Guantánamo*, Human Rights Watch, June 2008, at 20, available at <http://www.hrw.org/reports/2008/us6008web.pdf>.

62. Not until July 2008, after Parhat won his Detainee Treatment Act case (discussed below), did the government transfer Parhat and eventually the other Uighurs out of the isolation regimen of Camp 6.

63. See, e.g., Army Regulation 190-8 §§ 3.4, 3.5 & 4.1; Military Police Internment/ Resettlement Operations, No. FM 3-19.40.

64. AR 190-8 § 3-2(b).

65. *Id.* 3-4(b) (emphasis added).

66. See AR 190-8 §§ 3-4, 3-5, 4-1.

67. Geneva Convention III Relative to the Treatment of Prisoners of War art. 25, Aug. 12, 1949, 6 U.S.T. 2063.

68. *Rasul*, 542 U.S. at 473.

69. Detainee Treatment Act, Pub. L. 109-148, § 1005(e) (2006).

70. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006).

71. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635, § 7 (2006).

the DTA. Congress had fully suspended the Great Writ.

The DTA vested exclusive jurisdiction with the Court of Appeals for the District of Columbia to consider two narrow questions:

- (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
- (ii) to the extent the Constitution and the laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.⁷²

There was no right to present evidence, confront witnesses, or even for the Uighurs to see and respond to the evidence placed before their CSRTs. The DTA gave a prisoner the right to challenge (1) whether his enemy combatant status determination was consistent with the CSRT procedures, (2) whether his status determination was based on a preponderance of the evidence, and (3) whether the CSRT procedures violated the Constitution and/or federal law.⁷³

After Congress enacted the MCA, leading *habeas* lawyers met in New York City to strategize. Most agreed that no one should pursue a DTA case. The CSRT Procedures constituted a kangaroo process, and few wanted to dignify Congress's *habeas* "substitute" by filing a petition under the DTA. If a detainee won under the DTA, the thinking went, the Supreme Court would be less likely to strike it down as an inadequate substitute for *habeas*. Most thought the better strategy was to press a facial attack against Congress's unlawful suspension of the writ. Two years later in 2008, this appeal would become *Boumediene v. Bush* in the Supreme Court.

But there was a problem: a legal strategy is not a client. The statute was set against us, but the Uighurs' interest was in getting out of Guantánamo, not in being a foil for appellate strategy. We felt we could not wait for scholars to litigate appeals in other cases. Congress gave us lemons, we said, but we will make lemonade. Reaction to this idea was chilly. No one wanted us to upset the appellate strategy, particularly given the absurdity of Congress's *habeas* substitute. Nonetheless, on December 4, 2006, we filed in the D.C. Circuit a DTA petition on behalf of Huzaifa Parhat and six other Uighurs.

One of the few footholds in the regulations was a requirement that the government have presented to the CSRT panel exculpatory evidence in its possession. We argued that we needed to see its files to determine whether it had complied. The government urged that the record on review in a DTA action should be confined to the CSRT record of proceedings. This construction would have obscured from scrutiny any exculpatory material that the government did not

assemble, cull, or present to the CSRT. In July, 2007, the court unanimously agreed with our position, holding that the record on review included "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant."⁷⁴ This victory proved wholly academic—no DTA petitioner in any case ever received the record mandated by the D.C. Circuit.

The government sought reconsideration and then *en banc* review. While the bridge match over the record continued, many Uighurs endured their second year of excruciating isolation in Camp 6. After much cajoling, at last on October 29, 2007, a month after the D.C. Circuit panel had denied reconsideration of its order, the government for the first time produced what *it* contended should constitute the record.⁷⁵ We thought we could win on this record alone. As we had long suspected, there was no evidence of anything remotely like enemy activity. On January 4, 2008, relying on the government's version of the record, we moved for judgment as a matter of law on Parhat's record, using him as a test case for his companions.

We made two principal arguments. First, we asserted that the President's war powers did not authorize indefinite detention, because Parhat did not fall within Congress's definition of the enemy. Under the DTA's review standard, Parhat's status determination as an enemy combatant was not "consistent with the... laws of the United States."⁷⁶ Second, we argued that the preponderance of the evidence—even on the government's record—failed to support Parhat's enemy combatant classification.⁷⁷

Recall that the CSRT Procedures defined an "enemy combatant" as:

an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁷⁸

The government's case rested on a theory that Parhat *allegedly* was affiliated with ETIM, that ETIM *allegedly* was associated with al Qaida or the Taliban, and *allegedly* engaged in hostilities against the U.S. or its allies. Parhat argued the preponderance of the evidence showed that he could not possibly meet the enemy combatant definition. Not a single source document indicated that Parhat had joined ETIM, that ETIM was associated with al Qaida or the Taliban, or that ETIM even exists as an organization. Indeed, except for memoranda of his own statements, none of the "intelligence" even mentioned him.

The lack of source evidence against Parhat illustrated the extreme to which the government had pushed the concept of military detention. At its core, military detention is premised on battlefield capture. The concept is simple. On an actual battlefield, U.S. military personnel directly observe hostile actions. They take captives. Questions may later arise as to a detainee's status as civilian or soldier, particularly where uniforms are not worn, but the evidence is well sourced.

granting, vacating, and remanding the case for reconsideration in light of *Boumediene*. In 2008, the Court of Appeals reinstated its earlier decision. The government fought three rounds over the record; Parhat won each.

75. The government's production came *two and a half years* after we filed the first Uighur *habeas* petition in *Qassim v. Bush*, 382 F. Supp. 2d 126 (D.D.C. 2005).

76. Detainee Treatment Act, Pub. L. 109-148, § 1005(e)(2)(C)(ii)(2006).

77. *Id.* at § 1005(e)(2)(C)(i) ("the conclusion of the Tribunal [must] be supported by a preponderance of the evidence").

78. *Parhat*, 532 F.3d at 837.

72. Detainee Treatment Act, Pub. L. 109-148, § 1005(e)(2)(C)(2006).

73. *Parhat*, 532 F.3d at 840.

74. Parhat's case was paired with that of Haji Bismullah, an Afghan who has brought a petition in 2006. *Bismullah v. Gates*, 501 F.3d 178, 180, 181, 184-86 (D.C. Cir. 2007). The government extended this contest over the record to the last gasp, losing a petition for rehearing, *Bismullah v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Sept. 7, 2007), and a petition for *en banc* review, *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008). The government thereafter sought certiorari. The Supreme Court held the petition for six months, then issued a GVR order,

The wide net the U.S. cast across Afghanistan and Pakistan in the aftermath of 9/11, however, upended this concept. A study of military records (*i.e.*, the *military's* charges, without regard to the contentions of the prisoners), shows that only five percent of the Guantánamo population is alleged to have been captured on a battlefield.⁷⁹ Eighty-six percent of the population was sold to U.S. forces by someone else (generally Pakistan or Northern Alliance⁸⁰ forces); the majority of the 'vicious killers'⁸¹ at Guantánamo are not alleged to have participated in even a single hostile act.⁸² Parhat's case, and others like it, were the consequence, as the government desperately tried to justify his detention with intelligence memos produced from entirely unknown sources.⁸³

On June 20, 2008, a panel of the D.C. Circuit held unanimously for Parhat.⁸⁴ The government had wrongly labeled Parhat the enemy. Any further detention would be illegal. In a lengthy opinion, the court held that "we cannot find that the government's designation of Parhat as an enemy combatant is supported by a 'preponderance of the evidence' and was 'consistent with the standards and procedures' established by the Secretary of Defense, as required by the [DTA]."⁸⁵ The court noted that the government derived its "evidence" entirely from four intelligence reports describing ETIM's "activities and relationships as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, and as things that are 'suspected of' having taken place."⁸⁶ Parhat, it went on, had provided "substantial support" for the notions that (i) the source was the communist Chinese government, and (ii) "Chinese reporting on the subject of the Uighurs cannot be regarded as objective."⁸⁷ Because the reports failed to identify any underlying source for who may have "reported," "said," or "suspected" such things, the court found the reports inherently unreliable.⁸⁸ At oral argument, the government argued that assertions were reliable because they were repeated in multiple reports. Invoking Lewis Carroll, Circuit Judge Garland observed drily that "the fact that the government has 'said it thrice' does not make an allegation true."⁸⁹ The court held that, as a matter of law, the government's "bare assertions cannot sustain the determination that Parhat is an enemy combatant."⁹⁰

The court ordered the government to release or to transfer Parhat, or expeditiously to hold a new CSRT consistent with its opinion.⁹¹ It also noted that the district court, as a *habeas* court, had the power to order Parhat's release, and that Parhat could seek that remedy immediately through a writ of *habeas corpus*.⁹²

A critical development had taken place just eight days earlier. The Supreme Court had reversed *Boumediene*,⁹³ restoring the "the constitutional privilege of *habeas corpus*" to Guantánamo prisoners.⁹⁴ The Court concluded that Congress had unconstitutionally suspended the Great Writ. On July 29, 2008, the district court lifted the stays and vacated the dismissals in place over the Kiyemba Petitioners.⁹⁵ The court consolidated the *habeas* petitions for seventeen Uighurs, including Parhat, on July 10, before District Judge Ricardo M. Urbina.⁹⁶

POST-PARHAT CONDITIONS OF CONFINEMENT

Following the D.C. Circuit's decision in *Parhat*, the government finally transferred Parhat, and eventually the other Uighurs confined in solitary, to Camp Iguana. The conditions of Camp Iguana are far less restrictive than Camp 6. Nevertheless, it is a high-security area of the prison controlled by the same Joint Task Force Guantánamo that operates all areas of the facility. The camp is surrounded by fences and razor wire. Heavily armed military police guard the prison, patrol its perimeter, and monitor the men by camera twenty-four hours a day. Huts occupy much of the physical space at Camp Iguana, leaving a small area as the only outdoor access. On three sides, the fences are covered in opaque mesh. Guards refer to the men only by number.⁹⁷

THE RESTORATION OF THE *HABEAS* CASE

With Parhat's *habeas* case restored, he immediately moved for a resolution of the elemental question of *habeas corpus* itself—release. After all, the D.C. Circuit had concluded that "in [Parhat's *habeas*] proceeding there is no question that the court will have the power to order him released."⁹⁸ He sought release in the United States⁹⁹ based on that conclusion.¹⁰⁰ The government stoutly resisted. It contended that the release remedy would offend the President's exclusive power over immigration matters. And so, it said, the Uighurs might be held in Guantánamo "as long as it takes" for some other country to provide refuge. The *habeas* judge scheduled oral argument on Parhat's motion for his release for October 7, 2008. Meanwhile, all of the other Uighurs joined Parhat's motion for release.

