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

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

CHAIRMAN WALTON: Thank you very much.
Your Honor, thank you for your presence. I have
the utmost respect for the work that you do because my last
job before I went to the federal bench was heading our
Family Division which included the Juvenile Court in the
District of Columbia, so, I know the difference that judges
can make in the lives of children, so, we welcome your
presence.

JUDGE BLITZMAN: Thank you very much, Your Honor.
First of all I'd like to say that I'm very, very glad that
Mr. Dunlap got to follow Senator Kennedy, and did a great
job, I might add.

I was extremely excited, honored and flattered
when I received an e-mail from Mr. Thomas inviting me on
behalf of the Commission to appear to address these issues.
I've been asked to speak or address the issue of detention
decisions that are made, although I think my comments will necessarily involve some of the other issues that Senator Kennedy, for example, spoke so eloquently, and I submit rather cogently, about, issues that I think were also addressed by Commissioner Aiken and others in regards to what happens to juveniles who are treated as adults and placed into adult facilities, because I think those issues are also implicated in these remarks.

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

As I'm sure most of you are aware, in 1973 status offense prosecutions or cases were created, in large part because of the horrors that were visited during the training school era of large locked correctional detention facilities that had preceded it. If you go back to -- and Mark Silva did a little history so I'm going to do a little history --
go back to in re Gault, it was Dean Pound who was quoted in the Seminole Gault opinion who described the excess of the juvenile court as a trifle in comparison to those of the star chamber. A bit hyperbolic, perhaps, to compare the prosecutorial arm of the inquisition to what was misguided benevolent attempts at intervention, but the concerns were real. Children who were essentially deemed or labeled to be incorrigible being warehoused in locked facilities for a long period of time, indeterminate sentences. The Gault case itself involved a 15-year-old youth from Maricopa County in Arizona who made indecent phone calls of the so-called adolescent variety. There was no fact-finding. It was never even determined if Jerry Gault made those phone calls, but he faced six years in a training facility in Arizona. I'm sure things are very different now. That's a different era. Gault comes along and we talk about due process, and we talk about the fact that the status of being a youth does not justify a kangaroo court, there's no substitute for fairness, for process, all those wonderful quotes, and it's a marvelous opinion, it's an interesting legal opinion, it's also interesting social history.

I revisit that case now because I'm a little concerned looking at this detention problem because I'm getting this fear -- in Massachusetts we enacted our CHIN statute, Children in Need of Services, in 1972 -- that we
may be going full circle. Again, I'm old enough to have met
young women coming out of training schools. The
Massachusetts experience with de-institutionalization is
well known; it was mentioned before earlier by Dr. Krisberg
and others. Some of my early clients were girls who had
been locked up for two and three years for being stubborn
children. Now, we made a decision that that was not the way
to go, and when the Office of Juvenile Justice Delinquency
and Prevention was created, states could not commingle
status offenders with delinquent children who were held or
risk losing federal funding. Now I look at the detention
decisions that are being made, I look where we are now 30
years later, almost 35 years later, and I wonder if we run
the risk of recriminalizing the very offenses that we made a
conscious and I think correct choice to decriminalize over
30 years ago.

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

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

Now, at first blush, those conditions make sense, they're certainly going to help the youth be productive and help the family unit, but are they directed at -- do they bear any relationship to bail, which is to ensure court appearance, and do they protect public safety? I submit
that in many, many cases, although the conditions are well intended, the answer is no, they do not. What happens later, then, the child is not going to school, the child comes in in front of me, probation officer reports the youth has missed 30 days of school. Well, the first question I like to ask as a juvenile court judge is, well, was a truancy petition ever filed? The answer often is no. And, you know, schools are struggling with limited budgets, they're dealing with English immersion, they're dealing with a lot of issues, high stakes mandatory testing, MCAS in this state, sometimes truancy petitions aren't filed, sometimes kids sort of age out of the system. We call it in the business the invisible dropout rate. Then as a juvenile court judge I'm being asked to make detention decisions which really don't relate to court appearance. The condition might make sense in the context of a status offense case, what we call CHINs, what some other states call PINs, FINs, et cetera, because it makes sense in the consequence of delinquency. Frequently I think the answer is no. If the child then violates, then I'm asked to hold the child frequently pretrial without bail, so, then I'm in sort of a paradoxical situation. The status offense case was never initiated, I'm being asked to hold a youth without bail pretrial. There is a thing called a presumption of innocence which arguably is compromised in such
circumstances, and I think more fundamentally, the nature of a juvenile court is supposed to look at the nature of the offender, the alleged offender, as well as the nature of the offense. So, any conditions of release should be individualized, they should be tailored; that is what judicial discretion is about, that's what juvenile court should be about. It should be linked to diagnosis. And I think in the context of bail decisions it should be linked to what the case is itself. Otherwise, we're putting the cart before the horse; we're getting to sentencing phenomenon.

