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A Fond Farewell from Chief Justice Ireland

by Roderick L. Ireland

Voice of the Judiciary



When I retired at the end of July of 2014, my judicial service had spanned three court departments and thirty-seven years – thirteen years at the Boston Juvenile Court, seven years at the Appeals Court, and seventeen years at the Supreme Judicial Court, the last four as Chief Justice. A number of people asked me to reflect on my experiences and share what I learned during that time. As I thought about it, I decided that I wanted to give voice to my time as Chief Justice, since that represented such a unique experience.

It has been quite a journey. In my Boston Juvenile Court days, sitting in what was then called the “Old Courthouse,” my courtroom was so cold in the winter that I wore an overcoat and scarf under my robe, and the clerk had to wear gloves to punch the keys of her typewriter. I remember looking up from the ground floor of that building to the upper floors of the great hall, never thinking that one day I would be on those upper floors, in a beautifully rehabbed “John Adams Courthouse,” looking down to the space where I started out. For me, as the first person of color to serve on the oldest appellate court in the western hemisphere, to be appointed its Chief Justice was not only a great honor, but also a heavy responsibility.

It was one thing to serve as an associate justice, but quite another to serve as Chief Justice, and I did not go into it lightly. In fact, when Governor Deval Patrick first wanted to nominate me, I turned the offer down. I knew what the stakes would be for me personally, as a person of color.

Fortunately, Mo Cowan, the Governor’s Chief Legal Counsel and later his Chief of Staff, was a persistent advocate, and after many conversations over several weeks, I was persuaded to reconsider and to accept the nomination. As he pointed out to me, it was an historic opportunity, and there was no telling when another opportunity for a person of color to be Chief Justice would occur.

In spite of my reservations, I took the plunge. I have to say that I feared that any mistakes I made would not only reflect on me, but also would make it more difficult for other people of color to follow me. What would be the point of being the first, if there would never be a second? So, for me, doing a good job was

critical. That was my goal every day. Looking back, I am pleased with how things worked out and proud of what we accomplished. But there were challenges.

When I started as Chief Justice, the Judiciary was in the midst of a hiring freeze that had gone on for more than two years. Morale was at an all-time low because employees were being asked to do their own work and then take on extra work as a result of vacancies that could not be filled.

On top of that, the Justices had recently received a report from Independent Counsel Paul Ware about hiring and promotion in the Probation Department. The report concluded that the Commissioner of Probation had engaged in corrupt hiring that favored politically connected candidates, and indictments followed. Commissioner John O'Brien and Deputy Commissioner Elizabeth Tavares were eventually convicted of mail fraud, racketeering, and conspiracy to engage in racketeering; and Deputy Commissioner William Burke was convicted of conspiracy to engage in racketeering.

At the time, the Governor proposed that the Probation Department be moved from the Judicial to the Executive Branch. On the day I was nominated to be Chief Justice, even before I was sworn in, I was asked by the media about my position on moving Probation to the Executive Branch. I had to respectfully disagree with the Governor before my first day as Chief Justice. As it turned out, the Governor did not give up on this idea, and made the same proposal the following year, which meant that I had to publicly disagree with him a second time. Currently, the Probation Department remains under the authority of the Judicial Branch.

When I began as Chief Justice, the judiciary's relationship with the Legislature was "cool," to say the least, and our budget was significantly below what we needed just to stay afloat. We faced the likelihood of reducing court sessions, laying off employees, or a combination of those difficult options. To state the obvious, those were challenging times.

In my first Annual Address, which I gave in October of 2011, I indicated that I had three main objectives as head of the third branch of government: first, to build bridges with the courts' constituents, including the Legislature; second, to make the court system more user-friendly and responsive to the public; and third, to educate the public, particularly our youth, about how the legal system operates.

From my first day as Chief, reaching out to the Legislature was a major priority. We organized two first-of-their-kind programs – an orientation program for new members of the Legislature, and a similar one for legislative staff. I visited regularly with Legislative Leadership, as well as the rank and file members of the House and Senate, sometimes spending several hours a week at the State House. We worked with the Speaker on the legislation creating the new position of the Court Administrator to bring professional management expertise to the Judicial Branch. The Justices also adopted the recommendations for transparency in hiring and promotion practices in the "Harshbarger" action plan. And I met regularly with the Governor and his staff to share information, exchange ideas, and to advocate for proper funding for the courts.

Through our efforts we were able to secure an adequate budget to fund the work of the court system, and we have been able to fill some of the critical positions. Our efforts also resulted in a pay raise for judges and clerks – the first in eight years. Based on my regular visits to courthouses across the Commonwealth to thank the staff for their work, I can see that morale of court staff has noticeably improved.

We also built bridges with the business community, meeting with the CEOs of the biggest businesses to discuss the court system, emphasizing the importance of the Business Litigation Session of the Superior Court. We described how it was in their best interests that courts have proper resources in order to ensure speedy and fair resolutions of their legal issues. We pointed out that it was also in their employees' best interests to have a legal system that would provide speedy and fair resolution to their personal legal problems, because the sooner they were resolved, the more "present" the employees would be at work.

We enlisted support from the bar associations, to encourage their members to advocate for adequate funding for the judiciary and to share information on court initiatives. The Justices partner yearly with the Massachusetts Bar Association, the Boston Bar Association, and others, to "Walk to the Hill," as part of Court Advocacy Day. Our collaboration with the Bar means a great deal to the members of the Judiciary.

We endeavored to make the courts more user-friendly as well as more transparent to the public. Recognizing that every day more than 42,000 people come to our courthouses (based on the FY2010 Annual Report on the Commonwealth of the Massachusetts Court System), and more and more self-represented litigants, we are attempting to demystify the legal process. Help desks or information kiosks were initiated in various courts to assist the public as they enter court houses. We also opened several courts for extended hours so that, in some cases, litigants could resolve their cases without having to miss a day of work.

Our Access to Justice Initiatives provide services and support to litigants without access to legal representation in civil cases, some of which concern the most basic necessities of life. And through specialty courts we are able to deal with substance abuse and drug and alcohol addiction, mental health, and veterans' issues.

Another bridge we began to build was with our law schools. This year we held the first "Summit" with the deans of Massachusetts law schools. Our roundtable discussion covered many issues involving legal education in Massachusetts and ways to assist graduates to be more prepared for the "real world" of lawyering upon graduation.

I hope to continue to play a part in the lives of students, especially those at risk, even after I retire. This summer I again led the Judicial Youth Corps (JYC), the SJC's program for high school students, as I have for the past twenty-four years. With the wonderful support of the Massachusetts Bar Association, we expanded the JYC to both Worcester (in 2009) and Springfield (in 2014). At this point we have more than

700 alums of the JYC. Some are now lawyers, teachers, business professionals, and we even have one judge.

One aspect of the JYC that I am especially proud of is the role that court employees play each year. Each of our students has a volunteer supervisor who works with the student the entire summer. They do not get a single extra penny for doing this, and they do it for just one reason – to help a kid. And many of the employees have volunteered each and every year for the past twenty-four years. Paul Liacos, a former Chief Justice of the SJC, was the visionary who founded the program back in 1990. I know he would be proud.