On the eve of the hearing, the Executive conceded that none of the other Uighurs was an enemy combatant. The government never filed a return as to any Uighur asserting a legal basis for executive imprisonment, other than the "enemy combatant" status it later abandoned.¹⁰¹ The government offered no evidence demonstrating dangerousness, involvement in terrorism, criminal activity, or any other putative basis

79. Mark Denbeaux et al., *The Guantánamo Detainees: the Government's Story at 2* (2006), available at http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.

80. For a good account of the thuggishness of the criminal gangs that comprised the Northern Alliance, see generally Dexter Filkins, *THE FOREVER WAR* (2008).

81. *Rumsfeld: Captives will not be POWs*, USA Today, Jan. 28, 2002, at A1, available at 2002 WLNR 4493475.

82. *Id.* at 2.

83. See generally Declaration of Colonel Lawrence B. Wilkerson (Ret.), *Hamad v. Bush*, Civ. No. 05-1009 JDB, ¶ 9 (D.D.C. 2010), *supra* note 2.

84. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

85. *Id.* at 836.

86. *Id.* at 846.

87. *Id.* at 848.

88. *Id.* at 846-847.

89. *Id.* at 848-849 (quoting Lewis Carroll, *The Hunting of the Snark* 3 (1876)).

90. *Id.* at 847.

91. *Id.* at 854.

92. *Id.* at 851.

93. 553 U.S. 723, 128 S. Ct. 2229 (2008). *Boumediene* originally was brought by the Boston office of Hale & Dorr, which during the course of the litigation became WilmerHale. A cross-office WilmerHale team performed superbly in the Supreme Court to gain the narrow 5-4 victory. Collaboration with Massachusetts lawyers like those on the WilmerHale team, and our friend and colleague Jerry Cohen (whose article appears in this edition), has been a constant source of pride and inspiration.

94. *Id.* 128 S. Ct. at 2240.

95. *Kiyemba v. Bush*, No. 05-1509 RMU, Order (July 29, 2008).

96. *Kiyemba v. Bush*, No. 05-1509 RMU, Order (July 10, 2008).

97. *Id.*

98. *Parhat*, 532 F.3d at 851.

99. The D.C. Circuit ordered the government "to release or to transfer [Parhat]" or to hold a new CSRT. *Parhat*, 532 F.3d at 854. The government advised the D.C. Circuit that it would not re-CSRT Parhat, and it always conceded that it was barred from releasing Parhat to China, where he would face an unacceptable risk of torture, or worse, in light of his philosophical antipathy to the communist regime.

100. *Parhat*, 532 F.3d at 854. Because "release" necessarily means something

for detention. Instead, it argued that inherent Executive authority to “wind up” detentions in an orderly fashion justified continued detention of the Uighurs, even after conceding that they were not enemy combatants, and that the power to exclude aliens from entry into the United States rested exclusively with the political branches.

At the hearing on October 7, 2008, District of Columbia District Court Judge Urbina offered the government a further chance, soliciting a factual proffer of “the security risk to the United States should these people be permitted to live here.”¹⁰² The Executive again offered no evidence. Its lawyer responded, “I don’t have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street.”¹⁰³ The government had “seven years to study this issue,”¹⁰⁴ three years’ notice of the renewed *habeas* cases, ten weeks’ notice of the motion for release, and six weeks’ notice of the hearing. Nonetheless, the Executive “presented no reliable evidence that [the Uighurs] would pose a threat to U.S. interests.”¹⁰⁵ Local Uighur-American families had offered a short-term bridge to more permanent resettlement arrangements offered by a Lutheran refugee group and leaders from the Tallahassee, Florida religious community.¹⁰⁶ A donor committed substantial financial support.¹⁰⁷

Judge Urbina, ruling from the bench, granted our motion and ordered the Uighurs to appear in his courtroom later that week for a hearing to assess the conditions on their release in the United States. This was a watershed in the Guantánamo litigation, and for us an emotional high point. But it was a fleeting one.

Since 2003, he found, “the Government has been engaged in ‘extensive diplomatic efforts’ to resettle” the Uighurs abroad. “These efforts have failed for the last four years and have no foreseeable date by which they may succeed.” Judge Urbina concluded that any “wind up” authority had long since ceased, and further detention had become unlawful. While acknowledging “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control,” he concluded that this “does not mean that the third branch is frozen in place.”¹⁰⁸

Judicial authority to issue the writ in this case derives from “the guiding principle that personal liberty is secured by adherence to separation of powers.”¹⁰⁹ *Boumediene*, Judge Urbina reasoned, held that the writ is “an indispensable mechanism for monitoring the separation of powers,” and commanded that “the writ must be effective.”¹¹⁰ “[T]he court’s authority to safeguard an individual’s liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court’s jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release.”¹¹¹

other than “transfer,” it means something other than disposition to a foreign government. By process of elimination, “release” can only mean disposition to Parhat’s home country or to the United States. But the Court knew and noted that Parhat’s home country was unavailable. *Id.* at 838. At that time, release into the United States was the only option left of “release.”

101. As the return is the only means by which the jailer certifies “the true cause of the detention.” 28 U.S.C. § 2243 (cl. 3), we argued that the pleadings established a conclusive right to release.

102. Tr. of Hrg. at 15, *Kiyemba v. Obama*, No. 05-1509, D.D.C. (Oct. 7, 2008).

103. *Id.* at 17.

104. *Id.* at 15.

105. *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 40 (D.D.C. 2008), *rev’d*, *Kiyemba v. Obama*, 581 F.Supp.2d 33 (2009), *vacated*, 130 S. Ct. 1235 (2010) .

Citing *Hamdi* for the proposition that “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake,” the district court ruled that “the carte blanche authority the political branches purportedly wield over [Petitioners] is not in keeping with our system of governance.”¹¹² “The political branches may not simply dispense with these protections, thereby limiting the scope of *habeas* review by asserting that they are using their ‘best efforts’ to resettle the petitioners in another country.”¹¹³ “[O]ur system of checks and balances is designed to preserve the fundamental right of liberty.”¹¹⁴

Judge Urbina concluded that “[the Uighurs’] detention has already crossed the constitutional threshold into infinitum.”¹¹⁵ He granted our release motion, and ordered that the Uighurs and the resettlement providers appear just days later to address appropriate release conditions.

The government immediately moved for a stay pending appeal. The D.C. Circuit granted it the following day, October 8.

THE D.C. CIRCUIT’S DECISION: *KIYEMBA V. OBAMA*

On appeal, the government cast Judge Urbina’s decision as an unconstitutional infringement on the Executive’s exclusive authority to control the nation’s borders. It first argued that the power to admit aliens into the United States is a sovereign function exercised solely by the political branches. The Executive’s decision to exclude an alien, the government contended, is not judicially reviewable in the absence of authorization by Congress. The government argued that under the immigration laws, no statute gave the Uighurs the right to enter the United States. Even though *Boumediene* established that Guantánamo prisoners had the right to *habeas*, the Supreme Court did not empower the judiciary to order detainees released in the U.S. Finally, the government continued to rely on a so-called power to wind up the Uighurs’ detention, which afforded it additional time to imprison them.¹¹⁶

We countered that the government’s “exclusive authority” and immigration law arguments failed at the threshold of the Suspension Clause. That is, the constitutional privilege of *habeas*, the purpose of which is to relieve unlawful Executive detention, limited whatever discretion the Executive has under the immigration laws or to control the nation’s borders. Interpreting the immigration laws or the immigration powers of the political branches to bar a remedy in *habeas* where no law authorized the detention would effect an unconstitutional suspension of the writ. We also argued that Judge Urbina did not grant “entry” or “admission” as an immigration matter, nor did the Uighurs seek an immigration remedy; they sought *habeas* relief—so that affirming his order would not offend the Executive’s exclusion

106. Tr. of Hrg. at 48, *Kiyemba v. Obama*, No. 05-1509, D.D.C. (Oct. 7, 2008).

107. *Id.* at 51.

108. *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d at 42 note 5.

109. *Id.* at 42 (quoting *Boumediene*, 128 S. Ct. at 2277) (internal quotation marks and alterations omitted).

110. *Id.* (citing and quoting *Boumediene*, 128 S. Ct. at 2277, 2259, 2269)

111. *Id.* at 42 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

112. *Id.* at 43.

113. *Id.* at 42-43 (citing *Boumediene*, 128 S. Ct. at 2259).

114. *Id.* at 43.

115. *Id.*

116. See generally Br. of App’s, *Kiyemba v. Obama*, at 52, No. 08-5424 (D.C. Cir. Oct. 24, 2008).

power. In response to the government's assertion of "wind up" power, we contended that the power did not actually exist, and that, even if it did, the Executive had exhausted it after a failed five year attempt to resettle the Uighurs.