How does this play out? Some numbers. We've heard a lot during the day about detention rates. Well, in transfer hearing, the decisions by which youth are sent to adult court. Now, juvenile crime was rising up until 1994. These are Department of Justice statistics. And in Massachusetts, juvenile arraignments, which I supposed is the best tell of the crime rate, you can break it down more by nature of offense, peaked in 1996. In Massachusetts, which is a relatively enlightened state, I think in most people's estimation as regards juvenile corrections, in 1996 we had approximately 23, 24,000 arraignments. By 2005 the number of youth arraigned in this state had declined by 25 percent, which is good, which is very good. Now, we don't have data from our office or the Commission of Probation for
2006. There has been a widely reported resurgence of
gun-related violence in Suffolk County/Boston, the numbers
may have gone up, but by and large the arrest rate is down
dramatically from 1996, and I think it's true nationally,
yet the number of youth detained in Massachusetts had
doubled in the same ten-year period. And who were these
kids? Who are these kids? And research that I've done
shows that, while the number of arraignments declined by 25
percent, the number of probation violations, technical
probation violations, that is, probation violations that do
not implicate the commission of a new offense, had risen by
75 percent, which is a sobering statistic.

Now, that may be related to the decrease in
arraignments, that may have had a salutary public safety
effect or not. It may be directly related to the rise in
detention numbers. And we look at who are the kids in
detention. And increasingly the youth in our youth
correction facility have been younger and younger and
younger. The majority are still over 16, but almost 37
percent are now 14 and younger. So, when you fix -- and 15
percent are 12 and younger. Fifteen percent. So, when you
mix a vulnerable, an increasingly vulnerable population with
an older population, detention population, no good is likely
to come of it. And we have a uniform system of
transportation of youth; in other words, our sheriffs pick
up youth, they transport them to court, and they're all
transported together, the 12-year-old and the 16-year-old,
and they're detained in the same facilities.

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

We do very, very little for adolescent youth in
the way of mental health services, so, our DYS becomes the
mental health service provider by default. I'm a juvenile
court judge, I've got a 13- or 14-year-old kid on the run,
she's a cutter, she's into a lot of bad stuff, I get overly
paternal, I'm worried about her, I don't want to see her die on the street. I try to place her in our Department of Social Services where our CHINs kids are placed, she keeps running. She has mental health services; DMH is not stepping up. What am I to do? That's a common judicial lament. So, that is a real problem. We had two suicides committed, two suicides occurred in our youth facility last year, and now, of course, it takes tragedies like that to galvanize reaction, so, now, DMH is working collaboratively with our DYS to try to address some of those problems.

Younger age kids held for longer periods of time: I was interested, Mr. Dunlap said that the average period of detention is like 96 hours. Well, in Massachusetts it's 17 days, 17 days of detention. To me, the big tell is I ask probation, I ask the family if the youth is attending school. If the youth is attending school, I'm very, very reluctant to lock that child up. And why? It's a public safety phenomena. You take one of our court kids out of school for 17 days, that's like a month of school, they're hopelessly off track, they may never get back, and all research shows that kids out of school are at a much higher rate, a much more likelihood to get involved in criminal and delinquent conduct, 54 percent more likely to get arrested is one statistic that I found in the court's preparing for this presentation, and I think to be candid, that's an
understatement. And, again, who are these youth? The youth who are getting kicked out of school, African American youth are three to five more times likely to be suspended and expelled than our Caucasian kids. These are stats from our Department of Education. And I fear that unwittingly we in the court may be participating or exacerbating what's I think been accurately diagnosed by a lot of people or characterized is the so-called-to-prison pipeline, which is a real phenomena of what's going on in our juvenile courts now.