As I neared retirement in June of 2014, I was appointed Distinguished Professor of Criminology and Criminal Justice in the College of Social Sciences and Humanities at Northeastern University, where I have been an adjunct professor for the past thirty-six years. I joined the faculty full-time at the end of August. Among the courses I will be teaching is one that I am developing called, “The Third Branch of Government.” It will examine the interplay of the judiciary with the legislative and executive branches, as well as with external entities like business and the media.

One part of the course will be to look at the “theory” of how government is supposed to work. But another part will focus on the “reality” of government, and will look at how things actually work in the real world. And in that part of the course I hope to take my students on the road to see how government actually functions, from meeting with key players in all three branches, to observing the various processes of the branches unfold.

I hope to show my students what my experiences as Chief Justice have helped me to understand, which is that even though the three branches of government are “separate, independent and co-equal,” they are also all interdependent and connected with each other. For the third branch of government to perform its function properly, it must have the support and assistance of the other two branches of government. And without the support of the other two branches, the third branch will almost certainly be unable to provide the services that the public needs and expects in a timely, efficient, and fair way.

And with that, I will close. As I do, it bears repeating that my serving as Chief Justice these past four years has been the highest honor and privilege. But I did not do it alone. What made leading this Branch possible for me, from my very first day as Chief, was the tremendous support I received from my colleagues and staff. I am grateful to everyone who has helped me along the way. It has meant so much to me. I extend my best wishes to all in future years. All the best!!

Chief Justice Roderick L. Ireland serves as a Distinguished Professor of Criminology and Criminal Justice at Northeastern University. He served as Chief Justice of the Supreme Judicial Court of Massachusetts from 2010 to 2014. He received his B.A., 1966, from Lincoln University, Pennsylvania; his J.D., 1969, from Columbia Law School; an L.L.M. degree, 1975, from Harvard Law School; and his Ph.D., 1998, Northeastern University.

My Phone Is My Castle: Supreme Court Decides that Cell Phones Seized Incident to Arrest Cannot Be Subject to Routine Warrantless Searches

by Michael D. Ricciuti and Kathleen D. Parker

Case Focus



On June 25, 2014, a unanimous United States Supreme Court decided *Riley v. California*, 134 S. Ct. 2473, and held that police may not conduct a warrantless search of the digital information contained in a cell phone or smart phone seized incident to arrest absent exigent circumstances. Rejecting mechanical application of the prior rule allowing virtually unlimited search authority over items seized at arrest, the *Riley* Court continued the Supreme Court's trend of applying core Fourth Amendment principles when defining the scope of constitutionally permissible searches, especially those involving emerging technology. See *Chimel v. California*, 89 S.Ct. 2034 (1969); *United States v. Robinson*, 94 S.Ct. 467 (1973); *Arizona v. Gant*, 129 S.Ct. 1710 (2009). The net result is that the Court now requires the government to seek warrants for searches of digital information contained in cell phones absent exigency.

The Facts

In *Riley*, the Court decided two consolidated cases — *People v. Riley*, 2013 WL 475242, D059840 (Cal. App. 4 Dist. Feb. 8, 2013), a California Court of Appeal case, and *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), a case out of the First Circuit. In *Riley*, the defendant was stopped for driving with expired registration tags. The police discovered firearms, arrested Riley, and seized his smart phone from his pocket. They then accessed its stored information and found words, photographs and videos which allegedly linked Riley to a street gang and a gang-related shooting that had occurred a few weeks earlier. The government charged Riley in connection with the shooting and sought to use the gang-related information from the phone to seek an enhanced sentence. Riley's motion to suppress the cell phone evidence was denied, the California Court of Appeal upheld the denial, and the California Supreme Court denied Riley's petition for review.

In *United States v. Wurie*, a Boston police officer performing routine surveillance observed Wurie making an apparent drug sale from a car and arrested him. Incident to the arrest, the police seized a flip-style cell phone from Wurie and noticed that it was receiving calls from “my house,” as displayed on the external screen. Police opened the phone, accessed the call log, and identified the phone number associated with “my house.” They located the address that corresponded to the phone number, confirmed that the address was Wurie’s apartment and obtained a search warrant for the location. The search yielded drugs, drug paraphernalia, a firearm, ammunition, and cash. As a result of the search, Wurie was charged with drug and firearms offenses. He moved to suppress the evidence obtained from the search of the apartment on the grounds that it was the fruit of an unconstitutional search of his cell phone. The motion to suppress was denied by the district court. A divided First Circuit panel reversed the denial and vacated Wurie’s convictions. The Supreme Court granted certiorari.

The Riley Reasoning

The key issue in *Riley* was whether the traditional rule allowing police to seize and search anything found in the possession of the arrestee included data stored on a cell phone or smart phone.

As it had done in prior cases, the *Riley* Court began its analysis of the issues by looking at the underlying reasons for the search. The Court explained that police were permitted to search items found on an arrestee because things on an arrestee’s person could be used as a weapon against the police or could constitute evidence that could be destroyed by the suspect. The Court found, however, that such risks are not present when the search at issue is of digital data on a cell phone, and that rigidly applying a categorical rule permitting the police to search anything found on a suspect upon arrest, including a search of the data stored on a cell phone, made no sense in light of the reasons for the rule. Although the government raised concerns about the security of the data on a phone — for instance, the risk that information on a phone could be remotely wiped, making its data unsearchable — the Court rejected these concerns as insufficient to outweigh the privacy issues at stake. Since data on cell phones cannot be used as a weapon against the police and, once the phone is seized, an arrestee cannot himself destroy potential evidence stored on the cell phone, the logic that allows police to search items incident to arrest no longer applies and cannot be used to justify a search of cell phone data. Significantly, the *Riley* Court recognized that cell phones are in effect “digital containers” with “immense storage capacity” for private data and, as such, “implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet or a purse”— items that had traditionally been fair game in searches incident to arrest. Accordingly, the *Riley* Court concluded that permitting a search of a cell phone upon arrest extended the logic of prior law too far.

In reaching this conclusion, the *Riley* Court continued a trend in which the Court has closely reviewed the logic of core Fourth Amendment precedents to determine the legality of a search rather than simply

building upon more recent cases interpreting those principles. For instance, in 2009, the Court decided *Arizona v. Gant*. Prior to *Gant*, lower courts interpreted Supreme Court decisions as permitting police to search the interior of a car after the driver was arrested, even if the driver had been taken out of the vehicle. In *Gant*, the Court invalidated that interpretation. To reach this result, the Court re-examined the core reasoning justifying such search authority — to prevent an arrestee from reaching for a weapon or destroying evidence. The *Gant* court concluded that once a driver had been taken out of the car and arrested, there was no longer any possibility that he or she could seize anything in the vehicle and destroy it or use it as a weapon, and thus there was no longer any justification for allowing a warrantless search of the car's interior.

