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In Memoriam: Chief Justice Ralph D. Gants

A Few Words on Our Special Section

By Dean A. Mazzone, Esq., 2020-21 *Massachusetts Law Review* Editor-in-Chief

If it is true, as Socrates is said to have observed, that four things belong to a judge: "To hear courteously, to answer wisely, to consider soberly, and to decide impartially," then no one better exemplified the aphorism than Ralph D. Gants, whose recent passing has shocked and saddened the legal community in ways that are hard to put into words.

As a trial court judge, as an associate justice of the Supreme Judicial Court (SJC), and, finally, as the chief justice of the SJC, Chief Justice Gants left an indelible mark on the criminal law, the civil law, and the administration of justice in the commonwealth generally. A man wholly devoted to his family as well, he was truly a leader in every sense of the word.

As an appellate judge, Chief Justice Gants' comprehensive and meticulous opinions, whether one agreed with the outcomes or not, were always intellectual feasts for the curious and knowledgeable reader, combining both style and substance such that, as one eminent jurist wrote of another, "the subject is illuminated as if by a great searchlight."[1] And, one thing that cannot be gainsaid of Chief Justice Gants, is that he was truly indefatigable, a tireless promoter of the fair administration of justice for all and in all of its many variegated forms. Both qualities are attested to, convincingly and affectingly, in the following pieces. Indeed (as we lawyers say), "There is no guaranty of justice except the personality of the judge."[2] The life of Chief Justice Gants, again, proves that inarguably.

The special section of this issue of the *Massachusetts Law Review* features reflections on Chief Justice Gants by his colleagues and friends, each of whom seeks to capture in a unique way some aspect of the chief justice's dedication to his life and his work. Not an easy task, to be sure, where that life and work were so monumental, pathbreaking and varied. But I am sure the reader will find that our distinguished contributors do the judge, and the man, no small measure of, in a word, justice.

But, before turning to those contributors, I want to say, on behalf of the lawyers, the litigants, the court personnel, the law students and the people of this commonwealth, thank you, Mr. Chief Justice Gants.

1. Michael Boudin, "Judge Henry Friendly and the Craft of Judging," 159 U. Pa. L. Rev. 1, 14 (2010).

2. Erlich, *Judicial Freedom of Decision, in Science of Legal Method 9,* Modern Legal Philosophy Series 65 (1917).

In Memoriam

By Hon. Barbara Lenk, Associate Justice, Massachusetts Supreme Judicial Court (ret.)

It was the practice of Chief Justice Ralph Gants to offer farewell remarks when a justice was retiring. And so now, with a sad heart, I would like to do the same for him. In the wake of his untimely passing, the outpouring of appreciation for Chief Justice Gants has been extraordinary. How can one man mean so much to so many? When the man is Ralph Gants, the answer is in some respects self-evident.

I know that many people have already — and will for many years to come — celebrate Chief Justice Gants as a brilliant jurist. His scores of lucid, insightful and carefully reasoned opinions stand as a permanent testimonial to the prodigious power of his legal mind. However, as one of my colleagues said recently, the chief's brilliance was only overshadowed by his kindness. I experienced that kindness personally on many occasions, but especially during the year or so when I was very ill. He was so wonderful with me — not letting me resign, taking over my single-justice assignments himself, checking in regularly, and making sure that I had whatever I needed — including a little work, of course, to make me feel useful.

The chief's kindness was by no means limited to his close colleagues and friends. Many people have mentioned his gift for being uniquely "present" at parties or gatherings of any sort. When he spoke to you, you never had the sense that he was — like so many other "important" folks — looking over your shoulder to see if someone else nearby might be more worthy of his attention. No — he was talking with YOU; he was completely focused on what you had to say, on your experience, and on what he could do to offer encouragement, support or just warm camaraderie.

The chief's unbounded generosity of spirit was, in part, a function of the inexhaustible reservoir of energy, enthusiasm and focus with which he was blessed. I used to tease him that God must have made it so that he got 36 hours in a day, while the rest of us had to make do with the standard 24. How else to explain the time he had for the many people in his life (and he seemed to know EVERYONE), the state and national committees on which he served, the extraordinary number of administrative matters he oversaw, the many lower courts and their policies and personnel that the Supreme Judicial Court (SJC) oversees (and about which he seemed to know everything), and the productive, respectful relationships he fostered with the legislative and executive branches. That work alone would have more than broken the back of an ordinary mortal. I don't think it accounted for more than half of the chief's working time — also known as his awake time.

He spent the rest of his time thinking, writing opinions, mentoring law clerks, giving all sorts of talks, expertly editing the draft opinions for our monthly consultations, carefully reading briefs piled high on his desk each month, letting oral arguments far exceed the stated time constraints, and masterfully conducting sembles with the associate justices — all with our own strong views — ever in search of ways to harmonize those views. An amazing number of our opinions are unanimous, thanks in large part to his skill in showing us the common ground that we shared. And when justices, including the chief, wrote separately, they did so without rancor or personal invective, a tribute to the environment he created and sustained by his example.

It was all an enormous enterprise, the chief's work, but he embraced every part of it. He loved being chief justice, loved the court, and loved his colleagues. He loved it all, because he knew how important the work of the SJC is for the people of Massachusetts — the people who rely upon the court for justice — and he cherished the opportunity to do that work for their benefit. He was always focused on the people that we serve, and on the people behind the cases that we hear — especially those who have the least — and on what our rulings mean for them. In every respect, Chief Justice Ralph Gants fulfilled the Biblical injunction in the Book of Micah: he did justly, he loved mercy, and he walked humbly. He was indeed a mensch of mensches. May we all strive to follow his example.

Chief Justice Ralph Gants

By Hon. Paula M. Carey, Chief Justice, Massachusetts Trial Court

What do I say about my friend, my colleague, my mentor and, yes, my boss, Chief Justice Ralph Gants? He most assuredly was my boss, and we had many discussions about him "staying in his lane." His usual response was, "what do you mean?," accompanied by that amazing grin and an infectious laugh. He was a true leader. He had an innate capacity to listen and listen well. Chief Justice Gants was strong, opinionated and one of the most humble human beings I have ever known. He knew how to lift people up and inspire them in ways that only our most beloved leaders can do. He used his power to effect change and did so in a way that was clear and authentic. The chief was not about self-promotion. He did not care about getting credit, and in fact, mostly deflected credit to others.

I was blessed to be able to work closely with Chief Justice Gants since his appointment as chief justice of the Supreme Judicial Court (SJC). In fact, I was with him when he heard the news that he had been confirmed. After we hugged, he stood beside me shoulder to shoulder (with Harry Spence on my other side) and said, "it is important that there be no light in between us." From that day forward, there was no light between us. If we did not agree on something, we resolved the issue amicably behind closed doors and moved forward. There were few days during our time together when we did not have the opportunity to speak. I treasure those conversations and deeply miss them. I found them grounding and inspiring, both personally and professionally.

Chief Justice Gants embodied the best qualities of a judge: courage, compassion, humility, intellect, curiosity and a commitment to the rule of law and a dedication to equal justice for all. While the chief rose above all in embodying these qualities, it was his human side that really set him apart. He had a remarkable sense of humor and a wonderful laugh. If you met him for even a few moments, you remembered him. I will always remember his "Ralphisms" … little snippets of advice, invariably containing a sports reference. After his death, I received a condolence note from an attorney from the state of Maine who met him at a regional meeting on opioids that we had in Boston. She stated: "What struck me was his kindness and his true and deep belief that those of us blessed to practice law had an obligation to use that ability to make someone else's path in life easier."

Ralph Gants' standards were high. He led with both his written and oral words, but to him, words were not enough. He demanded action from both himself and others. He had an incredible ability to get to the heart of an issue through his questions, and to help develop a plan to right a wrong. Chief Gants did not believe that our legal system is fair. But he did believe in teamwork, and that collectively we could move the needle toward a fairer and more equitable system.

Chief Justice Ralph Gants was larger than life. He had a vision of a judicial system that would work for all people, and in which all persons would be treated similarly and equitably, regardless of the color of their skin, their ethnicity, or their gender preference. He wanted to ensure that all persons had access to the system in the same way, whether they were poor or rich, Black, Hispanic, white, Asian. That is the system envisioned by Chief Justice Ralph Gants. Unfortunately, he left this world too soon and before he could accomplish his goal, but the mark he has left on our system and on judicial systems across the country is indelible.

Many of you do not realize the impact Chief Justice Gants had at the national level. The most recent resolution on racial injustice by the Conference of Chief Justices/Conference of State Court Administrators was proposed and drafted by Chief Justice Gants. When he saw a wrong, he stepped up to do something about it. A few short months after his appointment as chief justice of the SJC, he delivered his annual address advocating for the elimination of mandatory minimum sentences because of their inequitable impact on communities of color. Next, he commissioned Harvard University to look at Trial Court data to examine disparate treatment in the justice system. Fortunately, Chief Justice Gants was able to see this completed report, but unfortunately, he is not here to help guide us as we work to change the system and eradicate systemic racism.

I had the great opportunity to travel to Israel with Chief Justice Gants and a number of other colleagues, along with our families. The trip was incredible, and after Chief Justice Gants passed away, a colleague shared the following memory: "I also wanted to share my favorite memory from our trip to Israel. Many times as we were walking around I would see you and Ralph with your heads together talking, and if I ever caught a snippet of conversation I could tell that the two of you were deeply processing some aspect of our courts. Each time I would smile and think to myself how incredibly lucky we are in Massachusetts to have you both at the helm of our justice system. By your shared body language, I could tell that you both liked and respected one another as people as well as co-leaders of an enormous, complex, enterprise."

It is hard for me to accept the loss of Ralph Gants. Since his death, I have often asked him for his guidance. It is as if a piece of me is missing, but when I lapse into a melancholy state, I ask myself, "What would he want?" The answer is simple . . . "Carry out my legacy." He would encourage all of us to confront systemic racism and work to make our system fairer and more just. He would ask us to right wrongs and to listen to one another. He would say, as he did in his 2015 State of the Judiciary, "In our courts, we seek to repair the world, sometimes even save the world, one person at a time. What that means is that our courts will step up to the plate and seek to address the challenging problems that come before us."

This is our challenge. I am up for it. Are you with me?

Personal Reflections on Chief Justice Ralph Gants

By Hon. Mark V. Green, Chief Justice, Massachusetts Appeals Court

I first met Ralph Gants in 1985, when he was working as an assistant United States attorney in William Weld's U.S. Attorney's Office. Together with my colleague and our mutual friend, Matt Epstein, we met for lunch every few weeks. Early during that series, Ralph began to confide his interest in pursuing a relationship with another assistant United States attorney, who happened to be my wife's best friend from law school. Eventually, Ralph enlisted Karen's assistance to plot a strategy to win the heart of Debbie Ramirez. (Successful romantic plots are something of a specialty of Karen's.) We celebrated with them at their wedding in 1988 and, a few years later, our younger son entered nursery school with their daughter Rachel. Across more than three decades, our families celebrated birthdays and holidays together, vacationed together, celebrated successes, and supported each other after setbacks.

In 1997, Ralph was part of a small group I assembled to help me prepare for what I anticipated to be a challenging confirmation hearing before the Governor's Council, for my nomination to the Land Court. I vividly remember Ralph putting me at ease by saying, "Let me put this into some context: you are where I hope to be." Within a few months, Ralph indeed was in the same position, and was confirmed (more easily I might add) to the Superior Court. When I moved from the Land Court to the Appeals Court, Ralph was the only trial judge on my recusal list. Karen and I celebrated with Ralph and Debbie when Ralph was elevated to the Supreme Judicial Court in 2008, and again when he was named chief justice in 2014 (and, crossing off an item from his "bucket list," threw out the first pitch at Fenway following his swearing-in ceremony).

In 2017, as I contemplated the prospect of serving as chief justice of the Appeals Court, one of the things that excited me was the opportunity to collaborate with my very close friend in our respective roles as chiefs of the two state appellate courts. Though our respective predecessors have typically enjoyed positive and productive relationships, I don't know that any pair of them carried the foundation of such a long personal friendship into their work together.

Of course the decisional work of our two courts was (and is) separated by a firewall. But in our respective administrative and leadership roles we worked closely together in countless ways. I learned early on that I might expect a call on my cellphone during his morning drive in from Lexington — accompanied on my caller ID by his chosen profile picture, in cycling gear taken on an Italian bicycling trip we shared in 2013. In 2018, together with several other Massachusetts judges, we traveled to Israel to meet with court and other governmental officials. A highlight of that trip was our visit to Yad Vashem, the Holocaust memorial in Jerusalem. That experience, in turn, prompted our visit the following spring, together with a much larger contingent of Massachusetts judges, to Montgomery, Alabama, to confront our country's fraught history of racial injustice.

The many tributes to Ralph's legacy of leadership and innovation have rightly recognized his passion and commitment to access to justice and racial equality in our delivery of it. Though perhaps lesser known, Ralph also recognized the need for the courts to improve their use of technology, and early on in his tenure he began planning for a technology capital bond request. But, as he confided in me early in that process, it was not enough to receive the funding — we needed to be confident we had a plan in place for what we hoped to accomplish with that investment, and a governance structure to ensure we could execute successfully. I had some experience with technology, and Ralph asked me to join with him in leading that effort, together with Trial Court Chief Justice Paula Carey and Court Administrator Jon Williams — a band that we took to calling the "Group of Four." That work continues in his absence, and will carry his vision forward.

With my role as Appeals Court chief justice came a standing bimonthly meeting with Ralph, with alternating locations "home and home." I kept a running list of topics to discuss at those meetings, and so did he. Characteristically gracious, Ralph always invited me to run down my list before turning to his. Almost invariably, we discovered by the end of the meeting that we had entered with the same list. Whether coordinating processes within the Reporter's Office, security for the Adams Courthouse, or communications on snow emergencies, the ease, comfort and trust of our personal relationship facilitated our collaboration in every respect.

He was a great and visionary leader, a great partner and a wonderful friend. I mourn the loss of my friend, but perhaps even more the loss of the unique privilege of our professional collaboration. I hope with his successor to build on the model of our close collaboration, even as I miss his presence as my friend.

Ralph Gants — Superior Among Supremes

By Hon. Judith Fabricant, Chief Justice, Massachusetts Superior Court and
Alex Philipson, Esq., Deputy Legal Counsel, Massachusetts Superior Court

Leading the Supreme Judicial Court (SJC) as chief justice from 2014 to 2020 was not the only way in which Ralph Gants was superior. Before his tenure on the SJC, which began with his appointment as an associate justice in 2009, he served for more than a decade as an associate justice of the Superior Court, from 1997 to 2008. That experience gave him firsthand knowledge of trying murder cases and other felonies falling uniquely within the jurisdiction of the Superior Court. That background richly informed the decisions he wrote and the projects he led on the SJC, benefiting both the Superior Court and the litigants who come before it.

Of importance to trials of the most serious offenses, Chief Justice Gants chaired the committee that updated the SJC's Model Jury Instructions on homicide in 2018. The instructions first appeared in 1999 and had been revised only once before, in 2013. It was a testament to Chief Justice Gants' impulse to improve the law without delay that the 2018 update appeared only five years after the previous one. Appreciating the difficulties of delivering complex instructions to a jury, he swiftly and successfully led a group of experienced trial judges in amending the homicide instructions and making them easier to understand. He knew as well as anyone that the court would have to repeat this endeavor periodically to keep pace with the law and advances in how best to convey the law to jurors.

Today, the 2018 version of the model instructions already requires further revision because of (among other things) one of the last opinions that Chief Justice Gants wrote, one that changed the law on first-degree murder by extreme atrocity or cruelty. The case, *Commonwealth v. Castillo*,[1] modified the seven-factor test articulated in *Commonwealth v. Cunneen*.[2] The *Cunneen* factors, only one of which must be proved to support a conviction of first-degree murder by extreme atrocity or cruelty, *Commonwealth v. Hunter*,[3] are: "[1] indifference to or taking pleasure in the victim's suffering, [2] consciousness and degree of suffering of the victim, [3] extent of physical injuries, [4] number of blows, [5] manner and force with which delivered, [6] instrument employed, and [7] disproportion between the means needed to cause death and those employed."[4] No mens rea other than malice, which is also required for second-degree murder, is needed.[5]

The defendant in *Castillo* urged the SJC to hold that the commonwealth must prove the defendant intended to commit an extremely atrocious or cruel killing, or at least was indifferent to the victim's suffering.[6] More specifically, the defendant argued that the SJC should adopt the view of then-Associate Justice Gants' concurrence in *Commonwealth v. Berry*.[7] The SJC in *Castillo* declined to go that far, but still modified the law.[8] Instead of inserting a new mens rea requirement into the law of extreme atrocity or cruelty, the court refined the *Cunneen* factors to focus on the egregiousness of the defendant's conduct.[9]

The main problem, the court explained, was with factor two — consciousness and degree of suffering of the victim — because that factor concerns only the victim's suffering and not the defendant's actions.[10] To solve the problem, the SJC rephrased factor two to address whether the defendant's "method or means" of killing the victim — that is, the defendant's conduct — "was reasonably likely to substantially increase or prolong the conscious suffering" of the victim.[11] As for the remaining factors, the court left factor one intact but rearranged the others under a new factor three.[12] Under new factor three, when the jury considers "whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person" (old factor seven),[13] the jury may weigh the extent of injuries (old factor three, new factor 3[a]), number of blows (old factor four, new factor 3[b]), manner of force used (old factor five, new factor 3[c]), and weapon or method employed (old factor six, new factor 3[d]). As for Chief Justice Gants' shift from his view in *Berry* (focusing on the defendant's mental state) to his view

1. 485 Mass. 852 (2020).
2. 389 Mass. 216, 227 (1983).
3. 416 Mass. 831, 837 (1994).
4. *Cunneen*, 389 Mass. at 227.
5. *Id.* at 226–27.
6. 485 Mass. 852 (2020).
7. 466 Mass. 763, 774–78 (2014).
8. 485 Mass. 852 (2020).
9. *Id.*
10. *Id.*
11. *Id.* at 865.
12. *Id.* at 865-66.
13. *Id.* at 869–870 (Appendix).

in *Castillo* (focusing on the egregiousness of the defendant's actions), perhaps the shift reflects a compromise with newer justices who joined the court in the intervening years, or merely demonstrates a more searching analysis of the subject. In any event, *Castillo* shows two of Chief Justice Gants' distinctive skills: persistence of thought and flexibility of execution.