We also argued that the Constitution's separation of powers compelled release. Article III invests in the federal courts the "judicial power of the United States."¹¹⁷ That power extends to cases and controversies, and the *habeas* cases fall within that power.¹¹⁸ Three attributes of the judicial power controlled. First, remedy is the hallmark of the judicial decree.¹¹⁹ Second, the judiciary discerns the rights of the coordinate branches and enforces their separation.¹²⁰ Third, the judiciary is charged with the urgent duty to protect the Great Writ.¹²¹ Within that duty, release lies at its very core.¹²² And not only is the writ an urgent judicial remedy, it is "itself an indispensable mechanism for monitoring the separation of powers."¹²³ Therefore, separation of powers principles, and the unique role played by the judiciary within the constitutional design, obligated Judge Urbina to order the Uighurs released from indefinite and unlawful Executive detention.

A long dormant 5-4 Cold War decision of the Supreme Court formed the centerpiece of the government's argument. In *Shaughnessy v. United States ex. rel. Mezei*,¹²⁴ the Supreme Court left suspected communist Ignatz Mezei stranded at Ellis Island. Unlike the Uighurs, Mezei did not arrive at the border as the President's captive. A former U.S. resident, he left the U.S. voluntarily, returned voluntarily, and sought the immigration remedy of admission. Executive officials excluded him as a suspected communist, invoking particular statutory authority. No other country would take him. Mezei brought a *habeas* petition. The Supreme Court held that Mezei was not entitled to admission to the U.S. pending his resettlement elsewhere. The government contended that *Mezei* stood on all fours with the Uighurs' case, supporting the proposition that an alien lawfully excluded from the U.S. has no right to enter, even if the consequence of exclusion means that the alien must remain in U.S. custody indefinitely (pending resettlement to a third country).

We distinguished *Mezei* as an *immigration* case—and at that, one limited to its Cold War context. Mezei arrived at Ellis Island *voluntarily*. He sought the immigration remedy of admission. The Supreme Court ultimately deferred to the government's concern that foreign enemies might dump "volunteers" on our doorstep, and when the ships sailed past the horizon, the Executive would be forced to open its doors.¹²⁵ That concern, we argued, does not arise where the Executive paid bounty hunters in Pakistan, shackled prisoners, and rendered them to Guantánamo, thus creating a population that is here only because the Executive brought it here. *Mezei* does not shield the Executive from problems of its own making. Moreover, we noted that whereas the Uighurs' detention had no basis in law, Mezei's exclusion

was expressly authorized by a statute designed to deny entry to suspected communists. *Mezei* thus involved a much narrower separation of powers concern, and did not unilateral Executive detention that, as *Boumediene* holds, gives rise to the judicial power to direct release.

On November 24, 2008, before a panel of Circuit Judges Randolph, Henderson, and Rogers, we drew heavy questioning. Three months later, on February 19, 2009, the D.C. Circuit reversed Judge Urbina's release order. No Uighur had ever sought refugee status or any other immigration remedy, and no executive discretion (such as the statutory discretion to parole, grant immigration status, exclude, or initiate removal) had ever been foreclosed. Nevertheless, the panel majority of Randolph and Henderson reconfigured the Uighurs' *habeas* petitions into requests for judicially imposed immigration status and reversed.

The majority began with an exegesis of immigration law decisions concerning "the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms,"¹²⁶ and concluded that it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."¹²⁷ The majority rested on *Mezei* and *United States ex rel. Knauff v. Shaughnessy*,¹²⁸ (another Cold War exclusion case), neither of which involved a prisoner captured by the Executive and brought to our threshold by force of arms.

The majority held that the District Court erred because it "cited no statute or treaty authorizing its order" and "spoke only generally" of the Constitution.¹²⁹ The Fifth Amendment's Due Process Clause, the majority held, "cannot support the court's order of release" because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."¹³⁰ "Not every violation of a right yields a remedy, even when the right is constitutional," the majority said, drafting the sovereign immunity and political question doctrines as support.¹³¹ The maxim "*Ubi jus, ibi remedium* . . . cannot overcome established law that an alien who seeks admission to this country may not do so under any claim of right."¹³²

Most telling was the majority's conclusion as to the role of the *habeas* court. The judiciary, it held, had no "power to require anything more" than the jailer's assurances that he was continuing efforts to find a foreign country willing to admit the Uighurs.¹³³

Concurring in the judgment, Judge Rogers found the majority's analysis to be "not faithful to *Boumediene*."¹³⁴ It "compromises both the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause, art. 1, § 9, cl. 2, and the balance of powers regarding exclusion and admission and release of aliens into the country recognized by the Supreme Court to reside in the Congress, the Executive, and the *habeas* court."¹³⁵ To reach

117. U.S. CONST. art. III, § 1.

118. *Boumediene*, 128 S. Ct. at 2240.

119. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) ("a monstrous absurdity" that there should be no remedy where a right exists).

120. *Boumediene*, 128 S. Ct. at 2259.

121. *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005); *Price v. Johnston*, 334 U.S. 266, 283 (1948).

122. *Wilkinson*, 544 U.S. at 79.

123. *Boumediene*, 128 S. Ct. at 2259.

124. 345 U.S. 206 (1953).

125. *Mezei*, 345 U.S. at 216.

126. *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009), *vacated*, 130 S.

Ct. 1235 (2010).

127. *Id.* at 1026 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)).

128. 338 U.S. 537, 543 (1950).

129. *Id.*

130. *Id.*

131. *Id.* at 1027.

132. *Id.* (internal quotation marks and citations omitted).

133. *Kiyemba* 555 F.3d at 1029.

134. *Id.* at 1032 (Rogers, J., concurring in the judgment).

135. *Id.* at 1035 (Rogers, J., concurring in the judgment).

its conclusion, Judge Rogers explained, the majority “recast the traditional inquiry of a *habeas* court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the *habeas* court is ‘expressly authorized’ to order aliens brought into the United States,” and “conflate[d] the power of the Executive to classify an alien as ‘admitted’ within the meaning of the immigration statutes, and the power of the *habeas* court to allow an alien physically into the country.”¹³⁶ She would have remanded to permit the government a further opportunity to show that the immigration laws formed an alternate basis for detention.¹³⁷

As the Uighurs began their eighth year of imprisonment, we sought *certiorari* review in the Supreme Court, by filing a petition on April 3, 2009.

THE NEW ADMINISTRATION

Even before the January, 2009 inauguration of President Barack Obama, we joined other *habeas* counsel in pressing the President-elect’s transition team for radical changes in detention policy. For many, this boiled down to the rallying cry—Close Guantánamo!—and indeed that cry took shape in one of the President’s first executive orders. But we knew that closing Guantánamo would raise practical problems as to a population—including, but not limited to the Uighurs—of stateless prisoners, and we believed that U.S. leadership would be essential to a practical solution. As Defense Secretary Robert Gates explained to Congress, “it’s difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won’t take any of them ourselves.”¹³⁸

We had just the candidates. So we lobbied to put Judge Urbina’s judicial order into political effect. The plan involved the assistance of the Uighur-American community, which has a strong presence in the metropolitan D.C. area.

In April, 2009, our quiet lobbying paid off—or so we thought. We were quietly summoned to meet senior officials in the Department of Homeland Security (DHS). A deal was quickly roughed out and signed by a senior DHS official.¹³⁹ Two Uighurs, including Huzaifa Parhat, would be brought to a Virginia suburb. The next morning, a Bingham team boarded a military flight for the base, where we quickly worked through the details with skeptical clients. They did not believe that this could be real, but we assured them. “Here is a signature of a very senior government official,” we said. “This is binding.” We would live to regret those words.

136. *Id.* at 1036 (Rogers, J., concurring in the judgment).

137. *Id.* at 1038 (Rogers, J., concurring in the judgment).

138. See Proposed Budget Estimates for the Fiscal 2009 War Supplemental: Hearing before the S. Appropriations Comm., 111th Cong. (2009) (statement of Robert M. Gates) available at <http://appropriations.senate.gov/ht-full.cfm?method=hearings.view&id=ef1b6977-eb37-4925-8291-ea7cf40c2e46>.

139. See Julian E. Barnes, *U.S. plans to accept several Chinese Muslims from Guantánamo*, L.A. TIMES, Apr. 24, 2009, available at <http://articles.latimes.com/2009/apr/24/nation/na-gitmo-release24>.

140. See Jane Mayer, *The Trial*, THE NEW YORKER, at 60 (Feb. 15 & 22, 2010). Seizing on the popular view that any Guantánamo detainee necessarily is a “terrorist,” the Senate Minority leader said, “[t]his administration—at least the Attorney General—has indicated there is a possibility they are going to allow some of the Chinese terrorists, the Uighurs to be released in the United States not in a prison. In other words, presumably they would be walking around in our country.” 155 Cong. Rec. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell). “The Justice Department’s opinion that terrorists can be brought to this country for the purposes of non-detention is preposterous,” said Senator Hatch, referring to Petitioners. *Id.* at S5606 (daily ed. May 19, 2009) (statement of Sen. Hatch).

On return we were met with—nothing. Silence. “Stand by,” we were told. And as we stood, news of the arrangements began to leak, and soon a trickle of leaks became a torrent of political opposition.¹⁴⁰ The Right characterized our clients as terrorists to be set loose on American streets, and the President as a dangerous Leftist who had lost his marbles.

A rider would soon be stapled to a must-pass defense funding bill, the Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859. Enacted on June 24, 2009, it barred use of the defense funding to release into the U.S. anyone detained at Guantánamo on the date of the bill’s enactment. The bill expired on October 31, 2009, but became a model for the October legislation that followed.¹⁴¹ But it had all come unraveled by early May, 2009, when we were summoned to the White House. One of the President’s senior advisors sheepishly told us, “We can’t do it. We’ve got 93 senators against this thing.” But, he said, “We have another idea.”¹⁴²

BERMUDA

The “other idea” was Bermuda. The President had recently met with Bermuda’s Premier, Dr. Ewart Brown, who had offered to help him with his Guantánamo troubles. Swiftly, a three-way negotiation was set up among senior government officials in Bermuda, the White House, and us.