The Upshot

Riley, like *Gant*, shows that the Court is concerned with stretching categorical rules governing police behavior beyond their core reasoning. The decision also reflects the Court's sensitivity to practical concerns in applying existing search and seizure law to new technology.

The immediate upshot of *Riley* is significant. Police who seize cell phones incident to an arrest generally need a warrant to search their contents. The same rule will apply to computers and computer media as well. This does not mean that cell phones or other digital media are completely off limits to the police absent a warrant. The Court acknowledged that there may be circumstances that justify an exigent, warrantless search of a cell phone, but such exceptions must be established by the police on a case-by-case basis.

It remains to be seen how *Riley* will apply to future cases where the government seizes information closely related to cell phone use, such as cell-tower tracking data, which can pinpoint a user's location even in real time, or non-content information relating to cell phone and email usage which can be searched in bulk and mined for insights into private behavior. But *Riley* and the cases that preceded it make clear that the Court is adapting to the times and will not blindly apply law from an earlier age to today's digital media.

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An Interview with the Honorable Rya W. Zobel

conducted by Judge Gabrielle R. Wolohojian

Voice of the Judiciary



I sat down with Judge Rya Zobel on a sunny afternoon in August to talk to her about her first 35 years on the bench. The impetus for the interview was the fact that she had recently taken senior status. With her usual dynamism, however, the judge informed me that she has not reduced her caseload despite the change in status. So this was not a pre-retirement interview, but rather an opportunity to ask her to look back and share some of her thoughts about her court, the cases that have come before her, and (once a clerk, always a clerk) for her advice.

What was your path onto the bench?

Good luck. I became a law clerk right after law school and remained one for ten years because there were no law firm jobs for women at that time. Being a law clerk was a good job for me because I was able to spend time with my young children. I then went to Hill & Barlow, and later to Goodwin Proctor, where I became the first woman partner. There were four vacancies on the court in 1978, and it was clear that one of the slots would go to a woman. Someone sent me an application for the court, and I filled it out. I happened to be in the right place at the right time.

It was exciting to be the first woman on this court, albeit less so to be the only one for fifteen years. I had experienced a similar first when elected to partnership at Goodwin Proctor, and later when I became the Director of the Federal Judicial Center. I came to realize how important my firsts were to the women in this profession and, for that matter, to the men.

What are the significant changes you have seen since you went on the bench? Has the nature of the cases changed? How about the lawyering?

The nature of the cases being filed has changed over time. When I was a law clerk, the criminal side of the docket had a large number of Dyer Act cases [interstate auto theft], which we don't see anymore. We also don't see the bookie cases that we used to see. The nature of the sex offense cases has also changed. We used to have Mann Act cases; now we are flooded with child pornography cases. We used

to have only a few drug cases; now we have piles of them – and they have huge sentencing consequences. We also have a lot of felon-in-possession cases, which come from state or local law enforcement authorities because of the long federal sentences. We don't see many antitrust cases anymore. But we see a fair number of qui tam actions, often against pharmaceutical companies.

E-discovery is a huge change. There are millions of email communications to be dealt with. Nothing is ever deleted, and so the volume of material is huge. I think lawyers are panicked about overlooking an email that could turn out to be the smoking gun. As a result, discovery requires an awful lot of lawyer time and expense on the part of the client. There are also many disputes about how to sample the emails, the protocols to be used, and whose emails are to be searched. In some areas of the law, such as patent litigation, computers have changed not just discovery, but the substantive law. I have a case now, for example, where the lawyers rely on a theory that the amount of lost advertising is the measure of damages. One of the questions is how to define discovery in order to probe that theory.

Do you feel your court has changed and, if so, how?

The court is changing now after having been stable for many years. Within the last year, Judge Wolf, Judge Tauro, and I have gone senior; and before us, Judge Ponsor took senior status. So we've had four vacancies – and the new judges are younger, and come from a range of backgrounds. They already are making their own mark. For example, Denise Casper arranged a session for the existing judges to answer questions for the new judges – something we had never done before.

Also, I was the only woman on the court and now there are four. I never felt discriminated against by my colleagues, and I feel that all my colleagues have always respected my views. But having more women colleagues is certainly a wonderful change.

You've taken senior status around the same time as Judge Tauro, and the two of you shared a lobby back in the old courthouse in Post Office Square. I remember that you always chatted with each other as you went on or off the bench. It all felt very cozy and collegial. What are some of your recollections of Judge Tauro?

We had a very good relationship and I greatly admired how he ran his courtroom, and his smarts. When I first arrived at the court, Joe wanted to be helpful, which took the form of offering me advice. He was very experienced and I was very inexperienced, and so I wasn't in the least offended . . . and there were times I actually took his advice [said with a smile].

I also admired Joe's superb political instincts, by which I mean his ability to figure out how to solve problems involving personality issues as they arose in the courtroom. That skill can also be seen in what Joe did for our court. Joe is by nature a leader, and he made the court what it is today. When he became Chief, he was inclusive and really brought the court together. He strengthened the judges' monthly meetings and instituted the liaison judge system in which each of us is assigned a particular area

of responsibility. I, for example, am the court reporter liaison judge; other judges are responsible for the Bankruptcy Court, education, the jury, the U.S. Attorney's Office, the Rules, the Criminal Justice Act, and immigration and naturalization. Joe started this system, and it has been incredibly effective for the organization.

When you have a court where judges have individual caseloads and operate as chiefs of their own domain, it is important for each judge to recognize that the court is an institution and cannot work as a bunch of individual chiefs. It is a big task to bring the court together. Not every court succeeds, and some are riven with disagreement. My court does not have those problems — the discussions during our meetings may at times be difficult, but they are never contentious and decisions are often reached by consensus. Joe laid the foundation for this culture. He was the person who arranged, for example, for us all to go each other's swearings-in and other ceremonies. And subsequent chiefs have followed his lead. He did the institution a huge favor, and I am most grateful to him for that.

What do you see as the big challenges for your new colleagues?

Many of the new judges need to learn about sentencing — not only about the Guidelines, but also about themselves and how to view sentencing. It takes time, and it takes experience. They need to learn how to run a courtroom — gently but firmly, with respect for everyone in the courtroom. They need to learn to be concise, and how to hold their own counsel.

What advice would you give a new judge?

None. To some extent, you just have to do it.

What advice would you give a young lawyer?

Guard your reputation. Once gone, it is very hard to resurrect it. Lawyers may not understand that judges remember the lawyers who appear before them, and that we talk about them among ourselves.

What are some of your most memorable moments on the bench?

I remember a moment in *Polaroid v. Kodak*, when Edwin Land [co-founder of Polaroid] was on the stand. The lawyer asked him a question involving the science at issue in the case. Land leaned back and said, "*That's* not the right question. *This* is the question you want to ask." His response was very revealing to me because I had been very concerned about getting the science right. And then I realized that I did not need to be a scientist or necessarily to get the science right. Instead, I needed only to accept the science as it was presented by the lawyers. My job was simply to decide the case, not the science. And this understanding has made patent cases easier for me ever since.

