

1 they're, one, in this facility to work because they need a
2 pay check, or two, because they care about kids and they get
3 lucky and get paid for doing it. If they're here in our
4 facility for the second reason, they'll be around for a
5 long, long time. If they're here for the first reason,
6 they've got something up their sleeve and ultimately they
7 will be gone.

8 Thank you. I appreciate you all taking the time
9 to listen to me.

10 CHAIRMAN WALTON: Thank you very much.

11 Your Honor, thank you for your presence. I have
12 the utmost respect for the work that you do because my last
13 job before I went to the federal bench was heading our
14 Family Division which included the Juvenile Court in the
15 District of Columbia, so, I know the difference that judges
16 can make in the lives of children, so, we welcome your
17 presence.

18 JUDGE BLITZMAN: Thank you very much, Your Honor.

19 First of all I'd like to say that I'm very, very glad that
20 Mr. Dunlap got to follow Senator Kennedy, and did a great
21 job, I might add.

22 I was extremely excited, honored and flattered
23 when I received an e-mail from Mr. Thomas inviting me on
24 behalf of the Commission to appear to address these issues.

25 I've been asked to speak or address the issue of detention

1 decisions that are made, although I think my comments will
2 necessarily involve some of the other issues that Senator
3 Kennedy, for example, spoke so eloquently, and I submit
4 rather cogently, about, issues that I think were also
5 addressed by Commissioner Aiken and others in regards to
6 what happens to juveniles who are treated as adults and
7 placed into adult facilities, because I think those issues
8 are also implicated in these remarks.

9 First of all, a little bit of my background. I've
10 been involved in juvenile and criminal justice for the
11 better part of 30 years. I actually started as a clinical
12 student in 1973. I share this history because I'm old
13 enough and I've been around the juvenile system long enough
14 to have witnessed the beginning of status offense cases, and
15 I think this is relevant given the direction that this
16 discussion has gone in, and I think it's directly related to
17 my concerns regarding detention decisions that are made, and
18 some of the remarks that Your Honor made regarding the types
19 of offenders who are now being detained.

20 As I'm sure most of you are aware, in 1973 status
21 offense prosecutions or cases were created, in large part
22 because of the horrors that were visited during the training
23 school era of large locked correctional detention facilities
24 that had preceded it. If you go back to -- and Mark Silva
25 did a little history so I'm going to do a little history --

1 go back to in re Gault, it was Dean Pound who was quoted in
2 the Seminole Gault opinion who described the excess of the
3 juvenile court as a trifle in comparison to those of the
4 star chamber. A bit hyperbolic, perhaps, to compare the
5 prosecutorial arm of the inquisition to what was misguided
6 benevolent attempts at intervention, but the concerns were
7 real. Children who were essentially deemed or labeled to be
8 incorrigible being warehoused in locked facilities for a
9 long period of time, indeterminate sentences. The Gault
10 case itself involved a 15-year-old youth from Maricopa
11 County in Arizona who made indecent phone calls of the
12 so-called adolescent variety. There was no fact-finding.
13 It was never even determined if Jerry Gault made those phone
14 calls, but he faced six years in a training facility in
15 Arizona. I'm sure things are very different now. That's a
16 different era. Gault comes along and we talk about due
17 process, and we talk about the fact that the status of being
18 a youth does not justify a kangaroo court, there's no
19 substitute for fairness, for process, all those wonderful
20 quotes, and it's a marvelous opinion, it's an interesting
21 legal opinion, it's also interesting social history.

22 I revisit that case now because I'm a little
23 concerned looking at this detention problem because I'm
24 getting this fear -- in Massachusetts we enacted our CHIN
25 statute, Children in Need of Services, in 1972 -- that we

1 may be going full circle. Again, I'm old enough to have met
2 young women coming out of training schools. The
3 Massachusetts experience with de-institutionalization is
4 well known; it was mentioned before earlier by Dr. Krisberg
5 and others. Some of my early clients were girls who had
6 been locked up for two and three years for being stubborn
7 children. Now, we made a decision that that was not the way
8 to go, and when the Office of Juvenile Justice Delinquency
9 and Prevention was created, states could not commingle
10 status offenders with delinquent children who were held or
11 risk losing federal funding. Now I look at the detention
12 decisions that are being made, I look where we are now 30
13 years later, almost 35 years later, and I wonder if we run
14 the risk of recriminalizing the very offenses that we made a
15 conscious and I think correct choice to decriminalize over
16 30 years ago.