Bermuda occupies an unusual political status. An independent nation, it is nevertheless subject, as a member of the British Commonwealth, to a shared sovereignty in certain respects. With an elected parliament and premier, Bermuda controls its own domestic laws, but defense and foreign policy fall under the brief of the United Kingdom.

The idea we hastily discussed was that four Uighurs would enter the country as “guest workers,” a program over which the domestic government has control. No one knew what Britain’s reaction would be, but everyone knew that a leak might kill the deal. With no time to go to the base, we were instead permitted a hasty phone call. Concerned that the men might not have heard of Bermuda, we were at pains to describe its situation, economy, and relations to the United Kingdom. About fifty minutes into our one-hour call, a client interrupted:

Client: Sabin, how much time do we have for this call?

Willett: An hour.

Client: Then stop talking! I want it clearly understood that I accept!

“These are the 17 Chinese Uighurs It is hard to believe that this administration is seriously considering freeing these men inside the United States and, most outrageous of all, paying them to live freely within American communities and neighborhoods. The American people don’t want these men walking the streets of America’s neighborhoods.” *Id.* at S5654 (daily ed. May 20, 2009) (statement of Sen. Thune). Senator Sessions added, “I don’t believe the administration has the legal authority to release these detainees.” *Id.* at S5791 (daily ed. May 21, 2009) (statement of Sen. Sessions).

141. On October 28, 2009, Congress would enact the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142 (the “DHS Bill”), and the National Defense Authorization Act for the Fiscal Year, 2010, Pub. L. No. 111-84, 123 Stat. 2190 (the “NDAA Bill”), each of which purported to bar the agencies in question from spending funds to aid release of detainees or aliens who were present in Guantánamo on a specified day. (We would later argue that the 2009 legislation must be read, under the canon of constitutional avoidance, as not applicable to noncombatants who had already won their *habeas* cases. In the alternative, we argued that the bills, if read to apply to the Uighurs, were void as an unlawful suspension of the writ.)

142. Conversation between authors and White House official in May, 2009.

On June 10, in Bermuda's Cabinet House on Front Street, Bermuda, we watched as a U.S. State Department representative and Bermuda's interior minister made the final arrangements.

And there was a glitch. The pilot of the aircraft chartered by Bermuda to effect the transfer lacked a night landing permit at Guantánamo.¹⁴³ The parties looked around the table and agreed – this could not wait another day. It would leak. A series of rapid phone calls led to another aircraft. We left the airport at midnight and landed at Guantánamo at just past 3:00 a.m. The jet remained at the end of the airstrip, and the four Uighurs were brought out by bus. The official handoff of custody took place at the bottom of the gangway. And then we were aloft again. Just after dawn on June 11, four clients touched down in Bermuda.¹⁴⁴

The ensuing row was more than anyone expected. For several weeks there were calls for the Premier's ouster, and British and American press flocked to the island. Once tempers subsided, the Uighurs began integrating into Bermudan society with the assistance of a retired local army officer.

Today, the Bermuda four live peacefully near Hamilton,¹⁴⁵ working as groundskeepers at the Port Royal Golf Club (a favorite of American tourists where the Professional Golf Association held a tournament in 2009).¹⁴⁶ Two joined a community soccer club; all were guests of the U.S. Consul at a Fourth-of-July beach party; and all have met with Premier and Mrs. Brown.¹⁴⁷ At the time of their release to Bermuda, thirteen Uighurs remained imprisoned.

PALAU

Also during June 2009, the Republic of Palau extended an offer to relocate temporarily up to twelve of the thirteen remaining Uighurs while the U.S. continued to seek a permanent resettlement. Palau is a tiny island nation lying some 500 miles east of the Philippines. Until recently it contained no Uighurs. The island has no Muslim heritage, although a small population of immigrants is Muslim. Six Uighurs accepted the offer. Four more months of prison followed this announcement, but at last the six left Guantánamo on October 31 and arrived on November 1, 2009. The Palauans have provided housing, an interpreter, English-language classes and job training.¹⁴⁸ While Palau's President has now said that the Uighurs are welcome to stay as long as they want, they have not been conferred citizenship and are not authorized to travel. They hope for permanent resettlement elsewhere. As one reporter recently wrote, "the prospect of an eternity in a small island country, with no passport and no Uighur community

other than themselves, is its own kind of confinement."¹⁴⁹ At the time of the Palauan resettlement, the U.S. continued to imprison seven Uighurs. Among them was Arkin Mahmud, to whom Palau made no offer of temporary relocation.¹⁵⁰

Meanwhile, on October 20, 2009, after holding our petition through multiple conferences, and, unusually, until a new term, the Supreme Court granted *certiorari*.¹⁵¹

THE SUPREME COURT

We filed our merits brief in December 2009. Seven Uighurs remained stranded, including brothers Arkin Mahmud and Bahtiyar Mahnut. The core of our argument was that until the D.C. Circuit's decision, giving remedies in cases in which courts have jurisdiction had always been an essential attribute of judicial power under Article III, with which the political branches could not interfere.¹⁵² *Kiyemba* stripped the district court of that power and gave it over to the Executive. That assignment was constitutionally intolerable. We urged the Supreme Court not to permit the Executive to avoid—indeed, thwart—the constitutional power of the Judiciary.

Within that framework, we argued that *Kiyemba* conflicted with *Boumediene* and hobbled the function of the judiciary within the constitutional design. Article III and the Suspension Clause preserved the Judiciary's critical checking power, "ensur[ing] that, except during periods for formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty."¹⁵³ By removing the remedy, *Kiyemba* removed this structural check and thus upset the separation of powers at the heart of our Constitution. This showed most acutely, we contended, in the *Kiyemba* majority's parting observation that the only judicial power was the power to receive representations from the Executive jailer that it would try to end its unlawful imprisonment on its own terms, by appealing to the grace of foreign countries. That conclusion left the Judiciary unable to discharge its constitutional checking function in a case in which it had jurisdiction.

The writ protected by the Suspension Clause presumes that every person is entitled to be free. It demands that the Executive explain the individual's imprisonment, and not, as the *Kiyemba* majority would have it, that the prisoner prove a personal right. "The question," wrote Chief Justice Marshall, "is what authority has the jailor to detain him?"¹⁵⁴ In the early years of the Republic, federal *habeas* decisions invariably were framed this way.¹⁵⁵

The remedy in *habeas*, we argued, *is* release. Indeed, *Boumediene*

143. The airstrip's proximity to the Cuban fence line makes landing a sometimes tricky maneuver.

144. Press Release, Dep't of Justice, U.S. Resettles Four Uighur Detainees from Guantánamo Bay to the Government of Bermuda (June 11, 2009), available at <http://www.justice.gov/opa/pr/2009/June/09-ag-574.html>.

145. Former Gitmo detainees work on Bermuda golf course, U.S.A. TODAY, Aug. 5, 2005, available at http://www.usatoday.com/news/world/2009-08-05-gitmo-detainees-bermuda_N.htm.

146. Former Gitmo detainees work on Bermuda golf course, U.S.A. TODAY, Aug. 5, 2005, available at http://www.usatoday.com/news/world/2009-08-05-gitmo-detainees-bermuda_N.htm.

147. James Whittaker, *Uighurs swap Gitmo fatigues for Bermuda Shorts*, AFP, Oct. 20, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5g-gzvviY7LycZeXRMH0eTsGzODXXQ>; Sam Strangeways, *A month after arriving, Uighurs wish to become productive island citizens*, THE ROYAL GAZETTE, July 15, 2009, available at <http://www.royalgazette.com/siftology.royalgazette/Article/article.jsp?sectionId=60&articleId=7d977b330030005>.

148. Jonathan Kaminsky, *Ex-Guantánamo detainees begin new lives in Palau*,

ASSOC. PRESS, Nov. 3, 2009, available at <http://abcnews.com/International/wireStory?id=8981107>.

149. Mary Kay Magistad, *Stranded in Paradise*, Foreign Policy Magazine, Mar. 26, 2010, available at http://www.foreignpolicy.com/articles/2010/03/26/stranded_in_paradise.

150. Bahtiyar Mahnut (Arkin Mahmud's brother) advised that he would have taken the offer, but could not in good conscience abandon his brother in Guantánamo. Del Quentin Wilber, *2 Brothers' Grim Tale Of Loyalty And Limbo*, WASH. POST, Sept. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/27/AR2009092703076.html>.

151. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

152. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Gordon v. United States*, 117 U.S. 697 (1864, reported 1885); *United States v. Klein*, 122 U.S. (13 Wall.) 128 (1872); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

153. *Boumediene*, 128 S. Ct. at 2247.

154. *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806).

155. See Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165,

concluded that a “*habeas* court must have the power to order the conditional release of an individual unlawfully detained.”¹⁵⁶ This conclusion has been well established.¹⁵⁷ The government never explained how it could be otherwise. A *habeas* writ that did not conclusively end unlawful Executive imprisonment would protect neither the separation of powers, because it would not judicially check the Executive; nor the prisoner, who would obtain nothing from judicial review; nor the Judiciary, whose function would be (and, since *Boumediene*, largely has been) reduced to cheerleading, if not outright irrelevance. The writ and the constitutional plan require more of the Judiciary than to accept assurances from Executive jailers that it is trying to find its prisoners a home abroad.