I also remember a pair of cases that demonstrated to me the limits of a judge's power. The first case involved a school bus driver strike in Boston. On a Friday afternoon (which, for some reason, is the time requests for injunctions are often filed), I issued an injunction ordering the drivers to return to work. They

refused to obey. On Monday morning, the city sought to have the order enforced, and I held the drivers in contempt. Ironically, the marshals brought a bunch of school buses to the courthouse in order to take the striking drivers to jail. As they were taken off, other drivers were protesting outside the courthouse. It was mess, and I spent the next week desperately trying to get the case back on track and to help reach a settlement. I came to realize that, although I had the power to issue the injunction, I should not have done so.

A few months later, there was a wildcat strike against Greyhound and the drivers were throwing stones at the buses. The company sought an injunction. Instead of issuing one, I spoke directly to the union representatives who were in the courtroom. I told them that, although I knew it would be difficult, they needed to keep their members from destroying property and that they needed to talk to Greyhound management. I also told them to call me if they had any problems. Greyhound management was furious that I didn't issue an injunction. But I was correct; a week later the case settled.

These two cases taught me an important lesson about the limits of a judge's power.

Would you encourage someone today to become a judge?

Yes. Why? Because I think, as Judge Wyzanski said, being a United States District Judge is the best job in the law. It is infinitely variable and you learn constantly. Where else are you taught the provenance of a painting in the Museum of Fine Arts, how the internet runs, how cameras are made, how a small city runs itself, or how a river is affected by something that happens upstream? It is remarkable how much a judge can learn — and it is all for free.

Judge Rya W. Zobel was appointed to the United States District Court for the District Court of Massachusetts by President Carter in 1979. She served as the Director of the Federal Judicial Center from 1995 – 1999.

Judge Gabrielle R. Wolohojian is an Associate Justice of the Massachusetts Appeals Court. After graduation from law school, she served as a law clerk to Judge Rya Zobel of the United States District Court for the District of Massachusetts.

Rethinking Law School Admissions Through Accreditation: A Simple Proposal

by Richard J. Yurko

Point



There is a glut of new law school graduates. One former law school dean has estimated that there is a need for approximately 25,000 new lawyers each year. Tamanaha, *Failing Law Schools* p.139 (2012). On average, law schools have been graduating almost twice as many lawyers each year. *Id.* This situation has persisted since 2009. One result of this glut is that many well-educated men and women pay (or *borrow* and pay) up to \$200,000 for a law school degree, but then are unable to find employment as lawyers. There is a market disconnect, an inefficiency of staggering proportions. *Id.*

Some believe that the problem is just a temporary dislocation in the market which will, in due course, right itself. I disagree. Yes, there *has* been some improvement since 2009. It is true that the **entering classes at law schools today are 20-25% smaller** in the aggregate than they were at the peak, in Fall 2010. Although that shrinkage is good, it is still not enough and it took too long for this contraction to occur. In the meantime, thousands upon thousands of law school graduates – perhaps one hundred thousand graduates in round numbers – found themselves up to \$200,000 poorer, often with long-lasting non-dischargeable debt, with no real prospect for legal employment. I believe that it does not have to be so. A non-market solution should be found.

An Historical Perspective

In the nineteenth century, most lawyers were trained not in law schools but rather in clerkships with practicing lawyers. Harné, *Legal Education in the United States*, p.27 (1953). As of 1900, the majority of American lawyers had not attended law school or, for that matter, college. Moline, “Early America Legal Education,” 42 *Washburne L.J.* 775, 801 (2003). Law was a profession that one joined by apprenticeship.

Although I am not recommending we return to this approach, it did have several advantages. First, young soon-to-be lawyers learned by doing; they got practical experience. Second, there was an effective cap on the number of lawyers who could come into the profession at any one time because taking on an apprentice was a time-consuming task usually involving intensive one-to-one teaching. By contrast, law schools permitted one professor to instruct scores or hundreds of students at a time.

By the start of the twentieth century, law schools had supplanted clerking and apprenticeship as the dominant means of legal training. Harne, p.82. And, because of the potential high student-to-faculty ratio, law schools became substantial revenue centers for universities. E.g. Harper, "Law School as Profit Centers," *The American Lawyer Daily* (Sept. 7, 2012). It was in the institution's short-term financial interest to admit as many "qualified" individuals as its classrooms could hold, irrespective of whether they ever obtained work as a lawyer. Indeed, it was in the institution's financial interest to build more classrooms.

In the mid-20th century, more than a few students went to law school with no interest in becoming lawyers, but because they saw a J.D. degree as a credential for advancement in business, politics, or government. However, as business schools (which were only two years in length) refined their curricula and became more widely respected, the M.B.A. degree began to fulfill this role. Additionally, specialized schools of politics, policy and government sprang up. In the last several decades, my impression is that law schools were operated to turn out lawyers-to-be, and they can no longer expect to have many graduates find comparable employment in business and politics.

2009 Recession and the Shift

Law schools, however, continued to grow as long as large private law firms ("Big Law") looked to law schools to fill their growing cadres of first year associates, typically hiring law students for the summer between their second and third years of study, and then making offers of post-law school employment to those who performed well, while taking into account the projected hiring needs of the firm a year hence.

Such law firms regularly rode the boom and bust cycle of other parts of our economy. Woe be the law student who graduated during a brief one or two year recession. There was always going to be a new crop of fresh law school graduates to choose from. Thus, when a recession was over, law firms rarely went back to look at applicants who happened to graduate during that recession unless an applicant had done something in the interim (like clerking for a judge or working for a highly touted government agency) that burnished his or her credentials and kept her "fresh" for her re-entry into the private job market. This was the nominally self-correcting market cycle that only left behind portions of a year or two of law school graduates who had the misfortune to finish their studies in a brief recession.

In contrast with the small cycles of the past, the collapse of the legal employment market in 2009 was deep, long-lasting, and truly dramatic. See Tamanaha. In addition, the 2009 recession occurred at a time

of technological change that is in the process of shrinking the domestic legal employment market. Just as one example, documents at one time reviewed by law firm associates for relevance and privilege are now likely to be stored electronically and capable of being sent by a mouse click halfway around the world to be reviewed for relevance and privilege by persons trained to do so in a foreign land at a fraction of the domestic cost.

One can debate the pluses and minuses of this shift, but the shrinking job market for law school graduates is hard to miss. Tamanaha, p.139 (45,000 graduates annually chasing an estimated 25,000 openings). We can also debate whether law schools were slow in coming to the realization that the marketplace for their graduates had fundamentally contracted, but at this time there is little doubt that it has. Chances are that, this summer, an embarrassing number of newly-graduated law students simply did not find jobs.

A Simple Proposal

Law schools are not to blame, neither individually nor in the aggregate. No one law school can solve the problem. But law schools are an essential place to focus on the solution.