17 This is how it plays out, and it relates to the
18 comments about when detention decisions are made and who are
19 the kids that we're holding and detaining. The three basic
20 opportunities to detain or make those decisions, one is the
21 arraignment. I think it's popularly assumed by those
22 outside the court system that the majority of detention
23 decisions are made at arraignment, and maybe a lot are.
24 However, there are other points along the system.
25 Violations of probation can result in youth being held

1 awaiting sentencing, and then sentencing itself. I want to
2 address each.

3 We have in this state the mechanism where we can
4 release youth on what we call conditions of release. Now,
5 this is I think one of the dangers perhaps of a court, of a
6 juvenile court, which sometimes gets I think a little bit
7 concerned about fixing the problem before there's an
8 adjudication. But it's also the tension between a juvenile
9 court and an adult court because we like to think we can do
10 more, but there are risks that are attendant to that type of
11 approach. So, for example, and 13- or 14-year-old youth who
12 is accused of shoplifting, or use without authority, which
13 in this state is joy riding, a judge might robotically --
14 and I say "robotically" advisedly -- set conditions of
15 release. Okay. I'm releasing you in your parents' custody;
16 conditions of your release include the following. You
17 follow a 7:00 o'clock curfew. Some judges do it
18 arbitrarily, they say you're 14, your curfew is 7:00 p.m.,
19 they cut it in half. You must attend school daily and do
20 certain other things.

21 Now, at first blush, those conditions make sense,
22 they're certainly going to help the youth be productive and
23 help the family unit, but are they directed at -- do they
24 bear any relationship to bail, which is to ensure court
25 appearance, and do they protect public safety? I submit

1 that in many, many cases, although the conditions are well
2 intended, the answer is no, they do not. What happens
3 later, then, the child is not going to school, the child
4 comes in in front of me, probation officer reports the youth
5 has missed 30 days of school. Well, the first question I
6 like to ask as a juvenile court judge is, well, was a
7 truancy petition ever filed? The answer often is no. And,
8 you know, schools are struggling with limited budgets,
9 they're dealing with English immersion, they're dealing with
10 a lot of issues, high stakes mandatory testing, MCAS in this
11 state, sometimes truancy petitions aren't filed, sometimes
12 kids sort of age out of the system. We call it in the
13 business the invisible dropout rate. Then as a juvenile
14 court judge I'm being asked to make detention decisions
15 which really don't relate to court appearance. The
16 condition might make sense in the context of a status
17 offense case, what we call CHINs, what some other states
18 call PINs, FINs, et cetera, because it makes sense in the
19 consequence of delinquency. Frequently I think the answer
20 is no. If the child then violates, then I'm asked to hold
21 the child frequently pretrial without bail, so, then I'm in
22 sort of a paradoxical situation. The status offense case
23 was never initiated, I'm being asked to hold a youth without
24 bail pretrial. There is a thing called a presumption of
25 innocence which arguably is compromised in such

1 circumstances, and I think more fundamentally, the nature of
2 a juvenile court is supposed to look at the nature of the
3 offender, the alleged offender, as well as the nature of the
4 offense. So, any conditions of release should be
5 individualized, they should be tailored; that is what
6 judicial discretion is about, that's what juvenile court
7 should be about. It should be linked to diagnosis. And I
8 think in the context of bail decisions it should be linked
9 to what the case is itself. Otherwise, we're putting the
10 cart before the horse; we're getting to sentencing
11 phenomenon.

12 How does this play out? Some numbers. We've
13 heard a lot during the day about detention rates. Well, in
14 transfer hearing, the decisions by which youth are sent to
15 adult court. Now, juvenile crime was rising up until 1994.
16 These are Department of Justice statistics. And in
17 Massachusetts, juvenile arraignments, which I supposed is
18 the best tell of the crime rate, you can break it down more
19 by nature of offense, peaked in 1996. In Massachusetts,
20 which is a relatively enlightened state, I think in most
21 people's estimation as regards juvenile corrections, in 1996
22 we had approximately 23, 24,000 arraignments. By 2005 the
23 number of youth arraigned in this state had declined by 25
24 percent, which is good, which is very good. Now, we don't
25 have data from our office or the Commission of Probation for

1 2006. There has been a widely reported resurgence of
2 gun-related violence in Suffolk County/Boston, the numbers
3 may have gone up, but by and large the arrest rate is down
4 dramatically from 1996, and I think it's true nationally,
5 yet the number of youth detained in Massachusetts had
6 doubled in the same ten-year period. And who were these
7 kids? Who are these kids? And research that I've done
8 shows that, while the number of arraignments declined by 25
9 percent, the number of probation violations, technical
10 probation violations, that is, probation violations that do
11 not implicate the commission of a new offense, had risen by
12 75 percent, which is a sobering statistic.