Moreover, the remedy is release *from the courthouse*. This is the remedy that the *habeas* judge has always given, regardless of citizenship. English cases during the period straddling 1789, and American cases following 1789, demonstrate categorically that the *habeas* remedy was immediate release, or “discharge” from the courthouse. In England, the writ would issue from a London courtroom to a distant jail,¹⁵⁸ including jails over the sea,¹⁵⁹ directing the jailer to return to the courtroom with the prisoner and the explanation for his detention.¹⁶⁰ With the prisoner there in the courtroom, the court would consider the grounds for detention. Finding them adequate, it would remand the prisoner to the jailer’s custody. Finding them inadequate, it would order the prisoner discharged then and there.¹⁶¹ Release was immediate, and practical (or political) difficulties were not permitted to delay release.¹⁶²

These same release mechanics obtained in the new Republic. Six years after the Constitution was ratified, a prisoner jailed in Pennsylvania sought the writ and was “now *brought into court* upon a Habeas Corpus.”¹⁶³ The Supreme Court granted the petition and directed release of the prisoner.¹⁶⁴ Eleven years later, in *Ex Parte Burford*, Burford was “brought before the supreme court on a writ of habeas corpus.”¹⁶⁵ The Supreme Court granted the petition and discharged the prisoner.¹⁶⁶ The same mechanics applied in *Ex Parte Bollman*.¹⁶⁷ “With the prisoners present, the Supreme Court fully examined and attentively considered, on an item-by-item basis, the testimony on which they were committed, held it insufficient, and ordered their discharge.”¹⁶⁸ It has always been true that “[a] basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. This is

the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term ‘*habeas corpus*.’”¹⁶⁹

With its response to our merits brief due in early January 2010, the Executive asked for an extension. January 2010 came and went. The Executive requested yet another extension, this time until February 5, 2010. On February 3, Switzerland offered refuge to Arkin and his brother, Bahtiyar Mahnut. They instantly accepted. (In late March, after eight full years of imprisonment, the brothers had arrived on Swiss soil.¹⁷⁰)

In its opposition brief, filed days after the Swiss announcement, the Executive now urged the Court to dismiss the writ of certiorari as improvidently granted.¹⁷¹ Judge Urbina’s release order, it asserted, hinged on the premise that release into the U.S. was the only means by which the Uighurs could leave Guantánamo.¹⁷² Accordingly, the Court granted review on that premise.¹⁷³ Since Judge Urbina’s ruling, the Executive had resettled four Uighurs in Bermuda, six in Palau, and two had received an offer from Switzerland, including Arkin, the only Uighur not to have received an offer from Palau.¹⁷⁴ This left five Uighurs, all of whom had received offers of resettlement in Palau, but turned them down.¹⁷⁵ “Because these developments eliminate a factual premise of the question presented in this case,” the Executive said, the Court should dismiss the writ of certiorari as improvidently granted.¹⁷⁶

To be sure, the government also briefed the merits of the dispute. At bottom, it relied on the so-called “exclusive authority” of the political branches over the nation’s borders. “As this Court has long affirmed,” the government argued, “the power to admit or exclude aliens is a sovereign prerogative vested in the political Branches, and ‘it is not within the province of any court, unless expressly authorized by law, to review [that] determination.’”¹⁷⁷ Judge Urbina’s order therefore intolerably infringed on the political branches’ power.¹⁷⁸

While we were preparing our reply brief and for oral argument (scheduled for March 23, 2010) the Court on February 12 ordered further briefing on the government’s suggestion of dismissal. We emphasized that discretionary dismissal would leave in place *Kiyemba*’s cession to the Executive of complete power over whether remedy may be granted at all. Review of that constitutionally intolerable decision remained necessary.

In a *per curiam* opinion issued on March 1, 2010, the Supreme

1187-88 (2007) (showing that in scores of early *habeas* decisions, courts discussed only the federal detention power, not whether the prisoner had an affirmative right to release); *Boumediene*, 128 S. Ct. at 2247.

156. *Boumediene*, 128 S. Ct. at 2266.

157. See, e.g., *St. Cyr*, 533 U.S. at 301 (“[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”) (internal quotation marks and citation omitted); *In re Medley*, 134 U.S. 160, 173 (1890) (“under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from wrongful confinement”); *Ex Parte Watkins*, 28 U.S. (3 Pet.) at 202 (Marshall, C.J.); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (a *habeas* court that finds imprisonment unlawful “can only direct [the prisoner] to be discharged”); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (*habeas* is “a remedy for [the] fatal evil” of “arbitrary imprisonments”).

158. See generally *Brief of the Right Honorable Lord Goldsmith et al. as Amici Curiae in Support of Petitioners*, *Kiyemba v. Obama*, No. 08-1234 at 27-29 (U.S. Dec. 11, 2009).

159. *Id.* at 20.

160. *Id.* at 35-44.

161. *Id.* at 28-32.

162. *Id.* at 30-35.

163. *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17 (1795) (emphasis added).

164. *Id.* at 18.

165. 7 U.S. (3 Cranch) 448 (1806); See *Ex Parte Watkins*, 28 U.S. 193, 208 (1830) (Marshall, C.J.) (describing *Burford* case).

166. *Ex Parte Burford*, 7 U.S. at 453.

167. 8 U.S. (4 Cranch) 75 (1807).

168. Eric M. Freedman, *Habeas Corpus, Rethinking the Great Writ of Liberty* 25 & notes 38-39 (New York University Press 2001) (internal quotations marks and footnotes omitted).

169. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

170. Two ex-Guantánamo Uighurs arrive in Switzerland, AFP, Mar. 24, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5izn7e2mpy-qbm6wZfzUK-BEAF-N6w>.

171. *Br. of Resp’s, Kiyemba v. Obama*, at 52, No. 08-1234 (U.S. Feb. 5, 2010).

172. *Id.* at 51.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)).

178. For the government’s complete fifty page brief, see *Br. of Resp’s, Kiyemba v.*

Court dismissed the appeal, vacated *Kiyemba*, and remanded the case to the D.C. Circuit.¹⁷⁹ The Court began, “[w]e granted certiorari, 558 U.S. ____ (2009), on the question whether a federal court exercising *habeas* jurisdiction has the power to order the release of prisoners held at Guantánamo Bay ‘where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.’”¹⁸⁰ “By now, however, each of the detainees at issue in this case has received at least one offer of resettlement in another country.”¹⁸¹ It thus held that “[t]his change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so.”¹⁸² The Court ordered the D.C. Circuit to determine what further proceedings—either in the court of appeals or in the district court—are “necessary and appropriate for the full and prompt disposition of the case in light of the new developments.”¹⁸³

The Court might have taken the government’s suggestion to dismiss *certiorari* as improvidently granted, which would have left *Kiyemba* to stand as precedent. Instead, it affirmatively chose to vacate *Kiyemba* and remand for further proceedings. On May 28, 2010, the D.C. Circuit denied our motion to remand, and reinstated *Kiyemba*.¹⁸⁴ The Court held that remand was unnecessary because, regardless of the appropriateness of the Uighurs’ resettlement options, if any, “they would have no right to be released into the United States.”¹⁸⁵ Palau was, in the end, irrelevant: relying on the core of its original opinion that the political branches have exclusive authority over the nation’s borders, the Court ruled that “it is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement.”¹⁸⁶ The Court also thought that the latest enactments by Congress were conclusive.¹⁸⁷ These statutes, enacted in 2009, prohibit the expenditure of funds to bring Guantánamo detainees to the United States.¹⁸⁸ We argued that the legislation must be read, under

the canon of constitutional avoidance, as not applicable to noncombatants who had already won their *habeas* cases. In the alternative, we argued that the bills, if read to apply to the Uighurs, were void as an unlawful suspension of the writ and would also constitute an unlawful bill of attainder. The Court rejected these arguments.¹⁸⁹ Instead, it reinstated both the original judgment and its opinion, modifying them to account for the latest developments in the case, but otherwise leaving the core decision intact.¹⁹⁰ With *Kiyemba* restored, *Boumediene* has been reduced to an advisory ruling, and the judicial power of the United States has been effectively ceded to the executive branch. We may boast of courts with *habeas* jurisdiction, but a court that cannot order release is not a real *habeas* court. Such is the federal judge today. He may not release. He may only invite the jailer himself to try to arrange it on his own terms.

CONCLUSION

In those moments when he can lift himself from depression, a prisoner at Guantánamo regards the legal battle with bemusement. American lawyers seem delusional to him. For reasons known only to themselves, they place enormous importance in the thrust and parry of court decisions. A man in Camp Iguana can tell you that little comes of American courts.

“If the Constitution ever perishes,” Justice Story warned long ago, “it will be, when the Judiciary shall have become feeble and inert, and either unwilling or unable to perform the solemn duties imposed upon it by the original structure of the Government.”¹⁹¹ *Kiyemba*’s removal of remedy power has profoundly enfeebled the district court. Imprisonment after *Boumediene* remains where it was before—entirely a matter of executive discretion. With *Kiyemba* decided, the existential dilemma that has always hung over the inter-branch contest at the heart of the Guantánamo litigation has been resolved. In an age of executive power, there is no real relief a court can give.

Obama, No. 08-1234 (U.S. Feb. 5, 2010).

179. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (*per curiam*).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Kiyemba v. Obama*, --- F.3d ----, 2010 WL 2134279 (D.C. Cir. May 28, 2010).

185. *Id.* at *1.

186. *Id.*

187. *Id.* at *2.

188. See *supra*, n.141, at 31.

189. *Kiyemba v. Obama*, 2010 WL 2134279, at *2.

190. Judge Rodgers concurred in the judgment, but would not have reinstated the Court’s original opinion, which she considered overbroad. *Id.*

191. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION 185 (1865).