So, how could this have been prevented? Better, how can it be prevented from happening again and again in the future? Simple. Make real employment rates a key component of law school accreditation and, in addition, cap incoming classes for any law school where some percentage (say 85%) of its graduates have not procured real legal employment within six months of graduation.

Law school accreditation is generally run by the American Bar Association. This has not been without controversy. In fact, the ABA's accreditation process was at one point the target of an antitrust suit filed by the Department of Justice. E.g., Tamanaha, pp.11-19. Nevertheless, currently the accreditation process requires law schools to report on some metric the percentage of their graduates who are employed in legal jobs. See Tamanaha pp. 71-74 (law schools use various questionable methods to inflate reported employment statistics). But it does not appear that the ABA actually uses those numbers for the purpose of accreditation.

Imagine, for a moment, that, in the accreditation process, a law school were told that it should not matriculate more students than 120% of the number of its students who got real, paid legal (i.e., J.D.-required) employment from the last class it graduated. (I suggest 120% because there will always be some folks who don't want a legal career, don't seek employment as a lawyer, or don't pass the bar exam.) If this were the standard, what might happen?

First, I suppose, each law school would spend still more money on its legal placement efforts than it does today. Probably not a bad thing.

Second, I predict, law schools would restructure their programs to include still more clerkships, internships, and other practical experiences, which often lead to jobs, rather than treat those experiences as a palliative for third-year blues. Probably, a good thing.

Third, law schools would downsize, even when their university's revenue center motive would counsel expansion, not to run afoul of an accreditation standard. Law schools might try to match the size of their classes to the actual demand for their graduates. Definitely, a great thing.

This potential accreditation standard does not mean that law schools would suddenly become less diverse. A reduction in size of the class does not mean a reduction in the percentage of women, students of color, LGBT students, or students from any socio-economic background. This potential accreditation standard also does not mean that there is no role for private and public employers in addressing the issue, but it may give the law schools themselves the incentive to bring together those disparate employers to explore changes to how law students and recent graduates learn practical skills and find employment.

Something has to change. My suggestion is that the accreditation process is where that change should begin. And if the ABA is unwilling or unable to address the situation, then state Supreme Courts, which set the standards for admission to the bar, should be the catalysts for such change.

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A Modest Response to a Simple Proposal

by Dean Camille A. Nelson

Counterpoint



In his essay, *Rethinking Law School Admissions Through Accreditation: A Simple Proposal*, Attorney Yurko presents some interesting ideas. The upshot is a suggestion for greater regulation of the market in legal education, due to a market failure that has resulted in significant student debt load, and an assumed inoculation of law schools from the consequences of lower placement rates.

But legal education does not exist in a vacuum. There has been a decline in the “market for lawyers” post-2008, as the US economy shifted from a period of relative expansion to one of economic stagnation, and ultimately financial crisis.

As the demand for traditional professional legal services decreases, there is an inevitable and predictable impact upon legal education as well. Given this interconnectivity, it is folly to assume that one can be fixed (i.e. law schools), without a corollary remedial assessment of the other (the legal profession). Moreover, law schools find themselves in the mix in other complex and, often complicated, systems beyond the legal profession. These other “partners in legal education” also often have strong views about the way forward in terms of the education of future lawyers.

It is increasingly important for law schools to be in dialogue with the practicing bar and bench, just as it is important to recognize that law schools must be responsive to the larger university systems of which they are often a part, the dictates of the Department of Education and accreditors, all while being vulnerable to *U.S. News and World Report* ratings. Law schools have complex governance structures, and it should not be forgotten that many of them also provide legal and community services in addition to graduate education.

Additionally, many schools have already done what Mr. Yurko suggests. They have “restructured their programs to include more clerkships, internships, and other practical experiences, which often lead to jobs.” Indeed the monumental work, *Educating Lawyers: Preparation for the Profession of Law*. (William

M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman. San Francisco: Jossey-Bass, 2007), also known as the Carnegie Report on Legal Education, produced seismic shifts in that direction. Importantly, however, law schools can seek to include all the clerkships, internships, externships, and experiential opportunities they want – and we do want – but we are only one piece of that puzzle. The bar and the bench are our obvious partners in this respect, and we rely on them.

The notion that increased accreditor regulation of law schools would mean “...that each law school would spend more money on its legal placement efforts than it does today” would likely elicit enthusiasm, but for the reality that the funds for investment in career placement services necessarily come from somewhere (especially if the number of matriculating students is summarily regulated by accreditors) and, as we know, increasing tuition should not be an option. So many law schools have quietly, or not so quietly, started shifted resources in more painful ways that have other impacts on the community, not the least of which is institutional morale, and the possibility of diminished student services in other areas. Thus, such allocations, investments, and shifts are not so easy after all — they have real-life consequences for our students, staff, administrators, and faculty.

For this reason, and others, I cannot embrace a suggestion that would turn over to the ABA the regulatory capacity to downsize law schools. I would rather that we leave the inevitable right-sizing of law schools to the market of consumers of our services, the potential students themselves, many of whom gauge value in ways not exclusively captured by aspirations of big firm or traditional practice possibilities, and for whom other legal, business, public service, and justice concerns might also influence their desire to study law. Indeed, the decline in applications to law schools is appropriately making those of us who are willing and able to be more responsive and accountable to student and graduate needs better situate ourselves for the shifting demand for legal education, and transformed legal services, both in terms of substance and delivery.

There is no doubt that “traditional” lawyering has been recalibrated, given the intersecting forces of globalization, technology, and rapid innovation in business and legal practices. Perhaps this is as it should be as, heretofore, legal practice has been, by definition, a backward looking profession, as demanded by our system of precedent, as opposed to necessarily future-oriented. I think that Attorney Yurko and I, therefore, agree that the crucial issues for legal education and practice relate to where we go from here. Where we may part company is the appropriate course of action.

While it is the case that many law schools have been strategically shrinking the size of their entering classes, to empower accreditors to mandate such reductions ignores some key variables. For instance, many law schools are not in a position to unilaterally shrink their class sizes – they are part of university systems that are interconnected in complex ways beyond the reach and purview of the ABA. Additionally, if taken to its logical conclusion, some law schools would be forced to close due to low placement rates. One can make an argument that some law school closures may be necessary. But *which* schools close and *which* schools remain is embedded with a hierarchical underpinning that furthers elitism within

the legal profession. As the top schools, meaning elite schools, generally have the best employment placement rates, they would ostensibly be immune from regulatory accreditor reductions. However, those schools which face challenges in this regard, disparately found at the lower end of the *U.S. News and World Report* rankings, would be reduced in size by the ABA under Attorney Yurko's model.

Were this to happen, the push to open up the legal profession to people from all walks of life would be curtailed. The legal profession would witness a significant reshaping of its demographics and its ability to provide broad-based and meaningful access to legal services would also be stymied. In this mix, we might wish to analogize between legal education and medical education and consider whether we ought to be thinking more seriously about residency programs, apprenticeships, pro bono legal services, grassroots legal enterprises, and innovative uses of technology, all towards the end of furthering experiential, entrepreneurial, and employment opportunities for law school graduates, whilst simultaneously making affordable legal services a real possibility.