13 Now, that may be related to the decrease in
14 arraignments, that may have had a salutary public safety
15 effect or not. It may be directly related to the rise in
16 detention numbers. And we look at who are the kids in
17 detention. And increasingly the youth in our youth
18 correction facility have been younger and younger and
19 younger. The majority are still over 16, but almost 37
20 percent are now 14 and younger. So, when you fix -- and 15
21 percent are 12 and younger. Fifteen percent. So, when you
22 mix a vulnerable, an increasingly vulnerable population with
23 an older population, detention population, no good is likely
24 to come of it. And we have a uniform system of
25 transportation of youth; in other words, our sheriffs pick

1 up youth, they transport them to court, and they're all
2 transported together, the 12-year-old and the 16-year-old,
3 and they're detained in the same facilities.

4 Now, we have a new DYS commissioner who was here
5 throughout the proceedings this morning, Jane Tewksbury, and
6 she is great. The legal counsel's here, so, I want to make
7 sure I say nice things about her. And I think that our
8 Commissioner will work very hard to return our DYS to the
9 well-deserved position it had several years ago when it was
10 held as a national model. But I'm saying this because we're
11 not immune in Massachusetts. And a lot of these kids, and
12 this relates to comments that a lot of folks have made, are
13 there not because they are bail risks or public safety
14 problems; they're there -- although that may not be true
15 with some of the runaways -- they're there increasingly
16 because of other systems' failures. Our Department of Youth
17 Services has become the de facto mental health service
18 provider for the State. Fox Butterworth in The New York
19 Times chronicled this phenomenon nationally; it's true with
20 adult corrections too.

21 We do very, very little for adolescent youth in
22 the way of mental health services, so, our DYS becomes the
23 mental health service provider by default. I'm a juvenile
24 court judge, I've got a 13- or 14-year-old kid on the run,
25 she's a cutter, she's into a lot of bad stuff, I get overly

1 paternal, I'm worried about her, I don't want to see her die
2 on the street. I try to place her in our Department of
3 Social Services where our CHINs kids are placed, she keeps
4 running. She has mental health services; DMH is not
5 stepping up. What am I to do? That's a common judicial
6 lament. So, that is a real problem. We had two suicides
7 committed, two suicides occurred in our youth facility last
8 year, and now, of course, it takes tragedies like that to
9 galvanize reaction, so, now, DMH is working collaboratively
10 with our DYS to try to address some of those problems.

11 Younger age kids held for longer periods of time:
12 I was interested, Mr. Dunlap said that the average period of
13 detention is like 96 hours. Well, in Massachusetts it's 17
14 days, 17 days of detention. To me, the big tell is I ask
15 probation, I ask the family if the youth is attending
16 school. If the youth is attending school, I'm very, very
17 reluctant to lock that child up. And why? It's a public
18 safety phenomena. You take one of our court kids out of
19 school for 17 days, that's like a month of school, they're
20 hopelessly off track, they may never get back, and all
21 research shows that kids out of school are at a much higher
22 rate, a much more likelihood to get involved in criminal and
23 delinquent conduct, 54 percent more likely to get arrested
24 is one statistic that I found in the court's preparing for
25 this presentation, and I think to be candid, that's an

1 understatement. And, again, who are these youth? The youth
2 who are getting kicked out of school, African American youth
3 are three to five more times likely to be suspended and
4 expelled than our Caucasian kids. These are stats from our
5 Department of Education. And I fear that unwittingly we in
6 the court may be participating or exacerbating what's I
7 think been accurately diagnosed by a lot of people or
8 characterized is the so-called-to-prison pipeline, which is
9 a real phenomena of what's going on in our juvenile courts
10 now.