Another aspect of Chief Justice Gants' influence on the Superior Court deserves special recognition — his influence on grand jury practice. Starting with *Commonwealth v. Walczak*,[14] the SJC turned its attention to the duty of a prosecutor to instruct a grand jury on mitigating circumstances or defenses in certain circumstances. A plurality of justices in *Walczak* agreed that a prosecutor who seeks to indict a juvenile for murder must inform the grand jury of the elements of murder and the significance of mitigating circumstances or defenses (other than lack of criminal responsibility) for reducing or eliminating the juvenile's criminal liability, if substantial evidence of such circumstances or defenses exists.[15] Then-Associate Justice Gants went further in a concurrence: He urged that the court should require the prosecutor to give such instructions in grand jury proceedings involving adults in comparable circumstances too.[16]

Five years later, in *Commonwealth v. Grassie*,[17] a defendant urged the SJC to expand the *Walczak* rule to apply to adults, echoing then-Associate Justice Gants' concurrence in *Walczak*.[18] The court declined to decide the question without first gaining a better understanding of grand jury instruction practices in Massachusetts, and so the court appointed a committee to study the question and make recommendations.[19] The committee submitted its report in 2018. The report included six Best Practices, two of which, Nos. 3 and 5, address the role of the prosecutor in instructing the grand jury on the law. As for when a prosecutor should instruct on lesser offenses and defenses, the report concluded that, unless required by case law — such as *Walczak* — giving such instructions is a matter of prosecutorial discretion, though encouraged.

A little over one year after the committee issued its report, the SJC, in *Commonwealth v. Fernandes*, again considered whether to expand *Walczak* to apply to adults.[20] Although the court again declined to do so, a plurality of the SJC, consistent with the grand jury committee's Best Practices, concluded that "It is generally advisable for prosecutors to instruct grand juries on the elements of lesser offenses and defenses whenever such instructions would help the grand jury to understand the legal significance of mitigating circumstances and defenses."[21] The justices disagreed about the consequence of a prosecutor's failing to give such instructions. A plurality of the justices would have required dismissal of the indictment only upon a determination of the existence of exculpatory evidence that was so compelling that, had the instructions been given, the grand jury probably would have voted not to indict. Other justices (including Chief Justice Gants, drawing heavily on his concurrence in *Walczak*) would have required dismissal on a determination that the lack of instructions on mitigating circumstances and defenses probably influenced the grand jury's decision to indict for murder rather than manslaughter (rather than deciding not to indict at all). And still other justices would have required dismissal only where facts known to the prosecutor clearly established that giving the instructions would result in complete exoneration, such that the failure to give the instructions constituted prosecutorial misconduct.[22]

Looking backward from *Fernandes*, one can see that Chief Justice Gants' concurrence in *Walczak*, seven years earlier, set the stage for *Grassie*, which in turn led to the creation of the grand jury committee — all of which made it possible for the SJC, in *Fernandes*, to declare it "generally advisable" for prosecutors "to instruct grand juries on the elements of lesser offenses and defenses whenever such instructions would help the grand jury to understand the legal significance of mitigating circumstances and defenses,"[23] that is, including where the subject of the grand jury proceeding is an adult.

With the long view of Ralph Gants' tenure on the SJC, from his years as an associate justice through his time as chief justice, one can appreciate the full impact of his work on Superior Court practice and the law of the commonwealth in the serious criminal cases that come before the Superior Court. As deeply as we feel the loss of his extraordinary leadership, we take comfort in recognizing that his influence on judges, practitioners and the public will endure for many years to come.

14. 463 Mass. 808 (2012).
15. *Id.*
16. *Id.*
17. 476 Mass. 202 (2017).
18. *Id.*
19. *Id.* at 219.
20. Commonwealth v. Fernandes, 483 Mass. 1 (2019).
21. *Id.* at 2–3.
22. *Id.* at 3–4.
23. *Fernandes*, 483 Mass. at 2-3.

Supreme Judicial Court
Chief Justice Gants — Reflections
Sept. 22, 2020

By Francis V. Kenneally, Esq., Clerk for the Commonwealth

In July, I had just returned home from a tough day at work on the heels of yet another COVID-related emergency, and my phone rang. It was Chief Justice Gants, who was aware that I'd had a particularly rough day.

"Are you home?" he asked.

"Yes."

"OK, good. Is someone with you?"

"Yes, my wife Cathy is right here."

"Good. Tell her that this is an order from Gants. You are not to do any work tonight, and you are ordered to get a good night's sleep. Rest up!"

The scene was as comical as it was touching as I pulled the phone away for a few seconds to explain to Cathy, "It's Chief Justice Gants. He says I have to relax tonight." Needless to say, the chief's order was followed, but I wondered how someone with so little spare time managed to find time for me and many others like me.

As I reminisced and laughed recently with Clerk Maura Doyle, and her office, and Maura Looney in my office, I was struck by common threads in our stories and memories. For example, after discussing the substance of an order that had to go out, the chief would invariably ask, "OK, who's typing the order?" But before the response, the chief would say, "Never mind, I'll type the order. That's not a good use of your time!"

These stories and countless others like them are important to remember and retell because the true character of a person is not revealed through grand public gestures but in these selfless, considerate and caring moments.

Since his passing, we've heard the most glowing accolades about Chief Justice Gants. "Brilliant jurist," "giant in the legal field," and "fearless" — to name a few.

These are fitting for certain, but it's important that our stories and memories not be lost in the sea of well-deserved superlatives. Our stories reflect a word that I've used most often to describe the chief to others well before he passed and certainly since then. The word is "decent." Now "decent" seems pedestrian compared to "brilliant."

Webster's, though, defines the "decent" person as one having moral integrity, kindness and goodwill — in other words — Ralph Gants.

A book I've visited and revisited often over the years is *Man's Search for Meaning* by Viktor Frankl. Frankl, a Holocaust survivor whose worldview was no doubt shaped by what he witnessed and endured at Auschwitz, concluded that the world has but two races of people — the decent and the indecent. And while we may all rightly lay claim to being among the decent, Chief Justice Gants, in my view, was the most decent. Why? Well not even Chief Justice Gants could be brilliant 24/7. Even the brightest stars dim in the night sky. Giants fall. Goliaths are laid low. Why then? It's because of the constant, consistent decency that permeated his every word and action.

Few of us will likely be called "brilliant" or "giant" in our chosen professions. But what is within our grasp is to aspire to reach the chief's level of decency.

That is my hope, indeed, that is my prayer for us as a court family as we go forward — that we have moral integrity, that we be kind to one another, that we spread goodwill — that we be like Chief Justice Gants.

Transparency and Fairness: Open the Doors

By Hon. Jay D. Blitzman (ret.) and Steven F. Kreager, Esq.

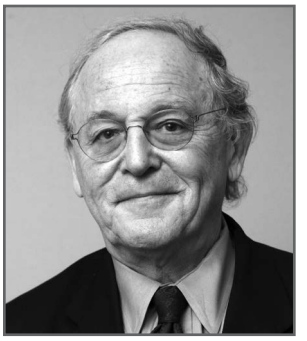
Framing the Issues

In addressing the evolving narrative regarding lifting the veil of secrecy that has traditionally characterized closed child welfare and juvenile delinquency proceedings, this article argues that greater transparency is a necessary component in realizing the therapeutic role of fundamental fairness and due process and is consistent with the aspirational goals of the Supreme Court of the United States in *In Re Gault*.[1] In supporting this proposition, this article discusses the evolution of the juvenile court system and the growth of support for open court sessions, an issue that Judge Jay D. Blitzman (ret.) and others have addressed previously.[2] While not yet a tsunami, it appears there is certainly a trend toward greater transparency.

"The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts."[3] The comparison to the prosecutorial arm of English monarchs might seem hyperbolic, but prior to the introduction of the concept of due process in juvenile proceedings in *In Re Gault*, the harm done to youth in the name of treatment was palpable. Houses of refuge and shelter had devolved into Dickensian orphanages and punitive juvenile prisons. The preexisting legal model had been predicated upon the virtually nonrebuttable presumption that any child before the courts was in need of treatment and fixing, but this medical model afforded neither due process nor treatment. The *Gault* court expressed concern that youth received "the worst of both worlds: that [they get] neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children."[4]

The juvenile court system has evolved dramatically since 1967 when *In Re Gault* established the right to counsel for indigent youth in juvenile court. At the time of Gerald Francis Gault's arrest in 1964, there were 2,987 juvenile court judges in the United States. Of this number, only 213 were full-time, one-fifth were not members of the bar, and one-half lacked a college degree.[5] The modern juvenile court features trained clinicians and probation officers and specialized education for judges.

Proponents of maintaining the traditional model of closed sessions fear that opening the doors will stigmatize juveniles in delinquency cases, compromise rehabilitative opportunities, and adversely affect confidentiality in abuse and neglect cases. The argument for opening the doors is exemplified by a resolution passed by the National Council of Juvenile and Family Court Judges (NCJFCJ) in July of 2005 in favor of presumptively opening hearings in child welfare or dependency cases.[6] 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 family courts."[7]



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1. 387 U.S. 1 (1967).
2. *See, e.g.,* Hon. Jay D. Blitzman, "Access to Justice in Juvenile Court," 93 Mass. L. Rev. 230 at 242 (2010); citing Hon. Gordon 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).
3. *Gault*, 387 U.S. at 18 (quoting Dean Roscoe Pound, *Young, Social Treatment In Probation & Delinquency,* Foreword at xxvii (1937)).
4. *Id.* at 28 (quoting Kent v. U.S., 383 U.S. 541, 556 (1966)).
5. *Id.* at 14, n.14 (quoting Harvard L. Rev. Note, p. 809).
6. National Council of Juvenile & Family Court Judges, NCJFCJ 68th Annual Conference, Resolution No. 9 (adopted July 30, 2005).
7. *Id.*

Educating the public about the complexity of the subject matter and the gravity of juvenile court decision-making could raise the level of practice by lawyers and jurists and defuse "kiddy court" perceptions. The latter concern is particularly apt in Massachusetts, as juvenile court subject matter jurisdiction allows for termination of parental rights in child welfare proceedings and for public juvenile trials, and the imposition of adult prison sentences in youthful offender proceedings. Public education includes an opportunity to provide a contextual understanding of the larger frames and issues that affect youth and their families. These topics include promoting greater understanding of the societal structures and systems that have resulted in the large numbers of youth who are dually involved in child welfare and juvenile justice, the reality of the cradle/school-to-prison pipeline, and the persistent problem of racial and ethnic disparity at all stages of the process. As Marian Wright-Edelman has stated, the cradle-to-prison pipeline runs through economically depressed neighborhoods and failing schools.[8] In *Baby Doe: A Political History of Tragedy*,[9] Jill Lepore discusses the worlds many court families live in and describes a juvenile version of the carceral state, noting that from 2010-2012, 72% of the youth committed to the Department of Youth Services (DYS) had been involved with the Department of Children and Families (DCF), and that over half had been involved with DCF before the age of five.[10] The disparate rate of systemic involvement for youth of color that we see in juvenile justice is paralleled in the child welfare system.[11] The realities of a nationwide problem of systemic racism in juvenile courts, and countless other institutions, have only been amplified by the scourge of COVID-19, which in all contexts requires us to confront racial, ethnic and socioeconomic divides.

It is time to open the doors, or at least to take a peek inside. In adopting this position, we argue that greater transparency is necessary to educate the public about the complexity of juvenile and child welfare matters, but even more importantly, it is central to enhancing confidence in the system by encouraging a more procedurally oriented model of juvenile justice, which is consonant with fundamental fairness — the functional definition of due process. In making this argument, we suggest that due process is inherently therapeutic and is at the heart of the inequity that *Gault* attempted to redress. The issue of open or closed sessions is not a binary proposition. Creating a rebuttable presumption of opening the doors would have to be part of more robust juvenile justice reform that would expand the sealing and expungement of, and minimize or preclude access to, juvenile records. There are national and international models we can learn from and adopt or adapt. The English system involves a rebuttable presumption of open sessions, yet it prohibits the media from identifying names of youths and also addresses access to juvenile records, which are worthy of emulating.

The Evolution of the Juvenile Court

In 1964, Francis Gerard Gault was charged with making a telephone call of the indecent adolescent variety[12] and subsequently committed to the Arizona Industrial School for an indeterminate period until the age of 21. The hearing that resulted in his commitment was conducted in the judge's chambers. No record was kept of the proceedings, and Gault did not have an attorney. There was no fact finding, witness testimony or confrontation; the mere allegation sufficed for an adjudication, and the judge functioned as the inquisitor. An adult charged with comparable conduct would have the right to a trial and would have faced a maximum jail sentence of 60 days or a fine between $5 and $50.[13] *Gault* recognized the chasm between outcomes for youth and adults for similar behavior, which had historically been rationalized in the name of treatment. Justice Abe Fortas noted that "[t]here is no material difference . . . between adult and juvenile proceedings . . . . A proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of liberty . . . is comparable in seriousness to a felony prosecution . . . . The child requires the guiding hand of counsel at every step of the proceedings against [them]."[14] In spite of the intent of the founders of the system, "the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context."[15] His scathing critique included an attack on what he perceived to be a misguided application of English *parens patriae* practice, which he characterized as a "Latin phrase of dubious relevance . . . which proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme."[16]

History has shown that the absence of substantive standards did not result in the careful, compassionate and individualized treatment that had originally been envisioned. In dramatically concluding that the "condition of being a boy does not justify a kangaroo court,"[17] *Gault* cited Justice Felix Frankfurter's observation in *Kent v. U.S.*,[18] "[t]he history of American freedom is, in no small measure, the history of procedure."[19] In holding that juveniles were entitled to the basic due process protections of notice, right to counsel, the

8. Marian Wright-Edelman, *Justice for America, Foreword to Juvenile Justice: Advancing Policy, Research And Practice,* Eds. Jacobs & Sherman (Wiley & Sons 2011).

9. Jill Lepore, "Baby Doe: A Political History of Tragedy," The New Yorker, Feb. 1, 2016.

10. *Id.*

11. *Id.*

12. In Re Gault, 387 U.S. 1, 4 (1967).

13. *Id.* at 8-9.

14. *Id.* at 36.

15. *Id.* at 10.

16. *Id.* at 16 (the phrase, meaning father of the country, in the English chancery context had focused on property rights before being expanded to considerations of child welfare, but did not address criminal behavior).

17. *Id.* at 28.

18. 383 U.S. 541, 556 (1966).

19. In Re Gault, 387 U.S. 1, 21 (1967). (quoting Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion)).

right against self-incrimination, and the right of appellate review, *Gault* held the promise of heralding a due process revolution in juvenile law. However, the case has not proved to be the functional equivalent of *Gideon v. Wainwright*[20] in the criminal context. While the case constituted a sea change in terms of what had been normative practice, in spite of the soaring rhetoric about youth requiring the guiding hand of counsel at every step of the proceedings, *Gault's* holding was explicitly limited to the adjudicatory hearing or bench trial.[21]

Justices Fortas and Hugo Black wanted to go further. As Justice Black observed, "[w]here a person, infant or adult, can be seized by the State, charged and convicted for violating a state criminal law, and then ordered by the State to be confined for [many] years, I think that the Constitution requires that [they] 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."[22] In focusing on the reality of what the deprivation of liberty and confinement entailed, Justice Black debunked the belief that juvenile detention, if not benign, was not punitive in nature. This non-punitive narrative was reiterated in *Schall v. Martin*[23] in 1984 when the Supreme Court upheld the New York preventive detention statute as serving both public safety and child protection purposes. The consequence of not fully incorporating all procedural rates as occurred in the criminal context has meant that juvenile proceedings are quasi-criminal in nature.

Gault supports the conclusion that the so-called debate versus due process promotes a false narrative. As Justice Fortas observed, "the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[24] Justice Fortas' admonition about what is truly therapeutic, being treated fairly, connects directly to the 2013 report, *Reforming Juvenile Justice: A Developmental Approach*, prepared for the Office of Juvenile Justice Delinquency and Prevention (OJJDP) under aegis of the National Research Council of the National Academies. The report notes and recommends that "[t]reating youth fairly and ensuring that they perceive that [they] have been treated fairly and with dignity contribute to positive outcomes in the normal processes of social learning, moral development, and legal socialization during adolescence. Based on perceptions of procedural fairness as well as constitutional requirements, juvenile courts should ensure that youth are represented by properly trained counsel, that adjudications do not occur unless youth are able to understand the proceedings and assist counsel, and that youth have an opportunity to participate."[25] Viewed through this lens, it is apparent that procedural fairness, the essence of due process, is rehabilitative.