NON-LAWYER REPRESENTATION IN COURT AND AGENCY HEARINGS OF LITIGANTS WHO CANNOT OBTAIN LAWYERS

By Allan G. Rodgers and Ernest Winsor



Allan G. Rodgers has been the Executive Director of Massachusetts Law Reform Institute since 1969, specializing in court reform, employment law and family law. He is a member of the Access to Justice Commission.



Ernest "Tony" Winsor was a staff attorney at Massachusetts Law Reform Institute from 1970 to 2009. Winsor specialized in court reform, language access and CORI issues.

I. INTRODUCTION

In recent times increasing attention has been given to the tremendous gap in lawyer representation for litigants who cannot afford or get their own lawyer in contested court and administrative hearings where important rights are at stake. On August 7, 2006 the American Bar Association approved this resolution on this topic:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.¹

The Boston Bar and Massachusetts Bar Associations and the state's Access to Justice Commission also endorsed the concept.² In 2007, the Boston Bar Association created a Task Force on Expanding the Right to Counsel in Civil Cases, and expanded it to include several representatives from other parts of the state.³ The Task Force's report, issued in September of 2008, identifies several high priority areas of cases in the housing, family, juvenile and

immigration fields and proposes some expansions of the right to counsel and several pilot projects to test out how expansion would work best. The Task Force acknowledged that its recommendations are just a start among the many areas in which legal counsel is needed to help litigants address the potential loss of important rights. It points out that these needs also exist in the public benefits, health and employment areas, for example.⁴

The Task Force also emphasized that expansion of the right to representation in civil matters where important rights are at stake must be placed in the context of other assistance which effectively gives justice to litigants but does not involve full lawyer representation. Examples are advice and assistance in preparing court and administrative hearing papers and for a hearing; alternate dispute resolution; unbundling of lawyer services; and the use of lay advocates.⁵ It is crucial for courts and agencies which provide hearings to offer these alternatives to help meet the enormous civil case representational gap. Regardless of how much paid and volunteer lawyer resources can be created, the gap will remain huge.

In the course of the discussions on improving access to justice, little attention has been paid to how the use of trained and supervised lay advocates can help fill the gap. The Access of Justice

1. ABA House of Delegates Res. 112A, <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (last viewed April 6, 2010).

2. *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts 2* (Sep 2008), available at http://www.bostonbar.org/prs/nr_0809/

GideonsNewTrumpet.pdf

3. *Id.* at 6.

4. *Id.*

5. *Id.*

Commission recognized this potentially important resource in its report issued in June of 2007.⁶ One of its recommendations to the Supreme Judicial Court was:

The Commission strongly urges the Justices of the Supreme Judicial Court to redefine the unauthorized practice of the law to permit trained non-lawyers to speak in the courtroom in certain civil matters on behalf of low-income people. We leave to the Justices the questions of how those advocates should be trained and identified, what character of proceeding should have lay advocates, what ethical rules would apply to such advocates, whether the authorization should exist only when the other side has counsel, and the litigants' income levels at which such services would be permissible. The Commission recommends that the lay-advocacy program extend at least to in-court eviction proceedings and domestic violence hearings.⁷

The Commission had this to say, in its June, 2008 report to the Supreme Judicial Court:

Lay Advocates. With a trial judge's permission, there are today lay advocates speaking in court on behalf of a party, thus appearing to practice law in the traditional sense. The Commission has recommended that, in limited circumstances, a well-trained lay person should be allowed to act affirmatively in court on behalf of an indigent individual. See recommendation 2 on page 40 of the June, 2007 report. Specifically, the Justices should clarify that the trial judge has the discretion to determine what role, if any, a lay advocate in these limited circumstances should be permitted to play in a given case. It may also be appropriate to endorse the concept of lay advocacy for indigent litigants in a pilot program limited to one trial court department (or one court) and limited to one kind of case (eviction proceedings, for example).⁸

In this article, we examine the long and successful experience with non-lawyer representation in administrative agency adjudicatory hearings (Part II), some examples of the use of lay advocates in court and at agency hearings (Part III) and our recommendations on how appropriate lay advocacy can become an important part of the resources we need to begin to narrow the enormous representational gap at both the court and administrative agency levels (Part IV).

II. THE USE OF NON-LAWYERS TO PROVIDE REPRESENTATION IN ADMINISTRATIVE AGENCY HEARINGS

Much of the discussion about the use of lay advocates in representing low-income people in agency and court hearings is a recent phenomenon. But, in fact, at the agency level at least, it has a solid history of more than thirty years in Massachusetts. For many years administrative agency adjudicatory hearings have been the appeal route for people who are dissatisfied with determinations by those agencies in public benefit programs.⁹ This hearing structure was mandated by the US Supreme Court decision in *Goldberg v. Kelly*.¹⁰ While *Goldberg* did not explicitly permit non-lawyers to represent beneficiaries in these hearings,¹¹ state laws or regulations permit such representation.¹² To our knowledge, there has been no "unauthorized practice of law" opposition raised to this representation.

Most of the structure for these "fair hearings" is in state regulations. The Office of Administration and Finance promulgated Standard Adjudicatory Hearing Rules in the early 1980's, and most of the state public benefits agency hearings are conducted under the "informal hearings" component of that regulation.¹³ Those agencies that have not adopted the Standard Rules use their own fair hearing regulations, which are very similar.¹⁴

Despite the availability of non-lawyers who are authorized to provide this representation, very few litigants have any representation at these hearings. When there is representation at these adjudicatory hearings, much of it is by paralegals and most of these paralegals do so under the supervision of a legal services program or a lawyer. The results of this non-lawyer representation are impressive. There are many studies that show this non-lawyer representation is much more effective than no representation, and some studies even indicate that non-lawyer representation is as least as successful as lawyer representation in these types of hearings. Some studies show that having a non-lawyer or lawyer representative in these hearings produces markedly better results for those who get representation. These studies have been collectively described by Professor Russell Engler in a recent law review article.¹⁵

Professor Engler, states that his research shows the following as to administrative agency hearings (footnotes omitted):

Available studies consistently reveal the importance of representation as a crucial variable in improving the success rate of appeals. Data from Social Security Disability Appeals, Unemployment Appeals, Immigration Appeals and other administrative appeals typically show that the success rate is 15 to 30 percent greater

6. *Barriers to Access to Justice in Massachusetts: A Report, With Recommendations to the Supreme Judicial Court*, (June 2007), available at <http://www.massaccess-tojustice.org/reports-of-the-commission.php>

7. *Id.* at 12-13.

8. *Third Annual Report of the Massachusetts Access to Justice Commission* (June 2008), available at <http://www.massaccessjustice.org/third-annual-report.php>

9. See, e.g., MASS. GEN. LAWS Ch. 30A, § 1(1)(2008).

10. 397 U.S. 254 (1970)

11. *Id.* at 270-271

12. See, e.g. MASS. GEN. LAWS Ch.151A §39(b)(2008); 801 C.M.R. 1.02 (2010).

13. 801 C.M.R. 1.02 (2010)

14. The public benefit programs that are covered by the "fair hearing" requirement of *Goldberg v. Kelly*, 397 U.S. 254 (1970), include those at the federal level involving the various Social Security benefit programs such as Old Age Assistance, Social Security Disability Insurance, Supplemental Security Income and Medicare. At the state level, "fair hearings" are held on cash assistance programs such as Transitional Assistance to Families with Dependent Children, Emergency Assistance to Elders, Disabled and Children, shelter benefits and Food Stamps. Such hearings are also held on unemployment benefits, MassHealth benefits, and on actions by the Department of Children and Families (formerly the Department of Social Services).

15. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L. J.* 37 (February 2010).

when the claimant is represented. While the jump is consistent across many studies, the levels of success vary not only based on the type of benefit case involved, but the grounds for appeal, nature of the claim and procedural posture as well. As a result, the increased chances for success with representation can range from a 50% increase in success according to some studies involving unemployment and social security disability appeals, to increases in which representation makes the chances of success at least two or three times more likely in certain immigration appeals.¹⁶

Most of the huge volume of hearings in these programs can be handled by trained and supervised non-lawyers. For hearings with some complexity or which raise legal issues that may eventually go to court, lawyer representation may be necessary. Lawyers will also be needed to handle the comparatively small number of court appeals that are made in these kinds of cases. Perhaps if lawyers were more readily available, more parties would be able to appeal to court. The need for non-lawyers in these public benefits cases is acute. Most studies indicate that only a small percentage of people in these hearings even get non-lawyer help.¹⁷

III. SOME EXAMPLES OF SUCCESSFUL LAY ADVOCACY REPRESENTATION

Massachusetts Law Reform Institute (MLRI) has for some time been privy to or played a role in helping people of low income to get help in administrative agency and court adjudicatory proceedings by the use of lay advocates.

Methadone patient advocacy.

In or about 1990, a major Boston methadone treatment program announced its intent to go out of business, presenting the likelihood of leaving scores of addicts with no place to go while in “cold turkey” withdrawal. Two Legal Services lawyers, James Singer of the Volunteer Lawyers Project and one of the authors of this article, Ernest Winsor, threatened legal action unless the closing program found “new slots” in other methadone programs for their patients. That effort, with help from the Department of Public Health (DPH), proved to be successful. Addicts then began to come to the two lawyers with an array of grievances about their new methadone programs’ practices. For example, one patient was rejected from the program for bringing a weapon to the clinic when the “weapon” was a screw driver which the patient had just used to repair his car.