That this has not happened in the last couple of decades when we have had a "surplus" of attorneys is disturbing. For their part, law schools have been investing in clinical, pro bono, and experiential programs designed to train and supervise students while bringing legal services to domestic and international communities. I think there are further opportunities for bridging this justice gap if the practicing bar, bench, tech-entrepreneurs and law schools could come together in meaningful partnerships to deliberate, and ultimately problem-solve, around this serious societal, and supply-line economic issue.

So we have to figure out how to preserve access to the legal profession for those individuals desirous of becoming lawyers, responsibly manage the costs associated with law school, provide potential applicants with information about the quantifiable costs and opportunity costs of attending law school, and work with the bar and bench to ensure that there are meaningful opportunities for graduates to enter the profession as practitioners, including filling the justice gap. There is much room for dialogue with the bar, the judiciary, the ABA, the AALS, bar affinity associations, law school deans, university provosts and presidents, students, and graduates in terms of these myriad concerns.

At the end of the day, I would urge an expanded appreciation for the work that lawyers have done, continue to do, and will do in the future. We are not, and have never been, a static profession. Instead, perhaps betraying my Canadian roots, I prefer to think of us as having a "Living Tree" approach to our profession. By that I mean that as a community we are not frozen, but rather we are progressively building upon what is best and strongest about our profession, whilst simultaneously advancing to meet the needs of an ever changing and diverse society, with evolving legal delivery demands and substantive requirements.

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Parole: Evidence of Rehabilitation and Means to Rehabilitate

by Crystal L. Lyons

Practice Tips



In *Diatchenko v. District Attorney for the Suffolk District & Others*, 466 Mass. 655 (2013), the Supreme Judicial Court invalidated the statutory provisions mandating life without the possibility of parole for juveniles convicted of first degree murder. The *Diatchenko* Court adopted the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012), which required consideration of a juvenile's "lessened culpability" and "greater capacity for change." As a result of *Diatchenko*, sixty-one Massachusetts inmates became eligible for parole and entitled to parole hearings where they will be afforded "a meaningful opportunity to obtain release," *Diatchenko*, 466 Mass. at 674, before the completion of their criminal sentence. This article provides guidance to practitioners appearing before the Parole Board for these and other life sentence hearings.

However laudable *Diatchenko's* reform, it has collided with a countervailing pressure to **tighten the standards for granting parole following the high-profile murder of a police officer committed by a parolee in 2010**, and the subsequent public outcry which led to the resignation of five Parole Board members who had voted for his release. According to several studies, including by the **Boston Bar Association** and the **Parole Board**, once the data are corrected for high-profile offenses, recidivism rates are actually higher for persons who are released after serving a complete sentence than for those who are paroled. Proponents of parole attribute this difference to the supervision, programs, and assistance parolees receive after release to facilitate reintegration into society.

Reconciliation of the two viewpoints lies in the application of one of the primary goals of sentencing: rehabilitation. *Commonwealth v. Goodwin*, 414 Mass. 88 (1993). Parole offers a "carrot and stick" approach to achieving rehabilitation. The carrot, because parole can be granted at least in part based on an offender's showing of rehabilitation, and the stick, because the Parole Board can place conditions on receiving parole, or rescind or revoke parole, based on failure to engage in programs, counseling, substance abuse treatment and a wide variety of other conditions. M.G.L. c. 127, § 5; 120 C.M.R. §

300.07. Importantly, offenders are not required to participate in treatment or educational opportunities offered during their incarceration, yet offenders often undertake such steps voluntarily with the goal of demonstrating rehabilitation and receiving parole. Similarly, conditions of parole and the creation of a release plan cannot be mandated except for those offenders subject to parole. Parole can thus be accurately described as both evidence of rehabilitation and a means of effecting the sentencing goal of rehabilitation. By extension, the best advice to attorneys representing either parolees or the Commonwealth in life sentence parole hearings is to focus on presenting a cohesive narrative that focuses on rehabilitation. The facts of the offense and an individual's criminal history have already been established, but an attorney can situate those facts within a narrative arc of the offender's development and future goals.

The Board must consider two factors in each parole decision: (1) the reasonable probability that the individual would not violate the law if released, and (2) the compatibility of release on parole with the welfare of society. Parole may not be granted "merely as a reward for good institutional conduct." M.G.L. c. 127, § 130; 120 C.M.R. § 300.04. The Parole Board may consider a variety of evidence in its decision, including: prior criminal record; pending cases; the nature and circumstances of the offense; recommendations from parole staff; statements from victims or their family members; physical or psychological examinations; information the inmate provides, including letters of support and a parole release plan; information the District Attorney's Office provides; and institutional behavior. 120 C.M.R. § 300.05

A typical hearing begins with an opening statement by the offender or his counsel, followed by questioning of the offender by each Board member. The offender may present testimony from supporters, including family members, employers, or experts (such as mental health experts), each of whom may be questioned by the Board. After the offender's presentation, those opposing parole, including the victim or family members of the victim, may speak or present counter evidence. The offender's counsel may present closing arguments, and the Commonwealth may also present a closing argument or position statement.

The Board's published **Guidelines for Life Sentence Decisions** should serve as the framework for constructing argument and applying the evidence listed above. The Guidelines specify three questions to be addressed by the Board at each hearing:

- 1) Has the inmate's period of incarceration been of sufficient length to adequately protect the public, punish him for his conduct, deter others, and allow for rehabilitation?
- 2) Is the inmate rehabilitated?
- 3) Are there reasons to conclude that the inmate will live outside prison as a sober, law-abiding, employed, productive person who is making positive contributions to his family and his community?

The key issues underlying each question are fully outlined in the Guidelines and fall into three main areas of inquiry: the offender's past, his institutional behavior, and his action plan upon release.

Offender's Past

In addition to understanding the facts and circumstances of the crime, the Board will ask if the individual has taken responsibility for and appreciates his role in the crime, including the impact it had on any victims. Has the offender's story changed over time and is the offender only acknowledging his behavior for the purpose of gaining parole? In that regard, assess if post-trial litigation can fit into a narrative of eschewing responsibility, or instead protecting a valuable substantive or procedural right. What is the criminal history beyond the offense of incarceration and does it reveal a pattern of violent behavior or crimes committed against particularly vulnerable victims (such as children or the elderly)? Has the offender had past defaults, bail revocations, or other factors which may indicate difficulty complying with conditions of parole?

An offender's personal circumstances are also important, but can be a double-edged sword: they can serve as mitigating or aggravating factors depending on how they have been addressed. Does the offender recognize the role those circumstances may have played in the offense or how they may impact his life upon parole? Has he specifically tailored his rehabilitative efforts to areas of substance abuse, childhood trauma, or other relevant factors? Similarly, if the offender has struggled with mental health issues, have those issues led to previous commitments, and have they been adequately treated?