The Opening the Doors Debate

The first juvenile court in the United States was established in Chicago, Illinois, in 1899, and that court was open to the public.[26] Similar juvenile courts were established throughout the United States to care for and treat court-involved youth, and juvenile court judges focused on the treatment and rehabilitation of young people, as opposed to blame and punishment.[27] Over the course of the early 20th century, society began to believe that confidentiality was a necessary component of such treatment and actual rehabilitation.[28] The idea was that open juvenile courts could stigmatize and, ultimately, harm the very young people that the courts were intended to aid, so by the mid-20th century, juvenile courts throughout the country were generally closed to the public.[29] There is a modern trend, however, favoring increased access to juvenile courts, as evidenced by the NCJFCJ resolution in favor of presumptively open child welfare, or dependency, proceedings discussed previously. Many states also have some degree of access in the delinquency context, including open transfer proceedings in most states.[30] In Massachusetts, delinquency proceedings and records are closed to the public,[31] while youthful offender proceedings and records are open.[32] In child welfare proceedings, including children requiring assistance status offense cases and care and protection matters, the only hearings that are open to the public are do-not-resuscitate (DNR) cases; child welfare records are generally closed.[33]

As has been discussed, the structure and procedure of juvenile court systems vary from state to state. In the criminal context, you can observe a session in different cities and in different states and understand the process. This is not the scenario in our national patchwork quilt system of juvenile justice by geography. Indeed, in

20. 372 U.S. 335 (1963).
21. *Gault*, 387 U.S. at 13.
22. *Id*. at 61 (Black, J., concurring).
23. 467 U.S. 253 (1984).
24. *Gault*, 387 U.S. at 26.
25. Richard Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach* (National Research Council of the National Academies, for the Office of Juvenile Justice and Delinquency Prevention 2013) at 6-7.
26. Jennifer Flint, Comment, "Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts," 28 J. Juv. L. 45, 47 (2007).
27. *Id.*
28. *See, e.g.*, Standard Juv. Ct. Act, Art. V § 17; Standard Juv. Ct. Act, Art. VII § 28.
29. Flint, *supra* note 26, at 47.
30. *See* Melissa Sickmund and Charles Puzzanchera, 2014 *National Report: Juvenile Offenders and Victims, National Center for Juvenile Justice (NCJJ)*, 97-100 (last updated Dec. 2014), https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf; *See also* Hon. Martin Jr., *supra* note 2, at 393.
31. Mass. Gen. Laws c. 119 §§ 60, 60A, 65.
32. Mass. Gen. Laws c. 119 §§ 52-54, 58, 60A, 65.
33. Mass. Gen. Laws c. 119 §§ 38 (closes all care and protection cases to the public with the exception of DNR matters).

some states, juvenile court culture or practice may vary from county to county. Unfortunately, fully actualizing *Gault's* promise of due process does not seem to be on the immediate horizon. Since *Gault*, the only extensions of constitutionally required due process rights were applying the doctrines of proof beyond a reasonable doubt in *In Re Winship*[34] in 1970 and double jeopardy in *Breed v. Jones*[35] in 1975. Opening the doors might shed at least some light on the great variability of practices and procedures. The rationale for the selective models developed by various states has ostensibly been the theory that juvenile cases are different and should allow for more informality and flexibility, but as history has demonstrated, closed doors and the lack of transparency have worked to the detriment of youth. As Justice Louis Brandeis opined, sunlight is the greatest disinfectant.

More than 50 years after *Gault*, access to counsel remains an issue in many jurisdictions. In 2016, the National Juvenile Defender Center (NJDC) reported on the excessive waiver of counsel, often occurring behind closed doors, in juvenile proceedings. "It is an open secret in America's justice system that countless children accused of crimes are prosecuted and committed every day without seeing a lawyer."[36] In *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel*, the NJDC indicated that "few states or territories adequately satisfy the right of access to counsel for young people."[37] The NJDC report suggests that the fact that 43 states allow youth to waive their right to legal representation without first consulting with a lawyer is part of the problem.[38] In Luzerne County in Wilkes-Barre, Pennsylvania, the "Kids for Cash" debacle involved judicial kickbacks to two juvenile court judges who induced thousands of youths to waive counsel. The youths were sent to a privatized detention center in which the judges had a financial interest. The incident serves as a sobering warning of what can occur behind closed doors. This reality was underlined in May of 2020 when a juvenile court judge in Michigan held a 15-year-old adolescent for violating a term of probation regarding non-compliance with doing online homework.[39] Everyone was shocked when the Michigan story went viral, but whether it is Michigan or Massachusetts, open courtrooms might redress some of the danger of unfettered subjective discretion by introducing a modicum of public accountability into the process.

The first juvenile court in the United States was open to the public and had jurisdiction over both child welfare and juvenile delinquency matters.[40] During those proceedings, the court employed the principle of *parens patriae,* whereby the judge would act as the parent of the child who was in need of society's care and protection, and the focus was on treatment and rehabilitation, as opposed to blame and punishment.[41] The Illinois statute that established the juvenile court required that special courtrooms be used for all juvenile proceedings.[42] Over time, that statutory provision was commonly understood as a confidentiality requirement, and subsequent jurisdictions established similar juvenile courts with varying degrees of confidentiality regarding access to hearings, access to records, etc.[43] However, "[i]n 1920, all but seven of the 45 states that established separate juvenile courts permitted publication of information about juvenile court proceedings."[44] The Standard Juvenile Court Act of 1925 also allowed the press to publish the names of juveniles involved in the juvenile courts.[45] The 1959 version of the act limited access to juvenile proceedings by mandating that "[t]he general public shall be excluded and only such persons admitted as the judge shall find to have a direct interest in the case,"[46] and "[t]he name or picture of any child . . . shall not be made public . . . except as authorized by order of the court."[47]

States, not the federal government, are considered to be in the best position to legislate and regulate juvenile matters, in the hopes of advancing the best interest of the child and promoting public safety.[48] Congress determined, however, that the right to a speedy trial applies to "an alleged delinquent who is in detention pending trial," even though the Sixth Amendment specifically applies to criminal, not delinquency, proceedings.[49] Based on a textual analysis, the rights to a speedy trial and a public trial are arguably constitutionally linked and both essential to fundamental fairness for adults and young people alike.[50] Notably, federal criminal, not delinquency, statutes address juvenile delinquency matters, and the U.S. Department of Justice outlines various procedures for juvenile delinquency proceedings in the Criminal, not Delinquency, Resource Manual.[51]

34. 397 U.S. 358 (1970).
35. 421 U.S. 519 (1975).
36. *Defend Children: A Blueprint for Effective Juvenile Defender Services*, Nat'l. Juvenile Defender Ctr. (Nov. 2016) at 10, available at https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf.
37. *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel,* Nat'l. Juvenile Defender Ctr. (May 2017) at 5, available at https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.
38. *Id.* at 25.
39. "Michigan judge refuses to free girl in missed homework case," BBC News (July 21, 2020), https://www.bbc.com/news/world-us-canada-53481539.
40. Flint, *supra* note 26, at 47.
41. Kimberly P. Jordan, "Kids Are Different: Using Supreme Court Jurisprudence about Child Development to Close the Juvenile Court Doors to Minor Offenders," 41 N. Ky. L. Rev. 187, 192-93 (2014).
42. Flint, *supra* note 26, at 47.
43. *Id.*
44. Sickmund and Puzzanchera, *supra* note 30, at 97.
45. *Id.*
46. Standard Juv. Ct. Act, Art. V § 17.
47. Standard Juv. Ct. Act, Art. VII § 28.
48. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).
49. 18 U.S.C. § 5036.
50. *See* U.S. Const. amend. VI; In Re Oliver, 333 U.S. 257 (1948).
51. *See* 18 U.S.C. § 5036; *U.S. Dept. of Jus. Crim. Resource Manua*l 143, https://www.justice.gov/archives/jm/criminal-resource-manual-143-speedy-trial-requirement.

Child Welfare Proceedings

Child welfare proceedings, or what are commonly referred to as dependency proceedings in some jurisdictions, focus on care and protection, and confidentiality is often viewed as a critical component of the process.[52] The concern is that open proceedings could re-traumatize victims and stigmatize young people involved in the juvenile courts. Some scholars suggest that, even if confidentiality is debatable regarding delinquency proceedings, child welfare proceedings should remain strictly confidential to protect juvenile victims.[53] In this context, it is necessary to revisit the 2005 NCJFC resolution, which, while recognizing this issue, opted to recommend opening up such proceedings after engaging in a balancing calculus.

The Child Abuse Prevention and Treatment Act (CAPTA) of 1974 allows states to "apply for grant monies . . . to be used to fund child abuse prevention and treatment programs and to train volunteers and employees of such programs."[54] In order to receive federal dollars, states must show "that they maintain complete record confidentiality 'in order to protect the rights of the child and of the child's parents or guardians.'"[55] A 2003 amendment to CAPTA removed mandatory confidentiality and, instead, allowed states to determine access to child welfare proceedings while maintaining a focus on the well-being of children and families.[56] The Adoption Assistance and Child Welfare Act (AACWA) was enacted in 1980 with the goal of "providing sufficient resources to the foster care system and ensuring that children did not languish for years in the system without a permanent plan or placement."[57] In order to receive federal dollars through AACWA, states must "put into place safeguards 'which restrict the use of or disclosure of information concerning individuals assisted under the State plan.'"[58] CAPTA and AACWA focus on record confidentiality and do not mandate courtroom closure, so states with open child welfare proceedings could still receive federal grants; however, privacy remains a key feature of such proceedings.[59]

States vary widely regarding access to child welfare proceedings, but in Florida, for example, all child welfare proceedings, except those involving termination of parental rights and adoption, are presumptively open to the public.[60] Juvenile judges in Florida have discretion to close proceedings when "it is in the best interest of the child or the public to deny public access."[61] Oregon has open child welfare proceedings pursuant to the Oregon State Constitution, which states, "[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay,"[62] and the Oregon Supreme Court's interpretation of that constitutional provision is expressed in *State ex rel. Oregonian Publishing Company v. Deiz*.[63] Minnesota opened child welfare proceedings as part of a pilot program after the Minnesota Supreme Court Foster Care and Adoption Task Force concluded that closed proceedings concealed systemic abuses and the effects of insufficient funding.[64] Arizona implemented a similar pilot program but ultimately concluded that open access had minimal impact on child welfare proceedings, due in large part to low volume of non-party courtroom attendance.[65] Conversely, California's child welfare proceedings are presumptively closed to the general public and the press unless a public proceeding is in the best interest of the child and/or a judge determines that a particular individual has a direct and legitimate interest in the case.[66] In reviewing this landscape, it is notable that the states that have opened proceedings have not reported that doing so adversely affected the operation of their courts. In other words, the doors were opened, but the sky did not fall.

Advocates of open child welfare proceedings believe that access would allow the public and the press to serve as a check on the juvenile judiciary, which could reduce arbitrary decision-making.[67] Access could also allow the public to better understand the child welfare system, and an informed citizenry theoretically results in a more perfect democratic process.[68] Additionally, expanded access to child welfare proceedings could actually be in the best interest of the child because increased access could allow for better communication between agencies and institutions attempting to provide therapeutic and rehabilitative services to young people suffering from abuse and neglect.[69]

Delinquency Proceedings

Arkansas, Nebraska and Oregon are the only states that have mandatory open delinquency proceedings without any restrictions.[70] Twenty states, including California, Georgia and Massachusetts, mandate access to certain delinquency proceedings depending

52. Emily Bazelon, "Note, Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Opened or Closed?," 18 Yale L. & Pol'y Rev. 155, 155 (1999).
53. *Id.* at 172-73.
54. Flint, *supra* note 26, at 48.
55. *Id.* (quoting 42 U.S.C. § 5106(a)).
56. *Id.* at 49.
57. *Id.*
58. *Id.* at 50 (quoting 42 U.S.C. § 671).
59. *Id.*
60. Flint, *supra* note 26, at 51.
61. *Id.* at 52.
62. Or. Const. Art. I, § 10.
63. Flint, *supra* note 26 at 57-60.
64. Blitzman, *supra* note 2, at 242.
65. Mary Jo Pitzl and Dianna M. Náñez, "These courts must protect kids' privacy. They also must be public. Can it be done?" AZ Central (July 31, 2019), https://www.azcentral.com/story/news/local/arizona/2019/07/31/juvenile-courts-arizona-supposed-transparent-theyre-also-supposed-protect-kids-privacy-can-they-do-b/1489522001/.
66. *See* Cal. Welf. & Inst. Code § 346; Flint, *supra* note 26, at 64-65.
67. Bazelon, *supra* note 52, at 193.
68. *Id.* at 192-93.
69. *Id.* at 156-57.
70. Sickmund and Puzzanchera, *supra* note 30, at 97.

on certain factors, including, but not limited to, the young person's age and the nature of the offense.[71] Fifteen states, including Colorado, Tennessee and Washington, have presumptively open proceedings, wherein judges may close proceedings upon special order.[72] Only 13 states, including the District of Columbia, have presumptively closed proceedings, wherein judges may open proceedings upon special order.[73] Some states, such as Massachusetts, have managed to balance access and confidentiality, as illustrated by the recognition of a young person's right to a public juvenile trial in delinquency proceedings and varying degrees of access in certain juvenile proceedings.[74] Georgia also generally allows the public to observe delinquency proceedings while still allowing for closed proceedings upon motion and requiring sealed records in certain circumstances.[75] The modern trend favors some degree of access, but the Supreme Court has yet to establish that the right to a public trial or public juvenile trial is applicable to juveniles and essential to fundamental fairness.[76] As discussed previously, access is not binary, meaning that juvenile courts do not have to be either completely open or completely closed. Reformers should discuss access to juvenile courts as a continuum, in which courts could be completely opened or there could be varying degrees of access, with closed proceedings when necessary on a case-by-case basis. Empowering youth and affected parties by giving them a degree of agency in the process is highly desirable.

Delinquency proceedings in North Carolina are presumptively open and remain open if the alleged delinquent so requests, but absent an affirmative request, judges have discretion to close proceedings for good cause.[77] Delinquency proceedings in Kentucky are presumptively closed, and judges have total discretion regarding access.[78] Many states, including Georgia, require juvenile judges to balance competing interests and present written findings regarding any decision to exclude members of the public or the press from delinquency proceedings.[79]

First Amendment Right to Public Access

The public and the press have a constitutional right to access adult criminal trials absent an expressed overriding interest[80] because "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."[81] The Supreme Court has held that the right to access not only includes access to trials but also access to preliminary hearings and *voir dire*.[82] The Court recognized that "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed,"[83] and the Court has "repeatedly recognized, one of the important means of [fairness] is that the process be open to neutral observers."[84] The Court also acknowledged that mandatory closure is unconstitutional in the adult context, but closure may be appropriate in limited circumstances given a compelling interest.[85] However, in the adult context, "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner" are not compelling state interests justifying closure.[86] Generally, the right to public access to the courts and the freedom of the press override a state's interest in confidentiality.[87] Ultimately, the Court suggested that public access is essential to fundamental fairness:

> [S]uppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, — that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.[88]

71. *Id.* (limited access: Alaska, California, Delaware, Georgia, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia and Wisconsin).

72. *Id.* (presumptively open: Arizona, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Michigan, Nevada, New Mexico, North Carolina, Ohio, Tennessee, Texas and Washington); *See also* Martin, *supra* note 6, at 396 n.16.

73. Sickmund and Puzzanchera, *supra* note 30, at 97-98 (presumptively closed: Alabama, D.C., Illinois, Kentucky, Mississippi, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont, West Virginia and Wyoming).

74. *Id.* (limited access: Alaska, California, Delaware, Georgia, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia and Wisconsin); *See also* Mass. Gen. Laws c. 119, § 55A.

75. O.C.G.A. §§ 15-11-700, 701, 704, 710; D. Burney-Butler, *Open Juvenile Courts in Georgia,* Emory Law School, Handout (April 24, 2014), https://law.emory.edu/_includes/documents/sections/centers/barton-presentations/open-juv-courts-handout.pdf.

76. *See* In Re Gault, 387 U.S. 1, 30-31 (1967); Janet Mason, "Confidentiality in Juvenile Delinquency Proceedings," 01 UNC Juv. L. Bulletin 2-3 (May 2011); Stephan E. Oestreicher Jr., "Note, Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings," 54 Vand. L. Rev. 1751, 1779-92 (2001).

77. *See* Mason, *supra* note 76, at 3.

78. Courtney R. Clark, Note, "Collateral Damage: How Closing Juvenile Delinquency Proceedings Flouts the Constitution and Fails to Benefit the Child," 46 U. Louisville L. Rev. 199, 203-04 (Fall 2007).

79. *Id.*

80. *See* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980).

81. Press-Enterprise Company v. Superior Court of California, 478 U.S. 1, 7 (1986) (*Press-Enterprise II*).

82. *See Press-Enterprise II*, 478 U.S. at 10; Press-Enterprise v. Superior Court, 464 U.S. 501, 508 (1984) (Press-Enterprise I).

83. *Press-Enterprise I*, 464 U.S. at 508 (holding that courts must consider the function of an event, not simply the label, when confronting issues of First Amendment rights).

84. *Press-Enterprise II*, 478 U.S. at 7.

85. Globe Newspaper Company v. Superior Court, 457 U.S. 596, 610-11 (1982).

86. *Id.* at 607.

87. *See Richmond Newspaper,* 448 U.S. 555; *Press-Enterprise II,* 478 U.S. at 7; *See also* Joshua M. Dalton, "At the Crossroads of *Richmond* and *Gault*: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis," 28 Seton Hall L. Rev. 1155, 1160 (1998).

88. *Oliver*, 333 U.S. at 271 (quoting Jeremy Bentham, 1 Rationale Jud. Ev. 523, 524 (1827)).

The Federal Juvenile Delinquency Act does not mandate closure of juvenile proceedings but instead states that "[u]nless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public."[89] The Court understood that "the strongly stated Congressional purpose of the Act is to facilitate rehabilitation by protecting juveniles from the stigma of criminal conviction," so closure was generally accepted to protect young people's privacy and anonymity.[90] Courts, however, cannot sanction the press for publishing a young person's name or picture that was lawfully obtained.[91]

In order to determine whether the right to access is essential to fundamental fairness in the juvenile context, one must balance competing interests in light of experience and logic.[92] The right to access must be understood in a historical context, and "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open . . . [and are] an indispensable attribute of an Anglo-American trial."[93] Regarding experience, juvenile courts were open at the time of their inception in 1899,[94] and while the public does not demand judicial infallibility, "it is difficult for [the public] to accept what they are prohibited from observing."[95] Regarding logic, the right to access must be understood in light of the nature of the case and what is at stake, e.g., a young person's liberty is at stake in a juvenile delinquency proceeding.[96] In upholding a New York juvenile preventive detention statute in 1984, the U.S. Supreme Court indicated that juvenile detention is not primarily punitive in nature.[97] That conclusion, however, seems rather anachronistic[98] and adversely affects positive youth development, especially given the overwhelming body of research regarding child and adolescent development revealing that any period of detention is traumatic.[99] No matter the form, jail is jail.

The right to access is arguably fundamental to a fair hearing in a juvenile delinquency proceeding.