The legal services lawyers responded as best they could, but it soon became clear that (1) the DPH needed to change its regulations to provide fair hearing procedures for sanctioning client misbehavior; and (2) more help was needed in handling the due process hearings and the appeal processes that might follow. Happily, MLRI was successful in getting DPH to adopt a good set of fair hearing regulations, which included a provision that a patient could be represented by him-or herself or by anyone of his or her own choosing.¹⁸

MLRI got an initial grant from the Boston Bar Foundation, and a subsequent grant from Massachusetts Legal Assistance Corporation (MLAC), to pay the lay advocates we hired, trained and supervised to handle individual cases. When the grants ran out, we carried on for a few years using volunteer advocates. The system we set

up worked dramatically well in the first year, under the BBF grant. There were about fifty cases, in which the advocates won about half the hearings. Previously, when patients advocated for themselves, they virtually never won. And in that first year the advocates took eight appeals to the DPH’s methadone licensing manager, of which the advocates won all eight. In 1996, the federally funded Legal Services programs’ budget was severely cut and MLRI lost about a third of its staff. The Harvard Legal Aid Bureau assumed management of the methadone advocacy program.

CAAS’s Eviction Defense Program.

In July of 1999, The Community Action Agency of Somerville (CAAS), which got started in the War on Poverty in the 1960s, inaugurated its own Eviction Prevention Project, whereby one of the five non-lawyer staff members, at the beginning of each week, would go to the Clerk’s office of the Somerville District Court and get copies of all the summary process complaints returned that day with served summonses. They would take the papers back to CAAS where they were analyzed. The complaints from the local housing authority were forwarded to the Welcome Project, a non-profit that did some tenant advocacy.

CAAS sent the rest of the tenants a form letter in English, Spanish, Haitian Creole and Portugese advising them that they must file an “answer” with the court on the following Monday and appear in court to defend their case by the next Thursday. The letter also assured the tenants that they had a right to contest their threatened evictions and that CAAS might be able to assist them or provide a referral if they acted quickly. Tenants who came in by the following Friday morning were told about the process and were assisted in filling out the answer form and discovery requests, if appropriate, which CAAS filed in court the following Monday.

Some tenants with particularly interesting or winnable cases were referred to private attorneys or the Volunteer Lawyers Project, and sometimes Section 8 cases were referred to lawyers at Cambridge & Somerville Legal Services (CASLS). What was left were often non-Section 8 private landlord cases. These tenants were accompanied to court by a CAAS advocate on Thursday mornings.

In court, the advocate would sit with the tenants, quietly explaining what was happening (or going to happen) and giving him or her whispered advice when the case was called, or sometimes speaking directly to the judge without his objection. The advocate would also participate in informal negotiation in the hallway with the landlord or the landlord’s lawyer. Most eviction cases ended up with agreements of the parties, so this role for the advocates was crucial.

Unfortunately, a few years after the CAAS project began, new District Court personnel effectively terminated the lay advocacy program. The lay advocates had been college graduates trained in advocacy in administrative hearings at housing authorities and at DTA hearings. The final blow to the program came when CASLS, whose lawyers provided supervision to the advocates, lost some of its funding and its staff and could not continue as supervisors.

Western Mass. Housing Court Lay Advocacy

In December 2004, eight lawyers, paralegals and managers from legal services programs in western Massachusetts along with two

16. *Id.* at 58-49.

17. *Id.* at 40-41.

18. *See*, 105 C.M.R. 750.560(B)(2010).

lawyers from MLRI met to discuss the possibility of instituting a lay advocacy program in the Western Division Housing Court. A plan was developed whereby the Massachusetts Justice Project would train and supervise volunteers as lay advocates in the court. That lay advocacy program is still in existence, and operates to provide assistance to tenants in mediation and, under appropriate circumstances, in the courtroom.

IV. OUR RECOMMENDATIONS

Lay advocates are a great, largely untapped resource to narrow the representational gap in court and agency hearings where their participation is appropriate. We know from our longtime experience with their use in agency hearings that they can do a good, even outstanding job. From the small number of instances where they have represented persons in court the experience has been similarly good. There are many non-lawyers who could fill this role well if properly trained and supervised. We have hundreds of thousands of college students in Massachusetts, and we probably have not used law students for this purpose in anywhere near their potential numbers. In order to build programs that recruit, train and supervise lay advocates we recommend the following.

- 1) Identify programs with the potential to run, and with the interest in running, lay advocate programs. Many will be legal services and other nonprofit legal programs. Some will be colleges and law schools. Some will be courts.
- 2) Undertake an analysis of the kinds of court and agency hearings where representation by a nonlawyer would be appropriate.
- 3) Identify the major sources for lay advocates, including where they are located. Many, even most, of these persons will probably be willing to volunteer their services.

4) Develop standards for the qualifications, training and supervision of lay advocates doing this work.

5) Ask the Supreme Judicial Court to issue a rule stating that the representation of a low-income litigant by a lay advocate at court and agency hearings, under the supervision of a program run by a legal services or other nonprofit legal organization, a bar association or a court, is not the unlawful practice of law. This rule would also make clear that lay representation is appropriate in instances, such as administrative agency hearings, where it is otherwise authorized by law.

6) Develop several pilot programs in a variety of different courts to operate lay advocate programs. The results of these pilots should be documented and used to refine and improve these programs, and to decide whether and how to expand them.

7) Ask the Supreme Judicial Court to expand its law student practice rule to include first-year law students and lay advocates supervised by the kind of program described above, for the purposes of representation of low-income persons in court.

8) Enlist the Governor in reviewing and setting standards for the representation of litigants by trained non-lawyers in state agency adjudicatory hearings in public benefits cases.

In past years, proposing that nonlawyer advocates be permitted to represent persons in court has been considered to be a “third rail” in the legal and judicial communities. We sense that this view is gradually changing in light of the positive experiences with lay advocate representation and in light of the increased recognition of the dire need. We should view lay advocates as potentially valuable resources to help fill an enormous void that, to be realistic, cannot be filled by lawyers alone.

BOOK REVIEW

When Law Fails – Making Sense of Miscarriages of Justice, edited by Charles J. Ogletree, Jr. & Austin Sarat (New York University Press, 2009), 349 pages.

In *When Law Fails – Making Sense of Miscarriages of Justice*, editors and professors Charles J. Ogletree, Jr. (Harvard Law School) and Austin Sarat (Amherst College) present ten original essays, written by accomplished interdisciplinary scholars, that examine ways in which miscarriages of justice arise through shortcomings of our legal system and some of the law's built-in practices and mechanisms.¹ The essays are arranged in three parts. The first part contains three essays that focus on the meaning and significance of miscarriages of justice, two by looking at specific historical incidents and the third by exploring the origin and evolution of the doctrine of harmless error. The essays in the first part set the stage for part two, containing five essays that focus on the different components of the legal process at which a breakdown of justice may occur, namely the police, the jury, the punishment process, and clemency. The final part contains the two most philosophical essays that question whether miscarriages of justice should be reconceptualized. One of the two suggests that the penal process should be thought of as police failure, and the other suggests that smaller miscarriages of justice are routinely unrecognized and consequently are never remedied.

Although all of the essays are thought-provoking, four are particularly compelling. The first, written by Mary Dudziak, a professor at the University of Southern California Law School, deals with the well-known story of the “Scottsboro Boys,” where nine African American teenage boys were falsely accused and convicted of raping two white women in Alabama in 1931.² The last of the nine was released from prison in 1950, almost twenty years after he was arrested.³ Their injustice, however, had an impact on constitutional criminal procedure, for, in reversing their convictions, the Supreme Court established the right to adequate counsel in capital cases and stated:

Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense,

even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.⁴

Despite the significance of this decision, Dudziak notes that the fate of the Scottsboro Boys was never discussed afterwards. Dudziak opines that the public remembers the

rectification, the workings of the rule of law. What is left out is the failure of the law to put an end to wrongs inflicted within the legal system to the humans whose stories had been the occasion for the rule of law to demonstrate itself to the world. That demonstration depended on the erasure of the defendants' continuing stories.⁵

Second, Charles Ogletree's essay involves the story of a white-led race riot in Tulsa, Oklahoma in 1921.⁶ This riot stemmed from an incident on an elevator when an African American shoe shiner, riding to the “colored” restroom, accidentally stepped on the foot of a white, female, teenage elevator operator, who responded by slapping him.⁷ The incident led to false newspaper stories of a sexual assault, the young man's unlawful arrest for rape, and a white mob waiting outside the local jail to lynch him.⁸ To protect him, a group of African American residents gathered at the jail.⁹ One gunshot started the riot, and the white mob ultimately destroyed a successful town, killed hundreds of African American men and boys, and torched approximately 1,115 homes, causing more than \$1.5 million of property damage, a figure that equals more than \$17 million today.¹⁰

Ogletree highlights the riot as an example of the law's inability or unwillingness to provide justice to victims. The city of Tulsa refused all private contributions to help with the damage, and lawsuits seeking compensation from insurance companies were unsuccessful.¹¹ In 2001, Oklahoma's Governor denied compensation to the victims, despite a report by the Tulsa Race Riot Commission, a bipartisan group created by the state's legislature, evaluating and analyzing the events of 1921 and concluding that the white mob caused the riot and the African American community and their descendants were

1. This is Ogletree and Sarat's second of three collaborative books. The three are part of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, which “seeks to further the vision of racial justice and equality through research, policy analysis, litigation, and scholarships.” See *WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE*, front cover (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) [hereinafter, “*When Law Fails*”].

The first book, *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, released in May 2006, focuses on the connection between race and the death penalty through legal, historical, cultural, and social science perspectives. *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006). The third book, *The Road to Abolition? The Future of Capital Punishment in the United States*, released in November 2009, reflects on the decreasing number of executions and the changing attitudes in the United States toward capital punishment. *THE ROAD TO ABOLITION: THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009). Of the

three books thus far, the theme of *When Law Fails* seems the most far-reaching because it examines miscarriages of justice well beyond now-familiar stories of DNA exonerations.

2. *When the Law Fails*, at 38.

3. *Id.* at 39.

4. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

5. *Id.* at 41.

6. *Id.* at 51.

7. *Id.* at 52.