Institutional Behavior

The Board considers two main areas of institutional behavior: first, the offender's disciplinary record; and, second, how he has used his time in educational or other institutional activities. What is the total number of infractions received and what is the trend? Did infractions involve violence or contraband? Was the individual the instigator? What was the reason for any transfers within the Department of Correction? Did the offender use his time to enroll, regularly attend, and complete programs, or has he attended only sporadically or claimed he was unable to attend? How has he shown personal reflection and dedication to self-improvement? Has he achieved educational or vocational goals? Has he taken leadership positions or consistently worked during his incarceration? Has he been committed to any religion, vocation, organization, or family during his incarceration that will continue following his release? What efforts has he made to address the Board's concerns since any previous hearing and denial?

Release Plan

Finally, the Board considers the offender's plan for life after release: does the offender have an adequate support network, including a place to live and work, treatment for ongoing issues, and persons who are committed to his success? Be ready to show that these issues have been well thought out and not hastily thrown together. Has the defendant been pre-approved for housing or programs? Does he have an

employer willing to offer a job? Are there family members or religious supporters aware of the transitional difficulties he will face and willing and able to shoulder the potential emotional and financial impact? Any testimony should focus on these issues and evidence of rehabilitation. Avoid discussion about personal hardship due to incarceration or any perceived harm to the offender because of the conviction.

There are steps counsel may take to try to assuage any Board concerns arising during the hearing. With permission, supplement the record following the hearing. This can be particularly useful to address questions regarding the parole release plan and provide conditional acceptance to programs, housing, or employment opportunities. The Board may be inclined to grant parole with pre-conditions and transition periods rather than deny parole with recommended steps an inmate take before his next review hearing. After listening carefully to the Board's questions and testimony provided, use closing argument to address any trouble areas or discrepancies between what emerged at the hearing with the written materials provided to the Board.

Conclusion

Hearings mandated by *Diatchenko* began in May 2014 and have so far resulted in the parole of the first three juvenile offenders considered. Notwithstanding these recent decisions, the seriousness of life sentence offenses and the Board's stated goal of **achieving fairness and consistency across similarly situated offenders** suggests that parole will not be granted often on a first review, even where an offender has taken responsibility for his actions and demonstrated significant rehabilitation. The three juvenile offenders had served **twenty, eighteen, and twenty-two years**, respectively, where they are now eligible for parole after serving fifteen years. The Board also required each of the paroled juvenile offenders to complete additional programs prior to release after one year in a lower security facility.

Overall, **Parole Board statistics** show that parole was granted to 21% of offenders serving life sentences (including for crimes other than first degree murder) who were over 18 years old on the date of offense, compared with 53% of those who were under 18 years old on the date of the offense. This suggests that the Board is seriously weighing the role of youth in both the commission of the offense and rehabilitation, as required by the Supreme Judicial Court.

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Risky Policies: How Effective Are Restrictions on Sex Offenders in Reducing Reoffending?

by Eric Tennen

Legal Analysis



Sex offenders are one of the most reviled groups of felons. In the past few decades, there has been a dramatic increase in laws and regulations governing virtually every facet of their lives. The policy decisions about how to deal with sex offenders flow largely in one direction: restrict them as much as possible. This one-sided approach has created a complex web of restrictions that ultimately causes more harm than good.

Differentiating sex offenses from other types of offenses is perfectly rational. Further, government should try to address those harms by creating policies that will reduce offenses. In light of what we know today about sex offenses and sex offenders, it is possible to reduce the rate of recidivism, but the policies currently in place are not the answer. They are reactive, based often on outdated misconceptions, and far too broad.

Evidence-based practices have become common in almost all areas of public policy, because it is now well established that conventional wisdom is often inaccurate. But though there is an abundance of empirical data about sex offenders and reoffending, our policies are created without reference to the data. Rather, our policies are based on anecdotal information and inaccurate beliefs about sex offenders and reoffending. As a result, current policies do not address the problems they are seeking to correct. In most instances, the policies are ineffective; in many instances, they also create conditions that may *increase* the risk of reoffense.

Sex Offender Registry

Perhaps the most common restriction placed on sex offenders is the obligation to register. Every state has a registry that requires sex offenders to register with some frequency and dictates what information will be made available to the public. Though there are many other restrictions placed on sex offenders, the registry provides a good lens through which to evaluate the effectiveness of these policies.

In 1999, the Massachusetts Legislature created the current version of the Sex Offender Registry Board ["Board"]. A sex offender is defined as anyone convicted of an enumerated sex offense. G. L. c. 6 § 178C. The Board decides whether someone qualifies as a "sex offender" and then classifies them. The Board also disseminates information to the public about offenders. See G. L. c. 6 §§ 178C-178Q; 803 C.M.R. 1.00.

There are four possible outcomes to the classification process. The Board may determine that an offender poses no risk to reoffend, in which event the offender is not required to register. If the Board determines that an offender poses some risk of reoffense, he will be classified as either a Level 1, 2, or 3 offender. Level 1, 2 and 3 offenders are considered, respectively, to have a "low," "medium," and "high" risk of re-offense, and to pose an increasing danger to the public. G. L. c. 6 § 178K (2)(a)-(c). The Board is required by statute to promulgate regulations that govern how they conduct these evaluations; the regulations must weigh, but are not limited to, certain factors enumerated by the Legislature. G. L. c. 6 § 178K.

All sex offenders, regardless of levels, are regularly^[1] required to update their residential address, any secondary address, and employment or attendance at a post-secondary institution of higher learning. Level 1 offenders are required to register by mail. Their information is *not* available to the public in any form. Level 2 and 3 offenders must register in person, at a police station. Information concerning Level 2 and 3 offenders *is* available to the public and is posted on the internet.^[2] Additionally, Level 3 offenders are subject to "active" dissemination, which involves a "community notification plan" where police departments notify organizations and individuals in the community which are likely to encounter such a sex offender. G. L. c. 6, § 178K(2)(c). In addition, "[n]eighboring police districts [are required to] share sex offender registration information of level [three] offenders and may inform the residents of their municipality of a sex offender they are likely to encounter who resides in an adjacent city or town." *Id.* Regardless of one's level, all sex offenders are subject to criminal penalties for failing to register, which can encompass anything from registering late or failing to update one's information. G. L. c. 6 § 178H.

Most offenders must register for life. G. L. c. 6 § 178G. However, an offender may move to lower his classification or be relieved of his obligation altogether. 803 CMR 1.37A-1.37B. On the other hand, the Board may move to increase an offender's level any time after classification upon receiving new information indicating an increased risk to reoffend. 803 CMR 1.37C(10).