Sixth and 14th Amendment Rights to a Public Trial

The right to a public trial is guaranteed to adults in criminal prosecutions pursuant to the Sixth and 14th Amendments of the U.S. Constitution, and "due process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . ."[100] However, "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, [but] also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label" of convenience.[101]

The Supreme Court recognized that some due process rights and procedural safeguards are necessary to ensure that juvenile proceedings are fundamentally fair.[102] The Court has also suggested that a public trial may be essential to fundamental fairness in the adult context as noted above.[103] In order to determine whether certain due process rights apply in the juvenile context, courts must employ a fundamental fairness analysis, as the Court did in *Gault*, and courts must look to function as opposed to a proceeding's categorical label.[104] A juvenile delinquency proceeding is arguably functionally equivalent to a criminal trial.[105] Although juvenile proceedings are conveniently labeled as civil, an alleged delinquent's liberty is at stake,[106] as emphasized by Justice Black's concurring opinion in *Gault* noting that the indeterminate six-year commitment was the functional equivalent of a felony sentence to state prison without benefit of due process.

While individualized juvenile dispositions, as opposed to more formalized adult sentences, focus on treatment and rehabilitation, the juvenile adjudicatory process is still essentially criminal.[107] Further, court involvement is inherently traumatic and stigmatizing for youth, so replacing due process with informality and an individualized approach does little to protect young people from trauma and stigmatization.[108] In fact, informality and individualism often result in arbitrary decision-making, which arguably causes more harm than good for the young people that the juvenile courts seek to treat.[109]

The Supreme Court has repeatedly acknowledged that, although the creators of the juvenile courts were well-intentioned, "there is a gap between the originally benign conception of the system and its realities."[110] Opening the doors to juvenile courts could help bridge that gap and improve an imperfect system.[111] Increased transparency would allow judges, lawyers, clinicians and communities to work

89. 18 U.S.C. § 5038(e).
90. United States. v. Three Juveniles, 862 F.Supp. 651, 657 (1994).
91. Smith v. Daily Mail Publishing, 443 U.S. 97, 106 (1979).
92. *See Dalton, supra* note 87, at 1160.
93. *Richmond Newspaper*, 448 U.S. at 569.
94. Sickmund, *supra* note 30, at 97.
95. *Richmond Newspaper*, 448 U.S. at 572.
96. *Id.* at 589 (Brennan, J., concurring).
97. *See Schall*, 467 U.S. 253.
98. *See, e.g.,* Kate Lowenstein, *Shutting Down the Trauma To Prison Pipeline: Early, Appropriate Care for Child-Welfare Involved Youth* (Citizens for Juvenile Justice, 2018); available at https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b47615e6d2a733141a2d965/1531404642856/FINAL+TraumaToPrisonReport.pdf.
99. *Bonnie* et al., *supra* note 25.
100. *Richmond Newspaper,* 448 U.S. at 574 (quoting Levine v. United States, 362 U.S. 610, 616 (1960)).
101. *McKeiver,* 403 U.S. at 541.
102. *See Breed,* 421 U.S. 519 (holding that the Double Jeopardy Clause applies to juveniles); *Winship*, 397 U.S. 358 (holding that reasonable doubt standard applies to juvenile delinquency proceedings); In Re Gault, 387 U.S. 1 (1967) (holding that rights to notice, counsel, confrontation and cross-examination, and the privilege against self-incrimination, apply to juveniles); *Kent*, 383 U.S. 541 (holding that some due process rights apply to juveniles); Douglas v. California, 372 U.S. 353 (1963).
103. *See Oliver,* 333 U.S. at 273.
104. *See Winship,* 397 U.S. at 365; Oestreicher, *supra* note 76, at 1174.
105. *See* Dalton, *supra* note 87, at 1156.
106. *See* Oestreicher, *supra* note 76 at 1192.
107. *See Breed,* 421 U.S. at 528.
108. *See* Oestreicher, *supra* note 76; Dalton, *supra* note 87, at 1160.
109. *See* Oestreicher, *supra* note 76; Dalton, *supra* note 87, at 1160.
110. *See Breed,* 421 U.S. at 528.
111. *See* Bazelon, *supra* note 52, at 192; Dalton, *supra* note 87, at 1228.

together to actualize the rehabilitation of court-involved youth, with due process as an integral part of truly therapeutic treatment. Ultimately, "[j]uveniles will benefit from greater fairness and the court[s] will benefit from increased funding for juvenile services."[112]

A presumption of open access is constitutionally sound, and that presumption is "overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[113] A presumption of openness is supported by experience because juvenile courts were originally open to the public, and the ongoing trend favors some degree of access.[114] The presumption is also supported by logic because juvenile delinquency proceedings are functionally equivalent to adult criminal prosecutions where liberty is at stake.[115] "[T]he appearance of [juvenile] justice can best be provided by allowing people to observe it."[116] Additionally, a single juvenile judge is often the sole arbiter of justice because public juvenile trials and juvenile appeals are uncommon.[117] Arguably, a young person's right to a public juvenile trial is essential to fundamental fairness.

Access to Juvenile Court Records

Access to juvenile court proceedings must be discussed alongside access to juvenile court records. One aim of the juvenile courts is to "avoid creating records that would impose a stigma that a youth would necessarily carry forward to adulthood."[118] The *Gault* court noted that "[d]isclosure of [juvenile] court records is discretionary with the judge in most jurisdictions . . . and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."[119] Currently, each state has its own system regarding access to records, as well as the issue of sealing and expungement. While juvenile courts today often limit physical access to the courtrooms, "[m]any states [have] passed laws requiring juvenile records to remain open well into adulthood. [Some] states [have even] repealed laws protecting juvenile offenders' confidentiality, especially in cases involving violent or serious offenses. By 1997, half the states had enacted laws cutting back on sealing and/or expunging juvenile records."[120]

A presumption of open access to juvenile proceedings is constitutionally sound and supports youth enfranchisement as in *In Re Gault.* Legislative reform regarding sealing and expunging juvenile records is consistent with the aims of the juvenile court and must be discussed in tandem with physical access to the courtroom.

Critiques on Open Access to Juvenile Courts

Some critics argue that the more due process we inject into the juvenile justice system, the more courts will treat young people and adults alike, likely focusing on blame and punishment.[121] If juvenile courts sought to punish young people, instead of treating and rehabilitating them, it would be antithetical to the core aims of the juvenile justice system. Ultimately, if young people and adults were treated similarly by the courts, then separate juvenile courts would arguably be unnecessary.[122] This argument fails to factor in the status offense and care and protection matters that many juvenile courts hear in child welfare, or dependency, proceedings, which enable issues regarding youth and families to be considered contextually.

Of much greater import are the Supreme Court cases decided since these critiques were authored. This line of jurisprudence establishes that, while juveniles are accountable, they should be treated in a manner constitutionally different than adults, given their evolving stages of cognitive development, immaturity, and susceptibility to follow peers.[123] As *Gault* should have taught us, proportionality and fairness are integrally related, and this realization should obviate concerns about a rights-based, procedurally oriented model. We can have the best of both worlds. We can honor the goals of the juvenile court while ensuring that proceedings are conducted in a manner that is aligned with the "fundamental fairness" demanded by the Due Process Clause. Accordingly, juvenile courts could simultaneously expand juveniles' due process rights and continue to impose individualized dispositions focused on treatment and rehabilitation, rather than blame and punishment.

Some progressive proponents of juvenile justice reform, in general, are actually quite critical of increased access to the juvenile courtroom, specifically because those proponents fear that open access could lead to continued and prolonged stigmatization and traumatization for court-involved youth. Critics also fear that open access to the physical courtroom would naturally coincide with open access

112. Hon. Jay D. Blitzman, "Gault's Promise," 9 Barry L. Rev. 67, 97 (2007).

113. Dalton, *supra* note 87, at 1172.

114. *Id.* at 1201-04.

115. *Id.* at 1209-12.

116. *Richmond Newspaper,* 448 U.S. at 572.

117. *Id.*

118. Jacobs, James B., *Juvenile Criminal Record Confidentiality,* New York University Public Law and Legal Theory Working Paper, Paper No. 13-35, 2 (2013).

119. In Re Gault, 387 U.S. 1, 24 (1967).

120. Jacobs, *supra* note 118, at 9 (citing Butts, Jeffrey A., "Can We Do Without Juvenile Justice?" in *You Decide! Current Debates in Criminal Justice*, 321-31, Bruce N. Waller, ed., 2009).

121. Ainsworth, Janet, "Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court," 69 N.C.L. Rev. 1083, 1096-1101 (1991); Feld, Barry, "Abolish The Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy," 88 J. Crim. L. & Criminology 68, 79 n. 22 (1997).

122. Ainsworth, *supra* note 121, at 1118, 1132.

123. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012); J.D.B. v. North Carolina, 564 U.S. 261 (2011); Graham v. Florida, 560 U.S. 48 (2010); Roper v Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Thompson v. Oklahoma, 487 U.S. 815 (1988); *Gault*, 387 U.S. at 28.

to juvenile records. Open access to juveniles' records could result in increased stigmatization well into adulthood and indefinitely harm the young people that the court purports to treat and rehabilitate. As noted previously and explained below regarding an international perspective, however, open access is not binary. Perhaps there are creative ways along a continuum to both increase access to juvenile courtrooms in order to better treat and rehabilitate court-involved youth, while also protecting court-involved youth and preventing protracted stigmatization and trauma.

Others argue that opening juvenile proceedings could have serious, unintended consequences. For example, along with the press and the general public, Immigration and Customs Enforcement (ICE) agents could enter the juvenile courtroom in attempts to detain and deport undocumented individuals. Moreover, regardless of access to the actual courtroom, ICE agents could monitor the courthouse doors and nearby surroundings, absent policies prohibiting such conduct. Perhaps implementing reporting restrictions, prohibiting the publication of any identifying information of court-involved youth, along with a presumption of open access, could help mitigate any unintended consequences. The presence of ICE in courthouses and a detailed analysis of the unintended consequences of public access to juvenile courts are the subject of current debate and litigation and are beyond the scope of this article.

International Perspectives on Open Access to Juvenile Courts

The United Nations first recognized the rights of young people in court proceedings in 1966 with the International Covenant on Civil and Political Rights.[124] The covenant stated that young people should be treated differently from adults in court proceedings and that the aim of juvenile courts should be rehabilitation, not punishment.[125] Nations have broad discretion "to determine the nature of [their juvenile] system and its requisite procedures."[126] In 1985, the UN thoughtfully considered best practices for juvenile court systems with the Beijing Rules, which outlined principles and guidelines that nations should consider regarding juveniles' rights.[127] Young people's procedural rights were officially codified into international law in 1989 with the Convention on the Rights of the Child, whereby young people were guaranteed the presumption of innocence, right to notice, right to counsel, right to a speedy trial, right to the privilege against self-incrimination, right to confrontation and cross-examination, right to appeal, and the right to privacy during court proceedings.[128] In 1990, the Riyadh Guidelines recognized that public policies and communities should assist in the decriminalization of adolescence, outside of the courtroom, by helping young people avoid court involvement altogether.[129] Community resources should be "aimed at strengthening families, reforming educational programs, re-orienting community resources toward supporting children and families, and maximizing the appropriate use of the mass media."[130]

While a young person's right to privacy during court proceedings is recognized internationally, what constitutes privacy varies greatly from nation to nation. For example, in the British juvenile system, juvenile proceedings are closed to the general public, but open to members of the press.[131] "Reporting restrictions prevent the media from reporting the child's name, address, school, place of work, or any detail that might lead to a child being identified or any picture of the child. This includes online publications."[132] In Canada, members of the press and the public are allowed to attend juvenile court proceedings, but like Britain, members of the press and the public are prohibited from publishing any identifying information in order to prevent stigmatization and to ultimately promote rehabilitation.[133]

A young person's right to privacy and a systemic focus on rehabilitation are recognized around the globe as necessary tenets of a strong juvenile justice system. Great Britain and Canada strike a balance between those important tenets and the importance of free speech, public access, and transparency as a means of monitoring the courts and holding our judicial officials accountable. Perhaps transparency is a necessary element in effectively treating and rehabilitating court-involved youth in the United States and, ultimately, in creating safer and more productive societies throughout the nation and the world.

124. Roger J.R. Levesque, "Future Visions of Juvenile Justice: Lessons from International and Comparative Law," 29 Creighton L. Rev. 1563, 1566 (1996).

125. *Id.*

126. *Id.*

127. G.A. Res. 40/33, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* (Nov. 29, 1985).

128. *Convention on the Rights of the Child,* art. 40 § 2(b), Nov. 20, 1989, 1577 U.N.T.S. 3.

129. Levesque, *supra* note 124, at 1568; *See also* G.A. Res. 45/112, *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")* (Dec. 14, 1990).

130. Levesque, *supra* note 124, at 1568; *See also* G.A. Res. 45/112, *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")* (Dec. 14, 1990).

131. *YJLC Anonymity Guide 2017,* Youth Justice Legal Centre (last updated Nov. 2015), https://yjlc.uk/wp-content/uploads/2018/06/YJLC-Anonymity-Guide-2017.pdf.

132. *See Id.; See also Children and Young Persons Act 1933,* c. 12 § 49.

133. *See Youth Justice, Gov't of Canada* (last updated Oct. 16, 2017), https://www.justice.gc.ca/eng/csj-sjc/just/11.html; *See also* John A. Winterdyk, *Juvenile Justice: International Perspectives, Models, and Trends,* 124-25 (2015); Marjorie Montgomery Bowker, "Juvenile Court in Retrospect: Seven Decades of History in Alberta (1913-1984)" 24 Alta. L. Rev. 234, 239 (1986).

Conclusion

Juvenile courts in the United States, which were originally open to the public in 1899, were designed to assist in the treatment and rehabilitation of young people so that they may become well-functioning, productive members of society. An important feature of any well-functioning, democratic society is active participation in government. An important form of participation in government is observing court proceedings in order to inform the public and to hold judicial officials accountable. Ultimately, an open court system results in a more informed citizenry, and a more accountable judiciary, with the collective goals of societal stability, well-being and public safety. Access to the courts and transparency in the court process are critical components of accountability, especially in the context of juvenile courts where proceedings have historically been closed to the public and a juvenile judge is often the sole arbiter of justice. Opening the doors to juvenile courts in the United States could help reduce juvenile detention rates, could assist young people, particularly youth of color and dually involved youth, and, ultimately, could result in a safer and more productive society.

Young people are constitutionally different than adults, and juvenile courts are unique in their approach to justice. Promoting the presumptive opening of juvenile sessions, as was the case in 1899 when the juvenile court system began, is sound public policy. Due process, with transparency as a fundamental feature, is a necessary component of fundamental fairness, therapeutic treatment, and rehabilitation. With a presumption of open access, juvenile courts will still maintain discretion to close proceedings and to seal particular documents and/or clinical records absent a compelling showing of public interest. Additionally, reporting restrictions and legislative reform regarding sealing and expungement could be tailored in order to respect the right to access, protect a young person's right to privacy, prevent stigmatization, and reduce the traumatic effects of being court-involved.

As noted previously, in Massachusetts, delinquency proceedings are generally closed to the public,[134] but youthful offender proceedings are generally open.[135] In child welfare, or dependency, proceedings in Massachusetts, including children requiring assistance status offense cases and care and protection matters, the only hearings that are open to the public are DNR cases.[136] Unlike many states, Massachusetts allows for public juvenile trials and the imposition of adult prison sentences in youthful offender proceedings. Massachusetts already has expanded due process rights for young people in the context of juvenile court and features a model of legal representation that requires client-directed advocacy as opposed to best-interest. It is time for the commonwealth to move toward a presumption of open access to juvenile courts. Juvenile courts are not service providers. The best way to promote rehabilitative goals is to promote meaningful access to justice. This would equate with the actuality of fairness, as noted in 1967 in *Gault*, as opposed to well-intentioned benevolence. In short, the essentials of due process may be a more therapeutic attitude so far as the juvenile is concerned.[137]

The views expressed in this article are those of the authors and not of the Suffolk County District Attorney's Office.

134. Mass. Gen. Laws c. 119 §§ 60, 60A, 65.

135. Mass. Gen. Laws c. 119 §§ 52-54, 58, 60A, 65.

136. Mass. Gen. Laws c. 119 §§ 38 (closes all care and protection cases to the public with the exception of DNR matters).

137. The authors would like to acknowledge and to thank Isabel Patowski and Katherine Stevenson for their research assistance.