11 If you look at the DMC numbers, disproportionate
12 minority confinement, or contact numbers as it's popularly
13 called, there's a disturbing correlation between some of the
14 numbers and identities of children who are leaving school
15 and those who are appearing in our juvenile justice
16 facilities. In Massachusetts, we have between almost 55
17 percent of the children in our detention facilities are
18 children of color, 37 percent Hispanic, way in excess of
19 the Latino population, similar disparities with the African
20 American population. You look at school suspension rates,
21 33 percent of Hispanic children went to ninth grade are not
22 graduated and you wonder are there connections, who are the
23 kids in our facilities. And as you look at these
24 correlations it makes you realize that when you talk about a
25 juvenile court we're talking about a system, but a system

1 implies or suggests something that's coherent, and I think
2 very frequently we have fragmentation. We need these
3 systems to be more coordinated. We need to know what the
4 ramifications of school exclusion means in terms of court
5 involvement, public safety, and not just focus on one piece.

6 Frequently there is not that type of coordination, and I
7 think this is also a national problem.

8 So, in terms of being descriptive, we have these
9 issues, and then being prescriptive, what do you do to
10 address it? Well, you've got to look at your status offense
11 statutes, for one. Mark Soler spoke earlier about how some
12 states you can explicitly criminalize status offense
13 behavior and you can do that by statute, legislatures have
14 done it. You have a truancy petition, you don't go to
15 school, then you criminalize it by saying you've now
16 violated, in essence, a term of probation. I respectfully
17 think that's got to be revisited.

18 In Massachusetts, we cannot securely detain a
19 status offender, which I candidly think is a very, very good
20 thing. My fear is that we're doing -- Mr. Dunlap talked
21 about how -- your perception, you shared -- Mr. Dunlap
22 shared his perception about how status offense youth get
23 into the adult system, and often in our system youth are --
24 as soon as they get arrested and charged with a crime, which
25 happens as day follows the night, to quote Hamlet, we hit

1 them with one of those attend-school-without-incidence
2 conditions and, boom, we have what we want, and we've --
3 what have we accomplished? I think we've compromised public
4 safety dramatically in the process.

5 A brief word about the issues that were addressed
6 in large, I think, in response to the provocative
7 questioning of Commissioner Aikens, and that is the
8 commingling of the juvenile and adult populations. I urge
9 you to really think about what Mark Soler said about the
10 lack of protocol and guidelines for separating juveniles and
11 adults, notwithstanding the best efforts of correction
12 officers in adult institutions, criminal institutions. The
13 United States Supreme Court, as most of us are aware of, in
14 *Roper v Simmons*, looked at a lot of the research which a
15 number of speakers have cited today, the McArthur
16 Foundation's research was an amicus, the brain studies were
17 in an amicus, that one of the preceding speakers spoke about
18 when she talked about adolescent brain development. They
19 talked -- if you read *Roper v Simmons*, no matter what you
20 think about the death penalty, if you read *Roper v Simmons*
21 there's a pretty cogent argument that we should be raising
22 the age of jurisdiction for juvenile courts. I'd love it:
23 more business for me.

24 Some states have essentially criminalized
25 adolescents by lowering the age of jurisdiction, which I

1 think is unfortunate. James Bell of the Youth Law Center
2 speaks very, very passionately and eloquently about this
3 phenomenon. You could legislate the youth out of the
4 juvenile system; you can make your statistics look good, I
5 suppose, if you lower the age. And it's also interesting
6 that that whole phenomena of sending more and more youth or
7 amending state statutes to make it easy to transfer kids
8 occurred in spite of the fact that, sure, juvenile crime was
9 soaring, it peaked in 1994, has been going down. It's
10 unfortunate, I think, that 45 states changed their laws to
11 facilitate that process when I think the credible
12 psychological and scientific evidence mitigates in a
13 different direction.

14 When the -- and I'll sort of conclude the way I
15 started before just -- I make a few recommendations. Back
16 when the juvenile court was created, back in 1899, and Mark
17 talked about the Cook County Juvenile Court, there was this
18 implicit notion that adolescence was different, there was
19 something different about kids, that they went through some
20 type of rite of passage. The McArthur Foundation has
21 produced solid psychological research about children's
22 decision-making capacity, substituted judgment, ability to
23 make Miranda waiver, competency questions, which support all
24 of what we sort of intuitively knew when some researchers at
25 Clark University in Massachusetts first came up with the

1 notion of adolescence. Now we have this brain research,
2 these physiologists looking at brain studies, which have
3 given us hard evidence about development in certain regions
4 of the brain which show that there are changes. So, I think
5 we've got to really look at that in a much more rigorous way
6 because now we have the hard science is meeting the
7 psychology and I fear that we're still going in the wrong
8 direction really compromising the system and making our kids
9 that much more vulnerable.