If you look at the DMC numbers, disproportionate minority confinement, or contact numbers as it's popularly called, there's a disturbing correlation between some of the numbers and identities of children who are leaving school and those who are appearing in our juvenile justice facilities. In Massachusetts, we have between almost 55 percent of the children in our detention facilities are children of color, 37 percent Hispanic, way in excess of the Latino population, similar disparities with the African American population. You look at school suspension rates, 33 percent of Hispanic children went to ninth grade are not graduated and you wonder are there connections, who are the kids in our facilities. And as you look at these correlations it makes you realize that when you talk about a juvenile court we're talking about a system, but a system
implies or suggests something that's coherent, and I think very frequently we have fragmentation. We need these systems to be more coordinated. We need to know what the ramifications of school exclusion means in terms of court involvement, public safety, and not just focus on one piece. Frequently there is not that type of coordination, and I think this is also a national problem.

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

In Massachusetts, we cannot securely detain a status offender, which I candidly think is a very, very good thing. My fear is that we're doing -- Mr. Dunlap talked about how -- your perception, you shared -- Mr. Dunlap shared his perception about how status offense youth get into the adult system, and often in our system youth are -- as soon as they get arrested and charged with a crime, which happens as day follows the night, to quote Hamlet, we hit
them with one of those attend-school-without-incidence conditions and, boom, we have what we want, and we've -- what have we accomplished? I think we've compromised public safety dramatically in the process.

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

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

When the -- and I'll sort of conclude the way I started before just -- I make a few recommendations. Back when the juvenile court was created, back in 1899, and Mark talked about the Cook County Juvenile Court, there was this implicit notion that adolescence was different, there was something different about kids, that they went through some type of rite of passage. The McArthur Foundation has produced solid psychological research about children's decision-making capacity, substituted judgment, ability to make Miranda waiver, competency questions, which support all of what we sort of intuitively knew when some researchers at Clark University in Massachusetts first came up with the
notion of adolescence. Now we have this brain research, these physiologists looking at brain studies, which have given us hard evidence about development in certain regions of the brain which show that there are changes. So, I think we've got to really look at that in a much more rigorous way because now we have the hard science is meeting the psychology and I fear that we're still going in the wrong direction really compromising the system and making our kids that much more vulnerable.

Some quick recommendations, because I know I've been going on. Data, data, data, I don't know if it's data or if it's data. We all talk, I talk, I started by saying I've been in the business for 30 years, we all talk about our experience, we all talk anecdotally, we throw around a lot of numbers, but we really don't have nearly the data we need. Again, even in an enlightened jurisdiction like Massachusetts where we have due process rights for juveniles, we have -- we're one of 12 states with jury trials for kids, which I think is great, we don't collect numbers, so, I couldn't tell you of the 6,000 kids that we detain annually each year, 6,000 kids that we detain annually each year, what percentage are held for probation violation, what percentage are held pretrial for violating conditions of release before they're even adjudicated or anything, which I think is unfortunate.
We need more information and data about DMC and we've got to track it, we can't shy away from it. A lot of my colleagues say, well, Jay, you sit in Lowell, you're locking up a lot of Asian kids. What am I supposed to say? Well, that's the court demographic, these are the people who live in my community? That's one piece of it, but we're the caboose. We've got to look at the decisions of school exclusion, how kids are treated in school, how kids are charged by police, at every step of the way to see if it's being done fairly and equitably. And I think anecdote has its place, but it should inform, not overwhelm the discussion.

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

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

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

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

    JUDGE BLITZMAN: Right on.

    CHAIRMAN WALTON: Ms. Gadow. Thank you.

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

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

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