Case Comment

Civil Law: SJC Contextualizes Anti-Raiding Provisions

Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020)

Automile Holdings LLC v. McGovern (*Automile*) provides useful guidance with respect to two areas of uncertainty under Massachusetts law: whether and under what circumstances restrictive covenants that prohibit the solicitation of a company's employees — so called "anti-raiding" provisions — might be permissible; and whether and when a trial judge may extend a restrictive covenant beyond its plain terms as a remedy for breach in the context of the sale of a business.[1]

At common law in Massachusetts, covenants restricting competition are only enforceable to the extent that they are reasonable. "[A] restrictive covenant is only reasonable, and thus enforceable,[2] if it is: (1) necessary to protect a legitimate business interest; (2) reasonably limited in time and space; and (3) consonant with the public interest."[3] While the use of anti-raiding provisions is not new in Massachusetts, Supreme Judicial Court (SJC) precedent affirming their permissibility did not exist prior to *Automile*.[4] *Automile* affirms that anti-raiding provisions will be enforced on par with other restrictive covenants to the extent that they are reasonable.[5] In reaching this conclusion, the SJC reminds us that the context in which a restrictive covenant arises is critical to the determination of whether that covenant serves a legitimate business interest.[6]

After determining that the anti-raiding provision at issue was enforceable, the SJC ruled that the trial court abused its discretion by ordering an extension of that provision beyond its plain terms.[7] Nevertheless, the SJC predicted that such an extension "may be proper, but only if the party seeking to expand the terms of the restrictive covenant has demonstrated that monetary damages would provide inadequate relief."[8]

Facts and Procedural History

A. The Formation of Prime

In 2007, David Rosenberg; his friend, David Abrams; and defendant Matthew McGovern founded "Prime Motor Group," the trade name for the collective operations of a series of closely held limited liability companies that included Automile Holdings LLC and the other named plaintiffs[9] (collectively, "Prime").[10] Rosenberg and McGovern took minority interests in Prime.[11] Abrams' investment company took the majority interest.[12] McGovern began as Prime's chief financial officer, later transitioning to vice president of operations.[13] Rosenberg was Prime's president and chief executive officer.[14]

B. McGovern Sells His Interest in Prime, Agrees to Anti-Raiding Provision

In 2016, following disagreements between Rosenberg and Abrams, on one side, and McGovern, on the other, concerning

1. 483 Mass. 797, 798-819 (2020).
2. *See id.* at 808 (citing Whitinsville Plaza Inc. v. Kotseas, 378 Mass. 85, 102 (1979); All Stainless Inc. v. Colby, 364 Mass. 773, 778 (1974); Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 312 (1982)). This rule reflects the "public interest in the ability of individuals to be able to carry on their trade freely." *Id.* (citing Club Aluminum Co. v. Young, 263 Mass. 223, 226 (1928); *Kroeger*, 13 Mass. App. Ct. at 312).
3. *Id.* (citing Boulanger v. Dunkin' Donuts Inc., 442 Mass. 635, 639 (2004)).
4. *Id.* ("[T]he permissibility of anti-raiding provisions has not yet been addressed by this court."). Several Superior Court decisions have analyzed and enforced non-solicitation provisions, but these decisions rarely consider anti-raiding provisions in isolation. *See, e.g.*, Getman v. USI Holdings Corp., No. 05-3286, 2005 WL 2183159, at *2 (Mass. Super. Ct. Sept. 1, 2005) (Gants, J.); *see also* BNY Mellon, N.A. v. Schauer, No. 201001344, 2010 WL 3326965, at *8 (Mass. Super. Ct. May 14, 2010) (Hinkle, J.).
5. *Id.* at 812-14.
6. *Id.* at 811-12.
7. Automile Holdings LLC v. McGovern, 483 Mass. 797, 799 (2020).
8. *Id.* at 817.
9. AMR Real Estate Holdings LLC; AMR Real Estate Holdings LLC, Hanover Series; AMR Real Estate Holdings LLC, Westwood Series; AMR Real Estate Holdings LLC, West Roxbury Series; AMR Real Estate Holdings LLC, West Roxbury II Series; AMR Real Estate Holdings LLC, Walpole Series; AMR Real Estate Holdings LLC North Hampton Series; AMR Real Estate Holdings II LLC; Saco Auto Holdings LLC; Saco Real Estate Holdings LLC; Real Estate Holdings LLC, Saco I Series; Saco Real Estate Holdings LLC, Saco II Series; Saco Real Estate Holdings LLC, Saco III Series; Saco Real Estate Holdings LLC, Saco IV Series; AMR Auto Holdings-TY, LLC; AMR Auto Holdings-TH LLC; AMR Auto Holdings-TO LLC; and AMR Auto Holdings-LN LLC. *Id.* at 797 n.1.
10. *Id*. at 799.
11. *Id.*
12. *Id.*
13. Automile Holdings LLC v. McGovern, 483 Mass. 797, 799 (2020).
14. *Id*.

whether to sell Prime to a third party, Rosenberg and Abrams terminated McGovern's employment by Prime.[15]

After McGovern rejected a buyout offer from Rosenberg,[16] Rosenberg and Abrams put "as much pressure as they could . . . on McGovern to take the best deal they could get in purchasing McGovern's minority stake before [an] anticipated liquidity event," including amending Prime's operating agreements to eliminate distributions to cover the individual tax liability of its members, denying McGovern access to Prime's financials, and threatening to contact the authorities unless McGovern and his wife returned the company vehicles they had been using.[17] McGovern, meanwhile, intended to create a competing company, McGovern Motors.[18] Short on cash to pay his taxes and fund his new venture, McGovern entered into new negotiations with Rosenberg and Abrams to sell his minority interest in Prime.[19]

In October 2016, Rosenberg and Abrams agreed to purchase McGovern's interest based on a June 2016 valuation in exchange for McGovern agreeing to not, directly or indirectly, "hire or solicit any employee or consultant of [Prime] or encourage any such employee or consultant to leave such employment or hire any such employee or consultant who has left such employment, except pursuant to a general solicitation which is not directed specifically to any such employees" (2016 Agreement).[20] The anti-raiding provision in the 2016 Agreement was for a period of 18 months, with an April 2018 expiration.[21]

C. McGovern Hires Former Prime Employees, Agrees to Second Anti-Raiding Provision

Over the next several months, McGovern hired at least 15 former Prime employees to work at McGovern Motors.[22] Rosenberg threatened to sue; McGovern insisted that his hiring fit within the "general solicitation" exception in the restrictive covenant.[23] To avoid the cost of litigation, the parties entered into a more robust, superseding anti-raiding agreement in February 2017, which eliminated the "general solicitation" exception and extended the restrictive period by four months, ending August 2018 (2017 Agreement).[24]

In the event of a breach of the anti-raiding provision by McGovern, the 2017 Agreement provided that "Prime shall be entitled to all damages and remedies available under applicable law, and further, McGovern and McGovern Motors consent to the entry of preliminary or permanent injunctive relief as a remedy for a violation of this Agreement, without the need to prove irreparable harm or to post a bond."[25]

D. McGovern Breaches the 2017 Agreement, Prime Seeks Injunctive Relief

Shortly after entering into the 2017 Agreement, McGovern breached.[26] In August 2017, Prime learned that McGovern had hired former Prime employee Courtney Price and demanded that McGovern fire her.[27] McGovern complied.[28] In the fall, Prime learned that McGovern had hired former Prime employee Greg Howle, whom Prime had fired.[29] Prime promptly filed an action in the Business Litigation Session of the Suffolk County Superior Court seeking a preliminary injunction to enjoin McGovern from employing Howle and an order extending the anti-raiding provision in the 2017 Agreement by an additional 18 months.[30] The trial court declined to enjoin McGovern from continuing to employ Howle, finding that Prime's otherwise legitimate interest in preventing a former senior executive from poaching employees did not apply to a former employee whom Prime had elected to fire.[31]

E. McGovern Hires Three More Former Prime Employees, Prime Moves Again for an Injunction

McGovern went on to hire three more Prime employees: Timothy Fallows, James Tully and Zachary Casey.[32] Fallows left Prime in the spring of 2017 and worked briefly for two other dealerships before being hired by McGovern in November 2017.[33] Tully worked as a sales consultant and, later, commercial vehicle manager at Prime.[34]

15. *Id.* According to McGovern, Rosenberg wanted "to sell the Prime business so that he could focus on his interest in the burgeoning Massachusetts marijuana industry." Brief for Appellant at 13, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740). But McGovern was unwilling to sign a non-compete as part of the sale because "he had dedicated his career to the automotive industry and was not prepared to 'start over' at age forty-five." *Id.*
16. At the time of McGovern's termination by Prime, Rosenberg offered to purchase McGovern's interest in Prime at a 30% discount from fair market value, provided that McGovern executed a five-year non-solicitation agreement. *Automile*, 483 Mass. at 799-800.
17. *Id.* at 800 (internal quotation marks omitted).
18. *Id.*
19. *Id.* at 800-01.
20. *Id.*
21. *Id.* at 801.
22. Automile Holdings LLC v. McGovern, 483 Mass. 797, 801 (2020).
23. *Id.*
24. *Id.* The non-solicitation provision in the 2017 Agreement required McGovern not to "directly or indirectly . . . solicit for hire" Prime employees, "or encourage [Prime employees] to leave the employment" of Prime. *Id.* at 801-02 (alterations in original).
25. *Id.* at 802.
26. *See id.* at 802.
27. *Id.*
28. Automile Holdings LLC v. McGovern, 483 Mass. 797, 802 (2020).
29. *Id.*
30. *Id.*
31. *Id.* at 802-03; see Excerpt of Preliminary Injunction Hearing at 3, Automile Holdings LLC v. McGovern, C.A. No. 1784CV03809 (Suffolk Super. Ct., Dec. 21, 2017).
32. *Automile*, 483 Mass. at 803.
33. *Id.*
34. *Id.*

When Tully resigned from Prime in April 2017, Rosenberg sent an internal email stating that it was a "good thing" because Tully was "[w]ay overpaid, and thinks he deserves more."[35]

Casey had risen rapidly through the ranks at Prime to become a general manager of three Prime dealerships in Maine.[36] In connection with his ascension, Prime paid for Casey to attend a year-long training program out of state.[37] Casey met with McGovern in the fall of 2017 to discuss buying equity in McGovern Motors, after which Casey resigned from Prime and agreed to buy McGovern's interest in a Nashua, New Hampshire, Toyota dealership that was part of McGovern Motors.[38] To fund his purchase of the dealership, Casey used money loaned to him by McGovern.[39]

After learning that Casey had gone to work with McGovern, Prime again sought a preliminary injunction to enforce the anti-raiding covenant in the 2017 Agreement.[40] In opposition, McGovern filed an affidavit averring that Casey was not an employee, but, rather, had purchased McGovern's interest in the dealership.[41] McGovern's affidavit omitted the facts that McGovern had financed Casey's purchase, that Toyota had yet to approve the sale, and that Toyota's approval was prerequisite to consummation of the purchase.[42]

When Rosenberg learned that the sale to Casey might be a sham transaction, he alerted Toyota.[43] After Toyota threatened to terminate its relationship with the Nashua dealership, McGovern and Casey rescinded the sale.[44] Casey remained general manager of the Nashua dealership.[45]

Following a period of expedited discovery, Prime renewed its motion to enjoin McGovern from continuing to employ Fallows, Tully and Casey, and requested an 18-month extension of the anti-raiding provision.[46] Prime also amended its complaint to include claims for damages based on breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contractual and advantageous relations, and misappropriation of trade secrets.[47]

Following a hearing on Prime's motion that was consolidated with a jury-waived trial on the merits of Prime's claim for injunctive relief,[48] the lower court ruled that McGovern had breached the 2017 Agreement's anti-raiding provision by hiring Fallows, Tully and Casey.[49] But the lower court did not enjoin McGovern from continuing to employ any of them.[50] With respect to Fallows and Tully, the lower court concluded that an injunction would not advance Prime's legitimate business interests because neither was a particularly valued employee.[51] With respect to Casey, the lower court concluded that, while Casey was "just the kind of employee that the anti-raiding provision[] . . . w[as] designed to protect from solicitation by McGovern," there was "no way that the Court [could] order . . . Casey's relationship with Prime to be repaired."[52]

The lower court concluded that, "if Prime is able to establish that it suffered any damages as a result of the breach of contract as it relates to . . . Casey, then it would be entitled to monetary relief."[53] The lower court also extended the anti-raiding provision in the 2017 Agreement by one year, to August 2019, though the judge conceded that the law permitting him to do so was "less than clear."[54]

The lower court certified its order as a separate and final judgment pursuant to Mass. R. Civ. P. 54(b), from which McGovern appealed.[55] On appeal, McGovern argued that the anti-raiding provision was not enforceable because it was not necessary to protect a legitimate business interest.[56] McGovern also argued that the lower court exceeded its equitable authority by extending the anti-raiding provision by one year.[57] The SJC transferred the appeal on its own motion.[58]

Discussion

1. Anti-Raiding Provisions

In determining whether a restrictive covenant is necessary to protect a legitimate business interest, *Automile* reminds us that context

35. *Id.* (alteration in original).
36. *Id.*
37. *Id.*
38. Automile Holdings LLC v. McGovern, 483 Mass. 797, 804 (2020).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Automile Holdings LLC v. McGovern, 483 Mass. 797, 804 (2020).
45. *Id.* at 804-05.
46. *Id.* at 805.
47. *Id.* at 805 n.12.
48. *See* Mass. R. Civ. P. 65(b)(2).
49. *Automile*, 483 Mass. at 806.
50. *Id.*
51. *Id.*
52. *Id.* (quoting lower court oral findings). The lower court was also concerned that such an injunction would unfairly punish Casey, who was not a defendant in the case, and who had apparently moved his family to New Hampshire and enrolled his children into a new school in connection with his new position at McGovern Motors. *See id.*
53. *Id.* at 807 (quoting lower court oral findings).
54. *Id.* (quoting lower court oral findings).
55. Automile Holdings LLC v. McGovern, 483 Mass. 797, 807 (2020).
56. Brief for Appellant at 38-51, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740). McGovern did not argue that the provision was unreasonable in scope or injurious to public interest. *See id.* at 7-52.
57. *Id.* at 26-37.
58. *Automile*, 483 Mass at 807. Before reaching the merits of the appeal, the SJC acknowledged that the anti-raiding provision, including the one-year extension imposed by the trial court, had expired. Nevertheless, the SJC exercised its "discretion to reach the merits . . . regardless of whether the matter may currently be moot, because the issues are significant and have been fully briefed and it is in the public interest to do so." *Id.* at 807-08 (internal marks omitted).

is critical.[59] "In the employer-employee context, the legitimate business interests that may be protected consist of trade secrets, confidential information, and good will."[60] In the context of the sale of a business, however, there is no exhaustive list of what constitutes a legitimate business interest.[61] "Rather, unreasonableness in time, space, or product line, or obstruction of the public interest, are the principal bars to enforcement."[62] Ostensibly, McGovern's situation presented a somewhat hybrid set of facts.[63]

On one hand, McGovern was a former executive, the sale of his interest was not a typical arm's-length transaction in light of the pressure being applied by Rosenberg and Abrams, and the anti-raiding provision was undoubtedly related, at least in part, to the knowledge McGovern had acquired in his role as employee rather than as minority owner.[64] On the other hand, McGovern was fired prior to either the 2016 Agreement, which concerned the sale of McGovern's interest, or the 2017 Agreement, which concerned the settlement of a dispute. McGovern received a premium for his otherwise illiquid and unmarketable minority interest, was assisted by counsel, and had substantially more bargaining power than an ordinary employee.[65] On balance, it was not difficult for the SJC to conclude that the anti-raiding provision at issue was primarily related to the sale of a business.[66]

In that context, the SJC easily concluded the anti-raiding provision was necessary to protect a legitimate business interest.[67] Several factors supported its conclusion. First, the anti-raiding provision at issue was specifically and uniquely extracted from McGovern, as opposed to a *pro forma* restriction imposed on all Prime employees.[68] Second, "[f]ar from stifling ordinary competition, the restrictive covenant permitted McGovern to compete so long as he did not use his inside knowledge to raid Prime's key employees."[69] As the SJC noted, "McGovern was familiar with Prime's employee workforce and was well placed to identify key employees integral to the company's success," as well as knowledgeable about "salary structure and internal management dynamics," all of which could be leveraged effectively to solicit.[70] Third, McGovern received a premium for his interest in Prime in connection with the 2016 Agreement, and the 2017 Agreement was designed to reinforce the anti-raiding provision after a dispute about whether McGovern had honored his commitment.[71] Under those circumstances, the anti-raiding provision could be seen as serving Prime's "legitimate business interest of ensuring that McGovern did not 'derogate from the value of the business' interest he sold to the other owners of Prime in 2016."[72] Each of these factors supports the conclusion that the covenant was not designed to restrict ordinary competition, but, rather, that it was designed to restrict unfair competition.[73]

While *Automile's* holding is limited to the context of the sale of a business, the decision strongly implies that the SJC would hold that an anti-raiding provision was necessary to protect a legitimate business interest in the employee-employer context as well, under the right circumstances.[74] As discussed, "legitimate business interests" in the employee-employer context are limited to the protection of trade secrets, confidential information, and good will.[75] It is not difficult to imagine circumstances under which an anti-raiding provision could protect these business interests. In *Automile*, for example, had McGovern still been chief financial officer, then vice president of operations at Prime, but never had an ownership interest, then the anti-raiding provision would still have been arguably necessary to protect against misuse by McGovern of his knowledge about "salary structure and internal management dynamics," to the extent either of those things could be deemed trade secrets or confidential information.[76] In any event, the SJC's overriding concern appears to be that the anti-raiding provision, as with any other restrictive covenant, protects not against ordinary competition, but against unfair competition.[77]

59. *See id.* at 808-10. Of note, though it had not previously analyzed anti-raiding provisions, the SJC did not pause to consider whether an anti-raiding provision is sufficiently similar to other restrictive covenants to warrant the same analysis. *See id.* In Oxford Global Resources LLC v. Hernandez, the SJC observed that the Superior Courts had applied the "same principles" applicable to non-competition agreements when analyzing the enforceability of non-solicitation provisions. 480 Mass. 462, 470-71 (2018). The alleged misconduct in Hernandez and cases cited, however, concerned the solicitation of a company's customers, not its employees. *Id.*

60. *Automile*, 483 Mass. at 810 (citing New England Canteen Serv. Inc. v. Ashley, 372 Mass. 671, 674 (1977)).

61. *See id.* ("[R]estrictions are not rendered unenforceable merely because they protect an interest we might not recognize in any employment setting." (internal quotations omitted)).

62. *Id.* at 810 (internal quotation marks omitted).

63. *Id.*

64. *See id.* at 810-11.

65. *See id.* at 810-12.

66. Automile Holdings LLC v. McGovern, 483 Mass. 797, 810-12 (2020).

67. *Id.* at 813-15.

68. *See id.* at 813.

69. *Id.*

70. *Id.*

71. *Id.*

72. Automile Holdings LLC v. McGovern, 483 Mass. 797, 814 (2020) (quoting Boulanger, 442 Mass. at 645-46). Preventing the restricted party from derogating from the value of the business was recognized in earlier cases as a legitimate business interest in the sale of a business context. *See Boulanger,* 442 Mass. at 645-46; Wells v. Wells, 9 Mass. App. Ct. 321, 324 (1980).

73. *See Automile*, 483 Mass. at 812-15.

74. *See id.*

75. *Id.* at 810.

76. *See* Mass. Gen. Laws c. 93, § 42(4) (2018) (defining "trade secret"); Viken Detection Corp. v. Videray Techs Inc., 384 F. Supp. 3d 168, 177 (D. Mass. 2019) ("A trade secret is any confidential information used in the plaintiff's business that gives the owner an advantage over competitors who do not know or use it." (internal quotation marks omitted)). Prime did not advance this argument on appeal. *See* Appellee's Brief at 7-58, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740).

77. *Automile*, 483 Mass. at 812-15.