10 Some quick recommendations, because I know I've
11 been going on. Data, data, data, I don't know if it's data
12 or if it's data. We all talk, I talk, I started by saying
13 I've been in the business for 30 years, we all talk about
14 our experience, we all talk anecdotally, we throw around a
15 lot of numbers, but we really don't have nearly the data we
16 need. Again, even in an enlightened jurisdiction like
17 Massachusetts where we have due process rights for
18 juveniles, we have -- we're one of 12 states with jury
19 trials for kids, which I think is great, we don't collect
20 numbers, so, I couldn't tell you of the 6,000 kids that we
21 detain annually each year, 6,000 kids that we detain
22 annually each year, what percentage are held for probation
23 violation, what percentage are held pretrial for violating
24 conditions of release before they're even adjudicated or
25 anything, which I think is unfortunate.

1 We need more information and data about DMC and
2 we've got to track it, we can't shy away from it. A lot of
3 my colleagues say, well, Jay, you sit in Lowell, you're
4 locking up a lot of Asian kids. What am I supposed to say?

5 Well, that's the court demographic, these are the people
6 who live in my community? That's one piece of it, but we're
7 the caboose. We've got to look at the decisions of school
8 exclusion, how kids are treated in school, how kids are
9 charged by police, at every step of the way to see if it's
10 being done fairly and equitably. And I think anecdote has
11 its place, but it should inform, not overwhelm the
12 discussion.

13 And finally, I think that the whole issue of how
14 youth are heard, which I think has been touched on again,
15 once they're detained what is the mechanism for filing
16 complaints, et cetera, has got to be thought of. There's no
17 analog to any type of prisoners' rights committee for
18 juveniles. Once a juvenile gets committed, that's it.
19 Before I became a judge I ran the Youth Advocacy Project in
20 Roxbury, and we maintained contact with our clients, but I
21 think that's unique, or I shouldn't say unique, it's
22 unusual. We were able to do it because we had state funding
23 and we were salaried employees. Many kids, once they leave
24 the courtroom, they have no access to the legal system and
25 then psychologically for some of the reasons spoke about by

1 other speakers it's very, very difficult for them to be
2 heard.

3 I'll just -- I'm going to close now with the story
4 that I gave Ms. Smith, Commissioner Smith. I said I
5 wouldn't use it, but it is very, very upsetting, and that
6 was that whole discussion that you all had earlier about the
7 differences between rape, stat rape, forcible rape. This is
8 a story that I had involving a 14-year-old at the time who
9 was an alleged prostitute. She had palpable mental health
10 problems, she was in a treatment unit where she was supposed
11 to have access to psychiatric care and a full diagnostic
12 evaluation. It turned out unbeknownst to me that she was
13 sleeping with a 21-year-old staffer. She -- and this came
14 to light when the child's born, she ends up marrying this
15 gentleman, and I heard about it a few years after when I got
16 contacted when she was looking for a way out of the
17 relationship. So, that's the worst kind of abuse of
18 authority, violation, call it what you like, I think we all
19 know what it is.

20 I want to thank you very, very much for your
21 attention. I'm very, very excited by the work the
22 Commission is doing.

23 CHAIRMAN WALTON: Thank you, Judge. I don't think
24 we probably needed those scientific studies to tell us that
25 the brains of human beings change over time; we just need to

1 talk to parents and they can tell you that.

2 JUDGE BLITZMAN: Right on.

3 CHAIRMAN WALTON: Ms. Gadow. Thank you.

4 MS. GADOW: Members of the Commission, my name is
5 Diane Gadow. I appreciate very much being able to testify
6 with you today. I'm going to say I've only been in this
7 system almost 30 years and give deference to my colleagues
8 here who've been in 30 plus, but in that period of time and
9 working with the juvenile corrections system I've worked in
10 three different states, so, hopefully some of the comments I
11 make can be generalized beyond the State of Arizona where I
12 serve as the Deputy Director.

13 I'd like to just make a distinction between adult
14 and juvenile corrections. And, by the way, I really
15 appreciated the comments this morning because it's obvious
16 that the Commission is very aware of and seeking more
17 clarification as to the distinctions between adult and
18 juvenile corrections. I was very appreciative of those
19 comments earlier on.

20 But we're held to a different standard by law, and
21 by the child abuse and neglect laws of the different states,
22 and that goes by requiring, we are required that minors be
23 protected from harm, including abuse and neglect, rape and
24 sexual assault, and each state has mandatory reporting
25 requirements for these kinds of abuse and neglect.