8. *When Law Fails*, at 52.

9. *Id.*

10. *Id.* at 53.

11. *Id.* at 54-55.

12. *Id.* at 57.

entitled to restitution.¹²

Based on the Commission's report, Ogletree personally filed a lawsuit seeking compensation for one hundred fifty survivors and more than two hundred descendants of the race riot.¹³ He argued that the statute of limitations began to run in 2001 with newly discovered evidence contained in the report.¹⁴ Although acknowledging the harm the victims suffered, the federal district court concluded that the statute of limitations barred their claim.¹⁵ On appeal, both the Tenth Circuit Court of Appeals and the U.S. Supreme Court rejected Ogletree's argument.¹⁶ Congress later held hearings on the Tulsa riot. Thereafter, Congress introduced (although it did not pass) the Tulsa-Greenwood Race Riot Claims Accountability Act of 2007, which sought to extend the statute of limitations for five years to provide victims with their day in court.¹⁷ Pointedly, Ogletree wrote:

As we think about miscarriages of justice and how we address them, the case of the victims of the Tulsa race riot makes apparent the fact that courts of law are not always the most appropriate or ideal places to resolve disputes. Indeed, the limits on what claims may be raised, the time at which they may be raised, and the scope of the issues that may be raised leave many persuasive and powerful matters outside the walls of the courthouse, with victims searching for other ways to address those issues. ... In essence, when law fails, our options may be limited, but our responsibility to pursue matters in other venues with vigor and enthusiasm will only begin.¹⁸

The third, and one of the most thought-provoking essays in *When Law Fails*, is entitled "Margins of Error." Written by Stanford Law School professor Robert Weisberg, the essay examines "harmless error," a legal doctrine in which "a reviewing court agrees with a defendant's claim of legal error at trial but then must ask whether that error so materially undermined the fairness of the trial as to require reversal" of a conviction.¹⁹

The doctrine originated from the "Exchequer Rule," where a court automatically reversed a conviction when evidence was wrongfully admitted during trial.²⁰ By the twentieth century, courts continued to reverse judgments automatically "for errors of constitutional magnitude," such as violation of the Sixth Amendment right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)) and the right to a trial by jury (*Duncan v. Louisiana*, 391 U.S. 145 (1968)), as well as a prosecutor exercising a peremptory challenge for a racially motivated purpose (*Batson v. Kentucky*, 476 U.S. 79 (1986)).²¹ In other situations, however, courts began requiring some proof that the error was harmful.²² Weisberg opines that this change might have resulted from fear of appellate courts "disingenuously find[ing] no error in the first place" if a rule required automatic reversal for all constitutional errors.²³ Courts began creating harmless

error rules in various cases, including, for example, Fifth Amendment violations concerning a defendant's failure to testify (*Chapman v. California*, 386 U.S. 18 (1967)), Sixth Amendment violations of effective assistance of counsel (*Strickland v. Washington*, 466 U.S. 668 (1984)), and a defendant's coerced confession (*Arizona v. Fulminante*, 499 U.S. 279 (1991)).²⁴

Using these cases, Weisberg illustrates the difference between harmless and harmful errors through creative dialogues between various defendants and an anthropomorphic legal system.²⁵ In the following example, a defendant complains to the legal system about his ineffective assistance of counsel during sentencing:

Defendant: I pleaded guilty. I faced a possible sentence of eight years. My lawyer was a fool. He told me the judge would likely give me six years for a gun enhancement, so I cut a deal for four years. But it turns out the enhancement would have given me three years. If I had known that, I would have cut the deal for two years. The court has agreed that this was ineffective assistance of counsel. But it will not give me any relief.

Legal System: You say that had you been better informed about the sentencing rules, you would have held out for a much better deal. That may be true. But when in applying the constitutional standard for effective assistance of counsel, we apply it different when the appeal is from a guilty plea. The criterion for prejudice—our special name for harmful error here—is whether with an effective lawyer you would have chosen to go to trial—not that you would have gotten a better deal.

Defendant: If my lawyer was constitutionally incompetent, how can you dismiss the harm of a wildly excessive sentence?

Legal System: Well, how do we know for sure what sentence you would have pleaded to if your lawyer had better informed you? More important, who is to say that a sentence is excessive when it is still a sentence you could have gotten had you been convicted? What happens at trial—whether you get convicted or not—implicates fundamental questions of justice. An unjust conviction is a miscarriage of justice. But how much of a sentence you get, at least when it is under the statutory maximum—that cannot be described as a right or wrong, much less just or unjust. After all, these sentencing measures are arbitrary. Politicians legislate long maximum sentences, sometimes just for symbolic political gain, and many of them realize that a convicted defendant will get less. Your unfortunate placement along an arbitrary continuum of sentences is not

13. *Id.* at 58.

14. *Id.*

15. *Id.* at 58-59.

16. *Id.* at 59-60.

17. *Id.* at 60. Congressman John Conyers also submitted a bill on April 1, 2009 for the same purpose. See H.R. 1843, Tulsa-Greenwood Race Riot Claims Accountability Act of 2009, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:31:./temp/~bdwyGu:|/bss/>.

18. *When Law Fails*, at 63-64.

19. *Id.* at 74.

20. *Id.* at 81-82.

21. *Id.* at 82-85.

22. *Id.* at 82-83.

23. *Id.* at 83.

24. *Id.* at 83-87.

25. *Id.* at 76-107.

26. *Id.* at 87-89.

any miscarriage.

Defendant: But I just read a new case where a lawyer misguidedly his client about the possible sentence, and the wrongful sentence was held prejudicial enough.

Legal System: A surprising decision, and maybe it will not stand. But that was about ineffectiveness at trial. What we said about the arbitrary nature of sentencing needs to be underscored when we are talking about the contingencies and unpredictability of guilty pleas. As long as you are not coerced into that plea, you cannot complain that where you show up on the sentencing spectrum is unjust. Who knows what negotiating skills and varieties of human fallibility—moral and intellectual—might go into the bargain? Yes, the sentence is constrained by, and therefore sits under the umbrella of, a legal rule: the maximum sentence. But the outcome is outside the formal rules of law—and therefore outside of justice – because it depends on those human factors outside our control.

Defendant: Your disavowals are remarkable. You treat legislated sentencing ranges as just arbitrary data points, as if all the legal system does is set a maximum and leave things to chance or these so-called vagaries of human behavior. But the range is itself a legal creation ... These are professionals who operate under the rules you set up, and my lawyer violated a legal standard you yourself have set.²⁶

Weisberg uses examples such as this one to illustrate how a court, despite agreeing with a defendant's claimed legal error, finds that the harmless error doctrine provides no redress.²⁷ In considering a litigant's access to justice, Weisberg's essay and his examination of the harmless error doctrine, "giv[es] us some new revealing clues as to how the legal system distinguishes what lies within itself and its powers of self-redress and what lies without. More bluntly, it shows us how the legal system anticipates or responds to charges that it is to blame for miscarriages of justice."²⁸

Finally, in "Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State," co-editor Austin Sarat examines the clemency process in capital cases. He observes that the Supreme Court has decreased the availability of federal habeas corpus relief in capital cases and Congress has passed legislation eliminating what it saw as "abuses" in the habeas process.²⁹ As a result, a criminal defendant's last resort is now to seek gubernatorial clemency.³⁰ Sarat

believes that clemency petitions are important not only for their immediate effect on the petitioner but also as a way to "memorialize" the law's failures.³¹ He uses the term "memorialize" to mean that clemency petitions "provide an archive of stories of law's failures, of alleged breakdowns in the legal process, and of a legal process in disrepair, as well as of racial prejudice, of lives shattered by violence and neglect, of remorse, rehabilitation, and redemption."³²

Sarat explains that, after reviewing one hundred fifty clemency petitions, he and his research assistant classified them into the following types of issues, allegations, or claims:

factual error or innocence; police misconduct; prosecutorial misconduct; false or unreliable witness testimony; incompetent or unethical expert witness; ineffective assistance of counsel; jury bias; errors or omissions in the mitigation phase of the original trial; unavailability of life without parole as an option at the time of sentencing; equity; error or procedural bar in the appellate or postconviction process; remorse or religious conversion or post-sentencing rehabilitation or mercy.³³

Sarat thoroughly discusses five "exemplary" clemency petitions from Texas and Virginia, all of which were denied. In Sarat's view, the five "memorialize" failures of our justice system by allowing execution of defendants who claimed they were innocent, represented by incompetent counsel, mentally retarded, religious and remorseful, and a victim of racial prejudice.³⁴ Sarat believes that "clemency petitions in capital cases should be read ... not just as pleas to spare the life of someone condemned to death but as calls to the future to attend to injustices of the present moment, cumulating, despite their often narrow legalist frames, in a broad indictment of the inequities and injustices of America in the late twentieth century."³⁵

These four essays focused on defendants whose access to, or denial of, justice stemmed from a variety of systemic failures in the legal system – ranging from obtaining competent legal representation, as in the story of the Scottsboro Boys; having to look outside the court of law for justice, as Ogletree himself did while representing victims of the Tulsa race riots; and questioning the legal process itself and how it responds to alleged miscarriages of justice through the harmless error doctrine and clemency petitions. The focus illustrates Ogletree and Sarat's theme that injustices should be viewed "not as errors but as organic outcomes of a misshaped larger system."³⁶ *When Law Fails* raises many complex and thought-provoking questions about failures embedded in our legal system, though it leaves many of the answers to the readers and future generations.

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27. *Id.* at 10.

28. *Id.* at 74.

29. *Id.* at 230.

30. *Id.* at 231.

31. *Id.* at 235, 237, 238.

32. *Id.* at 235.

33. *Id.* at 266.

34. *Id.* at 239-264.

35. *Id.* at 264.

36. *Id.* at 1.