2. Equitable Powers

After affirming the enforceability of the anti-raiding provision, the SJC vacated the trial court's order extending that provision beyond its plain terms.[78] Relying on basic "freedom of contract principles," the SJC reasoned that, "generally, parties are held to the express terms of their contract."[79] In so doing, however, the SJC provided guidance for courts and practitioners alike concerning the circumstances under which an order to extend the contract term might be appropriate.[80]

Again, context is critical. In the employer-employee context, the SJC "ha[s] emphasized the gravity of, and ha[s] strictly enforced, restrictions on awarding equitable relief beyond the scope of a restrictive covenant" because "such agreements serve as a direct restraint on an individual employee's ability to earn a living."[81] The SJC declined in *Automile* to consider whether restrictive covenants might ever be permissibly extended beyond their plain terms in this context.[82]

In the sale of a business context, however, the SJC concluded that an extension of the provision's term might be appropriate, but only if the proponent could demonstrate that money damages would be inadequate.[83] Such a demonstration requires the proponent to "demonstrate why monetary damages cannot be reasonably estimated, or calculate the monetary damages incurred and demonstrate why damages would nonetheless be insufficient such that extraordinary relief is warranted."[84]

Recognizing the inherent difficulty in proving the inadequacy of money damages,[85] the SJC reminded practitioners of a simpler path.[86] Prime could have insisted on including a tolling agreement in the 2016 Agreement or the 2017 Agreement that automatically extended the term of the anti-raiding provision upon breach either for a fixed period or during the pendency of litigation.[87] At the time of the 2017 Agreement, in particular, Prime believed that McGovern had already breached the anti-raiding provision in the 2016 Agreement, and therefore had every incentive to insist on including a tolling provision in the 2017 Agreement that would have extended the term of the restrictive covenant by agreement.[88] Implicitly, the SJC reasoned that the very same "freedom of contract principles" that precluded extension of the restrictive covenant beyond its plain terms in equity might successfully be invoked to uphold an agreed-upon extension at law.[89]

Because McGovern's appeal was from a Rule 54(b) separate and final judgment that followed a trial on Prime's claim for injunctive relief, there was no evidence concerning damages, or their putative inadequacy, in the record.[90] Accordingly, the SJC remanded the case to the trial court for further proceedings.[91]

Conclusion

Automile contains valuable lessons for litigators and transactional attorneys alike. First, anti-raiding provisions will be enforced on par with other restrictive covenants. Second, context is critical when determining whether an anti-raiding provision, or any other restrictive covenant, serves to protect a legitimate business interest, or whether it might permissibly be extended in equity if money damages are proven to be inadequate. Finally, while it will be difficult to convince a court to extend a restrictive covenant beyond its plain terms, it is comparatively simple to include an enforceable, self-executing provision that tolls the restrictive covenant upon breach.

— Matthew A. Kane

78. *Id.* at 819.

79. *Id.* at 817 (quoting TAL Fin. Corp. v. CSC Consulting Inc., 446 Mass. 422, 430 (2006)).

80. *See id.* at 817-19.

81. *Id.* at 816 (citing All Stainless Inc., 364 Mass. at 777; Sherman v. Pfefferkorn, 241 Mass. 468, 477 (1922)).

82. *See id.* at 816 n.18.

83. Automile Holdings LLC v. McGovern, 483 Mass. 797, 817 (2020).

84. *Id.*

85. *Id.* at 818 ("[T]he task of quantifying the consequences of violating a noncompetition clause is a particularly difficult and elusive one." (quoting *Kroeger*, 13 Mass. App. Ct. at 322)).

86. *Id.* at 818 n.21.

87. *Id.*

88. *See id.* at 801-02, 818 n.21.

89. Automile Holdings LLC v. McGovern, 483 Mass. 797, 817, 818 n.21.

90. *Id.* at 818.

91. *Id.* at 819.

Book Review

A Republic, If You Can Keep It

By Neil Gorsuch, with Jane Nitze and David Feder (Crown Forum 2019) 339 pages

> "[D]emocracy depends on our willingness, each one of us, to hear and respect even those with whom we disagree strongly. And polarizing times are nothing new. Alexander Hamilton wrote in the very first of The Federalist Papers that even 'wise and good people' will disagree on questions of 'the first magnitude.' A fact, he said, that should 'furnish a lesson of moderation' to us all. In a government by and for the people, we have to remember that those with whom we disagree, even vehemently, still have the best interests of the country at heart. We have to remember that democracy depends on our ability to reason and work with those who hold very different convictions and beliefs than our own. We have to learn not only to tolerate different points of view but to cherish the cacophony of democracy. As Benjamin Franklin reminded us, 'in a democracy we have the choice of either hanging together or hanging separately.'"
>
> — Hon. Neil M. Gorsuch[1]

The proper role of the judge in our country today is a subject that lends itself to a wide variety of perceptions and an even wider variety of misperceptions. In his book, *A Republic, If You Can Keep It,* U.S. Supreme Court Justice Neil Gorsuch trains his eye on the job of a judge, properly understood. And, through that understanding, on the nature of our republic. With that understanding as foundation, the meaning of Benjamin Franklin's famous admonition, set out below and from which the book's title is drawn, becomes both luminously clear and painfully urgent.

The book, a collection of speeches, articles and select opinions from Justice Gorsuch's time on both the Supreme Court and the U.S. Court of Appeals for the 10th Circuit, is a virtual taxonomy of our constitutional structure and a precis of American civic life. It is descriptive, aspirational and, in its fashion, understatedly inspirational. It is put well by the author in the Introduction and as such is worth quoting in full: "The framers also knew that with a republic comes responsibility. Self-government is a hard business and republics have a checkered record in the court of history: Often they flicker brightly only to dim quickly. To succeed where so many others had failed, the framers understood that our republic needs citizens who know how their government works — and who are capable of, and interested in, participating in its administration. We won't always agree about the right policies for the day. That's to be expected, even treasured. After all, the capacity to express, debate, and test all ideas is part of what makes a republic strong. But to have any chance we must be able to listen as well as speak, to learn as well as teach, and to tolerate as well as expect tolerance. This republic belongs to us all — and it is up to all of us to keep it. I think that's what Benjamin Franklin was getting at when he spoke publicly after he emerged from the Constitutional Convention. A passerby asked what kind of government the delegates intended to propose, and Franklin reportedly replied: 'A republic, *if you can keep it.*'"[2]

And so Justice Gorsuch proceeds with his contribution to ensuring that we do, in fact, "keep it." The book opens with a discussion of the Constitution's structure and the separation of powers. While familiar to many, of course, these principles always bear repeating, and indeed, perhaps cannot be repeated enough. And for those unfamiliar with those principles, or uninterested, their thoughtful treatment here is crucial to the author's purpose: to re-teach and re-emphasize first principles. As the justice puts it: "A ruling elite can learn the business of government from their predecessors easily enough. But in our republic the ruling class is supposed to be the whole of the American people. And for us to govern ourselves wisely, every generation has to learn the business of government and what values our republic was designed to serve and then commit themselves to participating in its operation. Even before the Constitution was created, the Northwest Ordinance declared that '[r]eligion, morality, and knowledge, being necessary to good government

1. Neil Gorsuch, *A Republic, If You Can Keep It*, 37 (2019).

2. *Id*. at 8-9.

and the happiness of mankind, schools and the means of education shall forever be encouraged.' For us, civic education and engagement are not just ideals; they are indispensable. As Jefferson put it, 'If a nation expects to be ignorant and free . . . it expects what never was and never will be.'"[3]

As for the separation of powers, that the executive should not wield the legislative power, nor the legislature wield the judicial, nor the judiciary the powers of the other two, "to the end it may be a government of laws and not of men,"[4] is a powerful notion in the abstract. But its full power perhaps can only truly be effectively conveyed in the context of real cases and controversies, some of which are the subject of published opinions by the justice and are excerpted here. In one, a small nursing services company in Colorado catering primarily to elderly Medicare clients found itself the subject of an audit by the government, which resulted in a fine for the business of over $800,000, allegedly, for instances of improper billing.[5] The only problem was, "the government applied the wrong rules. Instead of applying the regulations in effect during the time Caring Hearts provided its services, it faulted the company for failing to abide by more onerous rules that the agency adopted only years later."[6] In another case, a man was charged with "knowingly violating" a statute that makes it a crime to be a felon in possession of a firearm; he was later convicted with no evidence presented by the government that the man knew he was, in fact, a felon.[7] In a third case, a Mexican citizen living in the U.S., who was married to a U.S. citizen with four children who were also U.S. citizens, sought to apply for lawful residency in the U.S., but he faced two inconsistent provisions of federal law, and two distinct legal authorities with differing opinions on which provision would prevail in his case: the U.S. Court of Appeals for the 10th Circuit and the Board of Immigration Appeals; for various reasons, the Board of Immigration Appeals won out.[8] Judge Gorsuch goes on: "At first, these stories might seem unrelated. They arise in different areas of law and implicate different questions of social policy. One is about Medicare and government contracts, the next about criminal law, the last about immigration. But despite their surface differences, over time I came to realize that cases like these reflect the same underlying problem: a mixing of what are supposed to be separated powers in ways that undermine the rule of law and diminish liberty. In the first case, the legislature delegated its lawmaking powers to the executive — and the result was that lawmaking had become so easy and came so quickly that no one could keep up with all the new restrictions. In the second case, the judiciary rewrote the legislature's statutes to make 'better' policy, even though it meant sending a man to prison for breaking a law nowhere in the books or approved by the people's representatives. In the third case, the executive assumed the judicial power 'to say what the law is' and left a family without fair notice of its demands on them. It's one thing to study the theory of the separation of powers. For me, it was another thing to witness how its disregard affects the lives of real people in real cases."[9]

Gorsuch also tackles the relatively fraught concept of "Originalism and the Constitution," comprehensively limning what has become a highly influential school of jurisprudential thought while giving thoughtful attention to and close consideration of its opponents and their competing philosophies. According to Gorsuch, "[o]riginalists believe that the Constitution should be read in our time the same way it was read when adopted."[10] Originalists believe that any constitutional right "can mean no less than it did at the founding."[11] Originalists do not balance competing interests, but only give effect to the specific constitutional right at issue. "That right, an originalist believes, must be honored always and never rewritten by judges who happen to see things differently. Naturally, originalists sometimes disagree on methods and results. But just like living constitutionalism has a core, so does originalism: that the Constitution's meaning was fixed at its ratification and the judge's job is to discern and apply that meaning to the people's cases and controversies."[12] In other words, the people choose. And, by legislation, constitutional or otherwise, the people chose. The only job for the judiciary is to announce that choice, or, put another, more famous way, "to say what the law is."[13] And the law is what it meant at the time it became operative. "It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute. After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the constitution commands."[14] It is also not the job of the judiciary to divine the intentions of legislation's authors, because those

3. *Id.* at 27.
4. Mass. Const. art. XXX, pt. I.
5. Caring Hearts Pers. Home Servs. v. Burwell, 824 F.3d 968 (10th Cir. 2016).
6. Gorsuch, *supra*, at 42.
7. United States v. Games-Perez, 695 F.3d 1104 (10th Cir. 2012).
8. De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).
9. Gorsuch, *supra* note 1, at 44.
10. *Id.* at 110.
11. *Id.*
12. *Id.*
13. Marbury v. Madison, 5 U.S. 137, 177 (1803).
14. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (internal citations and quotations omitted).

intentions are not the law. "We do not inquire what the legislature meant; we ask only what the statute means."[15]

Thus, originalism, as a legal philosophy and school of thought, has as its close companion textualism, also comprehensively advanced in the book. As Justice Gorsuch puts it, enlisting Justice Robert Jackson in his cause: "Textualism . . . holds the legislature to the constitutionally prescribed processes for making new law. Textualism honors only what's survived bicameralism and presentment — and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences. Textualism appreciates this. As Justice Jackson explained, '[I]t is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history' — or, you might add, from its underlying policy goals — is, as Jackson put it, 'merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.'"[16] Such sentiments may have been conventional legal wisdom at some time in our history, but that is not necessarily so today. Indeed, the point is hotly contested in both the academy and the courtroom. "The principle that the written word is just evidence of the law, rather than the law itself, is novel. It has snuck into American legal discourse almost without being noticed."[17] Justice Gorsuch's defense of the proposition that the written word alone is, in fact, "the law itself" is comprehensive, full-throated, and surely as compelling for some as it is provocative for others. It also holds up well against other well-regarded classics of the form.[18] As for how influential Justice Gorsuch's own, particular style of jurisprudence will be when it comes to the further development and reach of both originalism and textualism as legal philosophies, time, as they say, will tell.[19]

Justice Gorsuch proceeds with a section on "The Art of Judging," which should be required reading for all jurists, retired, active and, perhaps most pertinently, aspirational. As the author puts it: "A good judge knows that often the lawyers in the case have lived with it for months or years and thought deeply about it long before the judge enters the picture; they deserve the judge's respect as valuable colleagues whose thinking can be mined and tested to better the judge's own. A good judge recognizes that existing judicial precedents reflect the considered judgment of judges who have come before and sometimes embody the settled expectations of those in our own generation. A good judge listens carefully to colleagues, appreciating the different perspectives each brings to bear. A good judge always questions not only the positions espoused by the litigants but his own tentative conclusions as they evolve. Pride of position and fear of embarrassment associated with changing one's mind play no useful role; regular and healthy doses of self-skepticism always do."[20] The good judge, then, must accept the truism that he may not always be right, that he may very well be wrong, but that he must nevertheless do his level best to implement the law's command and "say what the law is" without regard to personal preference. Justice Gorsuch quotes Justice Antonin Scalia, who perhaps puts it best: "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[21] This sentiment, an interesting if not paradoxical blend of judicial humility and authority, of course dovetails nicely with the philosophies of originalism and textualism as limned above. It thus provides further ballast for one of Justice Gorsuch's main objectives of this book: the formulation of and advocacy for a coherent and comprehensive philosophy of judging and being a judge.

In another section of the book, Justice Gorsuch grapples with the thorny problems and challenges falling under the now-familiar rubric of "access to justice." As he notes in his introduction to the section: "While the world has never seen a perfect legal system, that's no excuse. We should not hide from our shortcomings or shirk from the job of trying to correct them. So, it seems to me, any book about the rule of law in this country today wouldn't be complete without some candid conversation about some of the ways in which we still fall short in our aspirations."[22]

Justice Gorsuch tackles the shortfalls of the civil justice system

15. Holmes, "The Theory of Legal Interpretation," 12 Harv. L. Rev. 417, 419 (1899). *See also* Frank Easterbrook, "Statutes' Domain," 50 U. Chi. L. Rev. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Frank H. Easterbrook, "Textualism and the Dead Hand," 66 Geo. Wash. L. Rev. 1119, 1119 (1998) ("[C]ollective bodies lack any intent."); Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction," 11 Harv. J.L. & Pub. Pol'y 59, 64 (1988) ("If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not. They must run the gamut of the process — and process is the essence of legislation.").

16. Gorsuch, *supra* note 1, at 132. As for the, perhaps misleadingly fine, difference between originalists and textualists: "Originalists make more than textualists of the drafters' imputed intents or expectations." Easterbrook, *supra* note 15, at 1120. *See* William N. Eskridge Jr., "The New Textualism," 37 UCLA L. Rev. 621 (1990).

17. Easterbrook, *supra* note 15, at 61.

18. *See, e.g.,* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttman ed., 1997).

19. *See, e.g.,* Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, (2020) (holding that Title VII of the Civil Rights Act of 1964 prohibits an employer from firing an individual solely for being homosexual or transgender). *But see Bostock*, 140 S.Ct. at 1775-76 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague, Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should 'update' old statutes so that they better reflect the current values of society. If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.") (citing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law 22* (Amy Guttman ed., 1997)).

20. Gorsuch, *supra* note 1, at 178.

21. *Id.* at 48.

22. *Id.* at 241.

with gusto, including its high (if not prohibitive) cost, inordinate periods of delay, and vexatious discovery rules. As Gorsuch puts it, in civil cases, litigation over discovery has "become the centerpiece of contemporary civil litigation. Lawyers who in another age would have been masters of cross-examination are now more likely to be masters of discovery disputes. Where in our civil justice system we used to have trials without discovery, today we have discovery without trials. The whole process is so complex and expensive and takes so long that many meritorious suits aren't filed and many non-meritorious ones settle for more than they're worth. For one, I cannot see why we allow this."[23] Any modern practitioner sees the truth in these words, and they are no less dispiriting for the familiarity of their sentiment.[24]

The rise of pretrial discovery practice brings with it a concomitant rise in the cost of often crucial legal assistance, and it is a cost that many simply cannot bear, no matter the merit of the case itself. Justice Gorsuch outlines a few proposals for sorely needed civil justice reform, and he forgoes the simple (and simplistic) plea for simply more public financing of legal services. As he puts it: "[O]n the road to change it seems to me that before asking others for help we should ask whether and to what degree our own self-imposed rules increase the cost of legal services and decrease access to justice in unwarranted ways."[25]

In this vein, Gorsuch suggests that states loosen the strictures on the "unauthorized practice of law," a label that can be too easily misused and exploited so that it is not merely (and laudably) applied to protect the unknowing from the unscrupulous, but simply (and cynically) used to protect a monopoly from competition. "In recent years, lawyers have used these rules [against the unauthorized practice of law] to combat competition from outsiders seeking to provide routine but arguably 'legal' services at low or no cost to consumers. Indeed, by far and away most unauthorized practice of law complaints come from lawyers rather than clients and involve no specific claims of injury."[26] This suggestion, to democratize legal services even further, has a certain appealing logic to it, both economically and morally. And while morality alone may not make such a development inevitable, economics just might. "Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction."[27]

Justice Gorsuch also suggests various reforms to the Federal Rules of Civil Procedure to make trials speedier and more efficient, including a once-proposed "rule requiring parties to disclose evidence and documents both helpful and harmful to their respective causes at the outset of discovery. . . . [L]awyers and parties are rightly expected to fight over the merits but that doesn't necessarily mean they should be permitted to fight (sometimes seemingly endless) collateral battles over what facts they must share with the other side. Just as a prosecutor must reveal exculpatory *Brady*[28] material before proceeding to a vigorous fight on the merits, so too civil parties should have to disclose the good and the bad of their evidence before proceeding to litigate its significance."[29] Needless to say, this proposal did not go over well in some quarters, and the proposed rule was never formally adopted. Perhaps it made too much sense.[30]

In another pass at articulating a way to reduce the cost of the legal profession for consumers and practitioners alike, Justice Gorsuch addresses the high, and skyrocketing, price of a legal education. Indeed, he wonders whether it is worth that high cost. The judge quotes the lawyer-President Abraham Lincoln on a particularly pertinent point: "[i]f you wish to be a lawyer, attach no consequence to the place you are in, or the person you are with; but get books, sit down anywhere, and go to reading for yourself. That will make a lawyer of you quicker than any other way."[31] In a country where, according to the author, since the 1980s, private law-school tuition has increased in inflation-adjusted terms by 155.8%, and public law-school tuition by a frankly frightening 428.2%, Lincoln's

23. *Id.* at 241-2.

24. *See also* Hon. William G. Young, "Vanishing Trials, Vanishing Juries, Vanishing Constitution," 40 Suffolk U. L.Rev. 67, 73 (2006) ("For some time now, circumstantial and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past. Institutionally, federal courts today seem unconcerned with jury trials"). In this vein, Gorsuch quotes John Adams, noting that "the right to trial by jury represent[s] democracy's 'heart and lungs, the mainspring and the centre wheel, . . . without [which] the body must die, the watch must run down, the government must become arbitrary.'"). Gorsuch, *supra* note 1, at 243.

25. Gorsuch, *supra* note 1, at 254.

26. *Id.* at 256.

27. *Id.* at 257.

28. Brady v. Maryland, 373 U.S. 83, 87 (1963).

29. Gorsuch, *supra* note 1, at 262.

30. *See, e.g.,* Commonwealth v. Durham, 446 Mass. 212, 218-19 (2006) ("Allowing the defendant to withhold [the ordered] evidence . . . would undermine the discovery rules and allow attorneys to return to trial by ambush. Theatrics do not accord with our discovery process.").

31. Gorsuch, *supra* note 1, at 264.

above admonition has more than a little surface appeal.[32] For this, Justice Gorsuch has a number of questions, including whether three full years of legal education is truly necessary and what purpose is really served by accreditation of law schools by the American Bar Association. "In our zeal for high educational standards, we have developed a long list of requirements that every law school must satisfy to win ABA accreditation and it's often unclear whether [their] many and various requirements can be justified on the basis of evidence of improved outcomes."[33] Justice Gorsuch makes a strong case that adopting some or all of these reforms, reforms that would not require any greater claim on the public fisc, would go a long way to actually increasing access to justice, not by increasing the repetition of fine-sounding rhetoric, but by increasing justice's supply and thus lowering its costs.

Rounding out the book is a section "On Ethics and the Good Life," and it is indeed a fine and appropriate way to end. Gorsuch provides some insightful, personal sketches of other judges whom he knew well and served as mentors and role models, including Anthony Kennedy, Byron White and Alfred Murrah. As for the latter two, Justice Gorsuch notes how "these two great lawyers achieved professional success without ever abandoning the humility and integrity and simple hard work that made them great men. In fact, I'd venture to say that they achieved what they did precisely because they never distinguished between their lives as lawyers and their lives as people. They viewed the practice of law as a profession, as a calling to work for the benefit of others."[34] Indeed, in his introduction, Justice Gorsuch relates an instance of walking down a hallway of the Supreme Court with the aforementioned Justice Byron White, for whom the author once clerked.[35] Justice White asked the young Neil Gorsuch if he could name any of the former Supreme Court justices whose portraits adorned the hallway down which they walked.[36] After Gorsuch answered that he might be able to identify half, the justice added, "Me too. We'll all be forgotten soon enough."[37] And it is that spirit of confident humility that, perhaps and in the end, is what really makes for a good judge and true public servant.

Finally, Justice Gorsuch closes the book with his opening statement to the Senate Judiciary Committee during his Supreme Court confirmation hearing.[38] In that statement, he relates walking through Boston's Old Granary burial ground as a student and noting the resting places of a number of our country's Founding Fathers.[39] One in particular strikes him, that of Increase Sumner, a lawyer and judge, born in Roxbury.[40] On Sumner's tombstone was this poignant description: "As a lawyer, he was faithful and able; as a judge, patient, impartial, and decisive. . . . In private life, he was affectionate and mild; in public life, he was dignified and firm. Party feuds were allayed by the correctness of his conduct; calumny was silenced by the weight of his virtues; and rancor softened by the amenity of his manners."[41]

Those words about a judge from the distant past had an impact on the future judge from modern times. He keeps those words on his desk today.[42] "They serve for me as a daily reminder of the law's integrity, that a useful life can be led in its service, of the hard work it takes, and an encouragement to good habits when I fail and falter. At the end of it all, I could hope for nothing more than to be described as he was."[43] That task is, of course, for some future author and legal observer, and this book will surely serve as a useful, if not indispensable, starting point.

— Dean Andrew Mazzone

32. *Id.*
33. *Id.* at 266.
34. *Id.* at 290.
35. *Id.* at 15-16.
36. *Id.*
37. Gorsuch, *supra* note 1, at 16.
38. *Id.* at 316-321.
39. *Id.* at 321.
40. *Id.*
41. *Id.*
42. *Id.*
43. Gorsuch, *supra* note 1, at 321.

Book Review

Uncounted: The Crisis of Voter Suppression in America

By Gilda R. Daniels (New York University Press 2020) 264 pages

On April 7, 2020, in the midst of the worldwide coronavirus pandemic, Wisconsin held an election for a seat on its Supreme Court and other state offices[1] despite the fact that 90% of Americans were under stay-at-home orders,[2] including 55 million children who were learning at home.[3] More than a million Wisconsin voters had requested absentee ballots,[4] but with massive numbers not having received them in time,[5] they were left with a Hobson's choice: endanger their safety and potentially their life going to the polls in person or give up their right to vote.

An emergency effort by the Democratic governor before the state legislature to postpone the election was thwarted by the Republican-led Assembly and Senate, which gaveled their sessions in and out within 17 seconds.[6] Then the Republican-controlled Wisconsin Supreme Court blocked the Democratic governor's last-minute executive order to attempt to suspend in-person voting and declined to move the deadline for mail-in ballots to give voters a chance to vote by mail.[7] An emergency appeal process culminating at the U.S. Supreme Court also proved unsuccessful for the Democrats.[8]

On election day, at least 7,000 poll workers refused to show up to work, leading to extreme consolidation of polling places, particularly in the cities that are Democratic party strongholds.[9] Milwaukee consolidated 180 polling places into five; Green Bay consolidated 31 polling places into two.[10] As anticipated, voting lines extended over numerous city blocks with voters standing six feet apart for hours during which rain was forecasted. Some gave up and left in frustration, particularly the elderly and those whose endurance was compromised by their medical conditions.[11] Others who were elderly or ill did not show up to vote at all, as they either did not have the stamina to wait in long lines or could not risk contracting the coronavirus.[12]

Members of the Democratic party cried foul, alleging this as yet another act of voter suppression, a direct attack on the very cornerstone of our democracy — free and fair elections — by trying to keep down the vote in areas where, historically, Democrats have been strongest. They cited the previous state Assembly election in 2018, where the Republicans had so effectively gerrymandered its districts that Democrats won 53% of the votes, but Republicans won 63 of the 99 seats.[13] They also pointed to the imposition of a stringent voter ID law and the Republican legislature's move to strip the governor of key powers when a Democrat won the seat in 2018.[14]

1. Ed Kilgore, "After Its Disturbing Election Day, What Happens Next in Wisconsin?," New York Magazine, April 8, 2020, https://nymag.com/intelligencer/2020/04/after-a-disturbing-election-day-now-what-in-wisconsin.html.

2. Philip Bump, "Nearly All Americans Are Under Stay-at-Home Orders. Some May Have Come Too Late," The Washington Post, Apr. 2, 2020, https://www.washingtonpost.com/politics/2020/04/02/nearly-all-americans-are-under-stay-at-home-orders-some-may-have-come-too-late/.

3. Lauren Camera, "Many Schools Are Not Providing Any Instruction Amid Closures," U.S. News & World Report, Mar. 31, 2020, https://www.usnews.com/news/education-news/articles/2020-03-31/many-schools-are-not-providing-any-instruction-amid-coronavirus-pandemic.

4. Nick Corasaniti and Stephanie Saul, "Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots," New York Times, April 9, 2020, https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html.

5. Jess Bravin and Alexa Corse, "Supreme Court to Weigh in on Wisconsin's Absentee Ballots," Wall Street Journal, Apr. 5, 2020, https://www.wsj.com/articles/supreme-court-to-weigh-in-on-wisconsins-absentee-ballots-11586118600.

6. Bill Glauber and Patrick Marley, "In Matter of Seconds, Republicans Stall Gov. Tony Evers' Move to Postpone Tuesday Election," Milwaukee Journal-Sentinel, Apr. 4, 2020, https://www.jsonline.com/story/news/2020/04/04/wisconsin-legislature-adjourns-special-session-monday-voting-track-tuesday-election/2948444001/.

7. Kendall Karson, "Wisconsin Supreme Court Blocks Order by Governor Suspending In-Person Voting, Putting Tuesday's Election Back on Track," ABC News, Apr. 6, 2020, https://abcnews.go.com/Politics/wisconsin-governor-suspends-person-voting-tuesdays-election-coronavirus/story?id=70002422.

8. Adam Liptak, "Supreme Court Blocks Extended Voting in Wisconsin," New York Times, Apr. 6, 2020, https://www.nytimes.com/2020/04/06/us/politics/supreme-court-voting-wisconsin-virus.html.

9. Bill Ruthhart, "Amid Coronavirus Outbreak, Wisconsin Election Still on for Tuesday Despite Stay Home Order and a Massive Poll Worker Shortage," *Chicago Tribune*, Apr. 4, 2020, https://www.chicagotribune.com/election-2020/ct-coronavirus-wisconsin-presidential-primary-election-covid-19-20200403-ew6bitvlafe55nk5rt3tkg5lvq-story.html.

10. *Id;* "Election Day Blog Recap: Milwaukee Releases Tuesday's Voter Turnout; Late Lines After Polls Closed," Milwaukee Journal Sentinel, Apr. 7, 2020, https://www.jsonline.com/story/news/politics/2020/04/07/wisconsin-april-7-presidential-primary-election-updates-voting-pandemic-milwaukee-polling-places/2959757001/.

11. "Election Day Blog Recap: Milwaukee Releases Tuesday's Voter Turnout; Late Lines After Polls Closed," *supra* note 8; Daphne Chen, Marcia Robiou, Elizabeth Mulvey, Kacey Cherry and June Cross, "'Voter Suppression At Its Finest': Wisconsin Citizens Say Missing Ballots, Lines and Coronavirus Kept Them from Being Counted in Election," Frontline, April 13, 2020, https://www.pbs.org/wgbh/frontline/article/voter-suppression-wisconsin-election-missing-ballots-lines-coronavirus-covid-19/.

12. Paul Acker and Joseph Ax, "Long Lines and Frustration As Wisconsinites Vote During Coronavirus Pandemic," Reuters, April 7, 2020, https://www.reuters.com/article/us-usa-election/long-lines-and-frustration-as-wisconsinites-vote-during-coronavirus-pandemic-idUSKBN21P1BG.

13. Paul Waldman, "Opinion: Wisconsin's Election Nightmare is a Preview of What Could Happen in November," Washington Post, Apr. 7, 2020, https://www.washingtonpost.com/opinions/2020/04/07/wisconsins-election-nightmare-is-preview-what-could-happen-november/.

14. Michael A. Cohen, "Wisconsin Republicans Put Political Power over Public Health," Boston Globe, Apr. 8, 2020, https://www.bostonglobe.com/2020/04/08/opinion/wisconsin-republicans-put-political-power-ahead-public-health.

In the spring of 2020, more than 15 other states had delayed elections due to the pandemic.[15] Those opposing a delay of Wisconsin's election said their election was different because some of its elected offices could become vacant with a delay, while other states were merely holding primaries for fall general elections.[16] Republicans said the governor lacked the constitutional authority to change the election date; they also claimed that measures had been taken to ensure the in-person election was safe and effective.[17]

The majority opinion of the U.S. Supreme Court's decision stated, "The question before the Court is a narrow, technical question about the absentee ballot process."[18] The Court explained that extending the date of the election "fundamentally alters the nature of the election."[19] It further noted that petitioners had introduced "no probative evidence . . . that these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections . . . ."[20] Justice Ruth Bader Ginsberg, in her dissent, countered that "[t]he Court's order requires absentee voters to postmark their ballots by election day, April 7 — i.e., tomorrow — even if they did not receive their ballots by that date. That is a novel requirement . . . . While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received."[21] Parenthetically, despite pessimistic forebodings of a loss in advance of the April 7, 2020, Wisconsin election, the Democratic nominee for the seat on the Wisconsin Supreme Court won an upset victory.[22]

The legal maneuvering that took place in the weeks leading up to the April 7, 2020, election in Wisconsin is a microcosm for the premise espoused by Gilda R. Daniels, a law professor and former deputy chief of the U.S. Department of Justice's Civil Rights Division, Voting Section during both the George W. Bush and Bill Clinton administrations.[23] In her book, *Uncounted: The Crisis of Voter Suppression in America,* she argues that American history, particularly since the end of the Civil War, is replete with efforts to limit access to the ballot box, particularly of people of color, but also of other minorities, poor people, and voters registered in the opposing political party.[24] Daniels has a definite point of view — that a party, lacking confidence that the voting majority will elect them at the polls, will, as their only perceived path to victory, interfere and block their opponents' supporters from even getting to the voting booth by making it difficult, dangerous or confusing. She argues that, if anything, incidents of intentional voter suppression have skyrocketed in present times.

Daniels asserts there is a history in America of elevating the electoral power, particularly of people of color, and then, in reaction, suppressing it. She claims the Voting Rights Act of 1965 (VRA)[25] is "one of the most important and effective pieces of congressional legislation in United States history,"[26] but then laments that it was gutted by the U.S. Supreme Court in 2013 in *Shelby County v. Holder,*[27] rendering it ineffectual and opening the floodgates for voter suppression, often for dubious reasons.

Earlier trampling of voting rights was less subtle. For example, after passage of the 14th and 15th Amendments at the end of the Civil War, former slaves got an all-too-fleeting taste of emancipation. Not only could they vote, but Southern states elected a number of African Americans to the U.S. Congress and Senate.[28] Then came the era of Reconstruction. Actual threats and violence were accompanied by legislation, including poll taxes, literacy tests, and grandfather clauses, that limited voting to persons whose grandfathers and fathers had voted before 1867, when African Americans acquired the right to vote.[29] In Louisiana, African American voter registration totaled approximately 135,000 in 1896, but by 1907, it had experienced a cataclysmic drop to 1,000.[30] In Alabama in 1890, 140,000 Black men were registered to vote, but by 1906, that number was reduced to a startling 46.[31]

There was rarely any high-minded-sounding pretense of a rationale even attempted by proponents of Black voter disenfranchisement. In 1908, unapologetic segregationist Senator "Pitchfork" Ben Tillman of South Carolina exclaimed in virulent oratory, "We have scratched our heads to find out how we could eliminate the last one

15. Nick Corasaniti and Stephanie Saul, "15 States Have Postponed Their Primaries Because of Coronavirus. Here's a List," New York Times, Apr. 7, 2020.

16. Mitchell Schmidt and Riley Vetterkind, "Statewide Election Back on After Wisconsin, U.S. Supreme Courts Take Action," Wisconsin State Journal, Apr. 7, 2020, https://www.wiscnews.com/bdc/news/state-and-regional/statewide-election-back-on-after-wisconsin-u-s-supreme-courts-take-action/article_302d1615-339b-5581-b081-80d22faf54bc.html.

17. *Id.*

18. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020) (per curiam).

19. *Id.* at 1207.

20. *Id.*

21. *Id.* at 1209 (Ginsburg, J., dissenting).

22. Reid J. Epstein, "Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift," New York Times, Apr. 13, 2020, https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html.

23. Gilda R. Daniels, *Uncounted: The Crisis of Voter Suppression in America* 265 (2020) [hereinafter Daniels].

24. *Id.*

25. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

26. Daniels, *supra* note 19, at 27.

27. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

28. Daniels, *supra* note 19, at 15.

29. *Id.* at 18-19.

30. *Id.* at 19.

31. *Id.*

of them. We stuffed ballot boxes. We shot them. . . . We are not ashamed of it."[32] Brazenly, Tillman said, "How did we recover our liberty? . . . By fraud and violence."[33]

Disenfranchisement continued for decades. Attempting to register to vote in Montgomery, Alabama, one African American female in the 1950s who possessed a master's degree successfully passed a literacy requirement by flawlessly reading aloud the Alabama Constitution, only to be denied registration when she failed to correctly answer the question, "How many bubbles are in a bar of soap?"[34]

The voter disenfranchisement that could not be accomplished through spurious rules and laws was frequently achieved through butchery. Recognized by historians as the most egregious and bloodiest instance of racial violence of the Reconstruction era, though just one among a legion of other incidents, was the Colfax Massacre of 1873.[35] A paramilitary organization called the White Leagues, along with the Ku Klux Klan, surrounded the local courthouse in Grant Parish, Louisiana, which was occupied by freedmen and a Black state militia who were trying to protect the recently elected Black and white Republican officeholders.[36] The African Americans were heavily outmanned and outgunned by the mob of white insurgents, who even used a cannon to murder as many as 150 Black men, most of them killed after they had walked out with white flags of surrender.[37] Only three in the white mob were killed.[38]

But in the aftermath, the legal ramifications were almost as tragic as the murders. Prosecutors strategized that the best way to bring the white mob ringleaders to justice was to charge them in federal court with violations of the Enforcement Act, also known as the Civil Rights Act of 1870, which prohibited government from denying the right under the 15th Amendment to vote based on race.[39] But the U.S. Supreme Court, in *United States v. Cruikshank*,[40] overturned the convictions, ruling that the Enforcement Act applied only to actions by the state, not by individuals. This ruling dramatically curtailed the federal government for generations from intervening against hate crimes and empowered segregationists with much freer rein to run roughshod over the rights of Blacks through intimidation and violence.[41] As Louisiana Governor William Pitt Kellogg said at the time, the acquittals of the white perpetrators "established the principle that hereafter no white man could be punished for killing a negro."[42] It could almost have been anticipated that local officials in the 1920s did, in fact, erect a monument to the three white members of the paramilitary mob who died, and in 1950, officials marked the site with a plaque that triumphantly declared that this riot "marked the end of carpetbag misrule in the South."[43]

The endless procession of violent acts to disenfranchise voters encouraged by the *Cruikshank* ruling continued in its aftermath for decades until Bloody Sunday, the violent attack against civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama, on March 15, 1965.[44] The attack in Selma so horrified the nation that it spurred President Lyndon Johnson and Congress to, at long last, give the federal government the tools it needed to combat discrimination fostered by those who would curtail the right of all Americans to go to the polls — the landmark Voting Rights Act.[45] Johnson declared that the VRA was a "triumph for freedom as huge as any ever won on any battlefield . . . . The act has attacked the shameful blight of voter discrimination."[46]

The VRA contained the weapons to combat the underhanded tactics legislators and other public officials had used in the past to thwart the exercise of voting rights of minorities. It outlawed practices such as literacy tests and poll taxes, empowered federal registrars to register citizens to vote, and gave the attorney general the power to bring extensive litigation instead of the piecemeal approach of the past. It also included the power to investigate and prosecute those who discriminated against voters, review voting practices and procedures, and monitor elections.[47]

32. *Id*. at 18.

33. George B. Tindall, "The Question of Race in the South Carolina Constitutional Convention of 1895," The Journal of Negro History, July 1952, at 294.

34. Daniels, *supra* note 19, at 21-22.

35. Danny Lewis, "The 1873 Colfax Massacre Crippled the Reconstruction Era," Smithsonian Magazine, Apr. 13, 2016, https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/.

36. *Id.;* Daniels, *supra* note 19, at 96-98.

37. *Id*. at 96-97.

38. *Id.* at 97.

39. U.S. Const. amend. XV.

40. United States v. Cruikshank, 92 U.S. 542 (1875).

41. William Briggs and Jon Krakauer, "The Massacre That Emboldened White Supremacists," New York Times, April 28, 2020, https://www.nytimes.com/2020/08/28/opinion/black-lives-civil-rights.html.

42. Daniels, *supra* note 19, at 97; Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2009).

43. Richard Rubin, "The Colfax Riot," The Atlantic Magazine, July/Aug. 2003, https://www.theatlantic.com/magazine/archive/2003/07/the-colfax-riot/378556/.

44. Daniels, *supra* note 19, at 26-27.

45. Voting Rights Act of 1965, 79 Stat. 437.

46. Daniels, *supra* note 19, at 27.

47. *Id.*

The VRA had an enormously effective impact. Almost immediately, there was a dramatic growth in the number of Black elected officials in the South.[48] An additional 250,000 African Americans registered to vote from the time the bill passed in August of 1965 through the end of that year.[49] In Alabama, 79% of voting-age African Americans eventually registered to vote.[50]

By all measures, the VRA was considered a success for almost 50 years. Then, according to Daniels, almost overnight, it was rendered impotent by the Supreme Court's 2013 decision in *Shelby County v. Holder*.[51] According to Daniels, the decision in *Shelby* is a pivotal moment in our nation's history comparable in its deleterious impact on the rights of people of color to *Plessy v. Ferguson*,[52] the since-denigrated case that upheld the constitutionality of racial segregation in its establishment of the separate but equal doctrine. Indeed, Daniels writes, "If Selma, Alabama, serves as the birthplace of the VRA, Shelby County, Alabama, could certainly serve as its resting place."[53]

The Court in *Shelby* eviscerated Section 5 of the Voting Rights Act, which had required jurisdictions to gain approval of any voting changes before implementation. Without Section 5, there was no longer any power to receive notice of any discriminatory legislation, prevent its application, and send in observers to ensure its legality.[54] Prior to *Shelby*, the U.S. Justice Department would receive, on average, 5,000 Section 5 submissions per year containing 14,000 to 20,000 changes in voting procedures. Gutting Section 5 meant that those 20,000 changes would occur without any federal scrutiny to determine whether the changes had any discriminatory effect on voters of color.[55] According to Daniels, "Just as in other eras of U.S. history, the courts became complicit in condemning voters of color to second-class citizenship. Indeed, the Court's actions in *Shelby* turned the hands of time backward on voting rights."[56] Daniels further asserts that, "The *Shelby* decision left advocates with fewer tools to combat the onslaught of legislation and litigation proffered with the intent to weaken the democratic process and quash access to the ballot."[57]

Shelby opened the floodgates to reversing half a century's worth of gains made after the implementation of the VRA. Daniels cites North Carolina as an example of a state that introduced legislative provisions that "target African Americans with surgical precision," as it imposed strict voter ID regulations, cut early voting hours, and eliminated same-day registration, out-of-precinct voting, and pre-registration of youth.[58] Because of the holding in *Shelby*, the aggrieved could no longer look to the federal government for help in the face of these rollbacks.

The rollbacks were not limited to one state, however. In 2000, only 11 states had a voter ID requirement, but by 2018, that number had tripled to 34 states, most requiring specific government identification.[59] The rationale for the stringent identification requirement is that it will cut down on voter fraud. But Daniels purports that voter fraud is essentially absent. She cites one comprehensive report that "found 31 credible instances of voter impersonation out of more than 1 billion votes cast between 2000 and 2014."[60] Daniels writes that studies show fraud at the ballot box "occurs as often as someone getting struck by lightning."[61] One project that analyzed fraud cases from 2000 to 2012 found that, "while fraud has occurred, the rate is infinitesimal, and in-person voter impersonation on Election Day, which prompted 37 state legislatures to enact or consider tough voter ID laws, is virtually non-existent."[62]

At first blush, it may not seem like an onerous expense to obtain government-issued identification, such as a driver's license, in order to comply with the voter ID laws. But, as Daniels argues, it can be when one considers that 25% of African Americans living in Georgia do not own a car.[63] Daniels illustrates a number of case studies of African Americans making herculean efforts to obtain proper identification, only to be thwarted again and again.[64] One person, Bettye Jones, was born in 1935 at home in Tennessee because no hospital nearby served African Americans.[65] Hence, she never had a birth certificate and there is no record of her birth.[66] In her adult life, she moved to Ohio, registered to vote, and had an active life of civic engagement.[67] At the age of 76, she moved to Brookfield,

48. *Id.* at 27-28.
49. *Id.* at 28.
50. *Id.* at 28.
51. 570 U.S. 529.
52. Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).
53. Daniels, *supra* note 19, at 45.
54. *Id.* at 46.
55. *Id.* at 49.
56. *Id.* at 48.
57. *Id.* at 50.
58. *Id.* at 39.
59. Daniels, *supra* note 19, at 64-65.
60. Justin Levitt, "A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast," Washington Post, Aug. 4, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/.
61. Daniels, *supra* note 19, at 70.
62. *Id.* at 90.
63. *Id.* at 70.
64. *Id.* at 73-79.
65. *Id.* at 74.
66. *Id.*
67. *Id.* at 74-75.

Wisconsin, to be near her daughter.[68] But the Wisconsin Legislature had just passed a law requiring a birth certificate in order to obtain a photo ID.[69] While she had several forms of identification, including a still-valid Ohio driver's license and her Social Security card, she was told her proof was insufficient.[70] She spent money on an effort that took months, trying to piece together family records, including those of her parents, to try to prove her birth so that Tennessee might issue a postdated birth certificate.[71] She was denied and kept reapplying.[72] Eventually, she received a delayed Tennessee birth certificate, presented it in Wisconsin, was denied again, appealed it, and, after a personal meeting with an official, was able to spend more money for the required identification.[73] Ms. Jones had missed the primary, and, finally, with her approved identification in hand, was prepared to vote in the coming election when she passed away.[74] She spent her last days in what she considered to be a very disturbing circumstance and lamented that others might not have the help, time or resources that she had.[75]

Other women who presented a birth certificate were told that they could not be issued a government identification to vote because the name on their birth certificate did not match their present married name, so they had to first track down a copy of their marriage certificate.[76] These examples are modern-day equivalents of the woman who was denied the right to vote in the 1950s for failing to correctly answer the question, "How many bubbles are in a bar of soap?" despite flawlessly reading aloud the Alabama Constitution.

The problem caused by voter ID laws is pervasive. One study claimed that 11% of Americans lack the requisite voter identification,[77] and, in Texas, a federal court determined that 600,000 Texans lack such an ID.[78] Studies show that such stringent voter ID laws more often tend to impact Blacks and the poor, and, as Judge Richard Posner of the Seventh Circuit Court of Appeals noted in the case of *Frank v. Walker*, such restrictive laws are more likely to be passed by Republican legislatures and more often impact those "likely to vote for Democratic candidates."[79] Daniels cites numerous studies that support the fact that stringent voter ID laws restrict the turnout of minorities, young people, poor people, and those who would be inclined to support Democratic party candidates.[80]

In fact, after North Carolina passed a restrictive voter ID law shortly after the *Shelby* decision, Don Yelton, a county Republican captain and member of the Republican Party Executive Committee, appeared on The Daily Show with Jon Stewart and transparently remarked about the law, "If it hurts a bunch of lazy Blacks who want the government to give them everything, so be it."[81] When Yelton testified before the North Carolina House Rules Committee, he stated that the photo ID requirement would "'disenfranchise some of [Democrats'] special voting blocks,'" and that "'that within itself is the reason for the photo voter ID, period, end of discussion.'"[82]

It is not just voter ID laws that suppress voters, however. Daniels cites a plethora of examples of another maneuver used to keep vote totals low — intentional voter deception. For example, Jefferson Riley, a metro Atlanta mayor, posted online, "Remember the voting days: Republicans vote on Tuesday, 11/8 and Democrats vote on Wednesday, 11/9" in the hope that Democrats would show up at the polls the day after they had closed.[83] Democrats in Maryland's two jurisdictions with the largest Black population received telephone calls telling them that Governor Martin O'Malley and President Barack Obama had already been elected and that they should "[r]elax. Everything's fine. The only thing left is to watch it on TV tonight" in the hope that these voters would think that there was no longer any point in going to the polls.[84] In Michigan, flyers were found "falsely claiming that [college] students could vote for Democratic presidential candidate Hillary Clinton by posting 'Hillary' on Facebook and Twitter and hashtagging it '#PresidentialElection.'"[85] And, in Virginia, voters in certain counties received robocalls falsely stating that their polling places had changed.[86]

Yet another maneuver for voter suppression is the wholesale purging of voter registration rolls where citizens show up at their regular polling place and are informed that they cannot vote because they

68. Daniels, *supra* note 19, at 75.
69. *Id.*
70. *Id.*
71. *Id.* at 75-76.
72. *Id.*
73. *Id.* at 76.
74. Daniels, *supra* note 19, at 76.
75. *Id.*
76. *Id.* at 77.
77. Keesha Gaskins and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice, July 18, 2012, https://www.brennancenter.org/our-work/research-reports/challenge-obtaining-voter-identification.
78. Daniels, *supra* note 19, at 72.
79. Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014).
80. Daniels, *supra* note 19, at 83-85.
81. *Interview by Aasif Mandvi with Don Yelton*, The Daily Show with John Stewart, Oct. 23, 2013, http://www.cc.com/video-clips/dxhtvk/the-daily-show-with-jon-stewart-suppressing-the-vote.
82. N.C. State Conference of NAACP v. McCrory, 831 F. 3d 204, 229 n.7 (4th Cir. 2016) (quoting Public Hearing on Voter Identification Before the H. Comm. on Elections (N.C. Apr. 10, 2014) (statement of Don Yelton)).
83. Steve Burns, "Georgia Mayor Creates Firestorm with Election Day Post," Atlanta-Journal Constitution, Nov. 8, 2016, https://www.ajc.com/news/local/georgia-mayor-creates-firestorm-with-election-day-post/f2z0F16LdR3sEZW1prSSqM/.
84. John Wagner, "Top Ehrlich Aide, Consultant Indicted in Maryland Robocalls Case," Washington Post, June 16, 2011, https://www.washingtonpost.com/blogs/maryland-politics/post/top-erlich-aide-consultant-indicted-in-robocalls-case/2011/06/16/AGwU2cXH_blog.html.
85. Olivia Dimmer, "Some College Students Are Being Met with Voter Suppression Tactics," USA Today, Nov. 8, 2016, https://www.usatoday.com/story/college/2016/11/08/some-college-students-are-being-met-with-voter-suppression-tactics/37424239/.
86. Daniels, *supra* note 17, at 102.

are no longer registered. In the two years between 2014 and 2016, nearly 16 million people were removed from the voter rolls.[87] Daniels underscored how critical purging of voter rolls is in deciding an election by noting that, prior to the 2000 presidential election, a private company was hired to purge voters whose names matched or were similar to ex-felons. Florida registrants were purged from the rolls, in part, because 80% of the letters of their last names were the same as those of persons with criminal convictions.[88] The result was the removal of 82,389 voters from the rolls.[89] A later investigation in just one of the Florida counties revealed that 95% of those voters purged were, indeed, legally entitled to vote.[90] Another investigation found that more than half of those wrongfully purged in Florida in 2000 were African Americans, even though African Americans represent 11% of the electorate.[91] One might surmise that Bush's winning Florida by 537 votes[92] and, therefore, the election, would indicate that the purging of votes in Florida may have been determinative of that race.

Daniels notes that other countries have soaring voter turnouts that dwarf the United States. In Australia, 96% of the electorate vote; in Canada, 93% turn out; and in Germany, 92% of the electorate show up at the polls.[93] Among a variety of suggestions Daniels makes to increase participation are that election day be a national holiday to free up workers to get to the polls, online voter registration, automatic voter registration, and same-day voter registration.[94]

However, in light of the *Shelby* decision, Daniels does not have faith that reliance upon the courts alone will immediately bring justice in assuring everyone this fundamental tenet of the American experiment. She contends, "The courts no longer serve as a beacon of light in the darkness of discrimination. Instead of voting rights, it is essentially voting fights. We are fighting much more as opposed to arriving at consensus decisions in a nonlitigative posture that allows previously disenfranchised groups to influence policy. This post-*Shelby* process also involves courts much more than they claimed they wanted to be involved in resolving many of these conflicts."[95]

Justice Ruth Bader Ginsburg raised the all-important fundamental question of why the courts and legislatures may not be doing all they could to accommodate and make it easier for the American voter to exercise this right. In *Crawford v. Marion County Election Board,* she joined the dissent when the U.S. Supreme Court's majority held that an Indiana law requiring voters to provide photographic identification did not violate the U.S. Constitution. During oral argument, she had asked, in essence, why wouldn't we want to make it easier for Americans to cast their ballots? She was referencing indigent people without photo identification when she noted, "They don't drive, and they can't get up the money to get the birth certificate or whatever else. They do have a burden that, it seems to me, the State could easily eliminate if they want those people to vote, and that is to say okay, do the affidavit, the whole thing in your local precinct; we'll make it easy for you and not send you away, send you off to the county courthouse to get it validated. Why-why, if you really wanted people to vote, wouldn't you do it that way?"[96]

This question lays the central premise of this book. If the facts and the evidence conclude that election fraud is almost nonexistent in the United States, then disenfranchising massive swaths of American voters in order to safeguard against this near-fictional issue is specious and cannot be justified. As Daniels opines, ". . . it is important for all Americans to understand that voting is not a black and white issue and that it is not a Republican or Democrat issue. It is a fundamental democratic issue."[97]

— Peter T. Elikann

87. Jonathan Brater, Kevin Morris, Myrna Perez and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote,* Brennan Center for Justice, July 20, 2018, https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote.

88. Myrna Perez, *Voter Purges,* Brennan Center for Justice, Sept. 30, 2008, https://www.brennancenter.org/our-work/research-reports/voter-purges.

89. Daniels, *supra* note 17, at 133.

90. *Id.*

91. *Id.*

92. 2000 Official Presidential General Election Results, Federal Election Commission, Public Disclosure Division.

93. Daniels, *supra* note 17, at 202.

94. *Id.* at 198-206.

95. *Id.* at 62.

96. Transcript of Oral Argument at 53, Crawford v. Marion Cnty. Election Bd, 553 U.S. 181 (2008) (No. 07-21).

97. *Id.* at 208.

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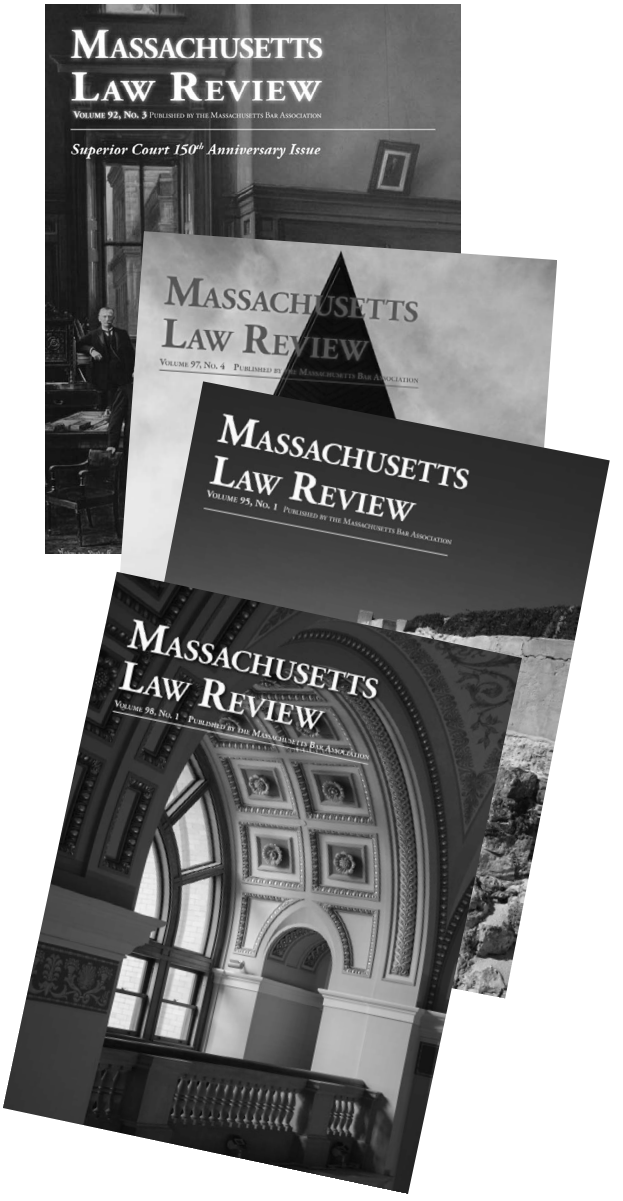

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