Additionally, an offender's level may affect other aspects of his life. A growing number of residency restrictions prohibit Level 2 and 3 offenders from living within a certain distance from parks, schools, or other places. See e.g. General Ordinances of the Town of Barnstable, Chapter 147, Article IV, § 147-12 (C); Ayer Town By-Law, Article XLIX. A person classified as a Level 2 or 3 offender can never seal his criminal record. G. L. c. 276 § 100A(6). No Level 3 offender may live in a nursing home, G.L. c 6 § 178K(e), though the Supreme Judicial Court has said this provision is facially unconstitutional in certain, if

not most, situations, *Doe v. Police Cmmr. of Boston*, 460 Mass. 342 (2011). No sex offender, regardless of level, may operate an ice-cream truck. G.L. c. 265 § 48. Any sex offender subject to *lifetime* registration is prohibited from receiving any federally assisted housing. 42 U.S.C. § 13663.

Do All Convicted Sex Offenders Pose a High Risk to Reoffend?

Registration and its collateral effects were designed to address a serious concern: the risk of sex offender recidivism. But since creation of the registry, we know more about sex offenders than when the law went into effect, and we also know more about the effectiveness of the registry in preventing reoffense.

Public perception is that sex offenders reoffend at high rates. See e.g. *McKune v. Lile*, 536 U.S. 24, 32-33 (2002); *Commonwealth v. Cory*, 454 Mass 559, 574 (2009). In reality, the most current research indicates that sex offenders, as a group, reoffend less than other criminal offenders as confirmed by federal, state, and academic studies.^[3] And because of the myth that sex offenders reoffend at very high rates, many people believe that most sex offenses are committed by repeat offenders. In fact, up to 95% of all sexual offenses are committed by *first time* offenders.^[4] It is extremely difficult, if not impossible, to prevent first time offenders from offending; however, our current regulatory framework is directed exclusively at prior offenders. Therefore, our policies can only be directed towards trying to prevent the relatively small proportion of all offenses committed by prior offenders. While that is a worthy goal, it must be considered in context.

***Does Registration Work?*^[5]**

Study after study shows that registries do not prevent reoffending.^[6] In fact, registration may actually *increase* the risk to reoffend in unintended ways. Persons with stable, supportive lives, with steady employment and housing, reoffend at lower rates.^[7] On the other hand, those who, because of registration, are unemployed, homeless, and generally unstable, suffer psychosocial stressors that may increase their risk to reoffend. *Id.* These policies also put significant stress on offenders' families, who in turn may abandon the offender; this aggravates an offender's stress and also isolates him away from persons who might otherwise provide a watchful eye. *Id.*

The Registry is particularly troubling in its application to juveniles. Juvenile sex offenders are less likely to reoffend than just about any other group of sex offenders.^[8] The juvenile justice system is designed to give all juveniles a second chance: proceedings are closed to the public, records are generally unavailable, and the goal of the juvenile justice system is rehabilitation rather than punishment. However, the offender registry makes public the juvenile's status as a sex offender and the crimes for which he was convicted. For a juvenile who is seeking to put his past behind him, registration and dissemination is devastating. Every other juvenile, no matter the conviction, has some assurance that if he avoids further trouble, his juvenile indiscretions will not haunt him. The same is not true for juvenile sex offenders. And,

of course, registration destabilizes a juvenile's support systems by, among other things, "adding to the [juvenile's] family's economic challenges, difficulty in securing or maintaining an approved residence, and straining or severing family relationships."^[9]

Characteristics Associated with Risk

The reason registries do not prevent reoffense is that they are predicated on outdated and inaccurate assumptions. Most sex offenses are committed by persons known to the victim (either a relative or acquaintance).^[10] Yet our policies are largely driven by the idea that sex offenders go after strangers. Indeed, offending against strangers is correlated with a higher likelihood of reoffending. But offenses against strangers are the exception.

Research has identified other specific factors that are correlated with a higher risk to reoffend. Having a legitimate sexual disorder, such as pedophilia, is also correlated with a higher risk to reoffend.^[11] In certain situations, having a male victim (typically a male child victim) is correlated with increased risk. So is having intimacy deficits—someone who has a hard time establishing lasting relationships.

On the other hand, certain groups of offenders pose much lower risks to reoffend than other sex offenders, regardless of the details of their offenses: people over 60, people whose offense(s) occurred when they were juveniles (under 18), females, people who have been in the community, without reoffending, for five years or more, and people convicted of possessing child pornography.

Then there are characteristics which are not correlated with an increased or decreased risk to reoffend. Thus, for purposes of whether someone is likely to reoffend, it is irrelevant whether they completed sex offender treatment, whether they deny their offenses, whether they use drugs or alcohol, or whether they were abused as a child.^[12]

Lastly, if an offender does reoffend, it is often in a manner similar to his first offense. It is very rare that a sex offender reoffends against different types of victims. For example, if a person offends against *pre*-pubescent children, it is likely that any reoffense by that person will be against a *pre*-pubescent child. In contrast, if a person assaults an adult, it is likely that any reoffense by that person will be against another adult.

While registration attempts to take some of these factors into account, it does not take them all into account. And when the Legislature imposes collateral restrictions on all offenders who are required to register, e.g. residency restrictions or exclusion from nursing homes, it treats all offenders the same, despite their varying risks.

Conclusion

There are many restrictions that, if properly targeted, could help reduce the rate of sex offender recidivism. Unfortunately, most current restrictions sweep too broadly. Registration is but one example; there are more (e.g. residency restrictions^[13] or GPS monitoring for *all* sex offenders on probation, regardless of risk to reoffend). If public policy were based on the best available, current evidence about sex offenders, and less on the public's perception of them, we could monitor, more efficiently, the true high risk offenders. But that requires acceptance that sex offenders are a heterogeneous population and not all of them pose a grave risk to the public. Only then could our policies better reflect the true risk that only a small percentage of convicted sex offenders pose to the public.

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[1] Sex offenders must register annually unless they are homeless, wherein they must register every 30 days. G.L. c. 6 § 178F ½.

[2] Prior to July 12, 2013, only Level 3 offenders' information was available on the internet. The law was amended to include Level 2 offenders. However, the Supreme Judicial Court ruled that only Level 2 offenders classified *after* July 12, 2013 can be subjected to on-line dissemination. Thus, there are currently two classes of Level 2 offenders: those whose information is on-line and those whose information is not. See *generally Moe v. SORB*, 467 Mass. 598 (2014). For those whose information is not on-line, their information may still be disclosed if a member of the public actively requests it. *Id.* at 601-602.

[3] See e.g. U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (2002) (after three years, 5.3% of sex offenders were rearrested for a new sex crime and 3.5% were convicted of a new sex crime); *Comprehensive Recidivism Study*, Massachusetts Sentencing Commission, June 1, 2002, pg. 38 ("Of the major offense categories, recidivism rates were lowest for sex offenders (20.8%) and highest for property offenders (56.5%)"); Hanson, K.R.; Bussière, M.T., *Predicting relapse: A meta-analysis of sexual offender recidivism studies*, Journal of Consulting and Clinical Psychology, Vol 66(2), Apr 348-362,(1998)(13.4% sexual recidivism for all offenders in meta-analysis of 61 studies and 23,400 offenders); Hanson, K.R.; Morton-Bourgon, K., *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, Journal of Consulting and Clinical Psychology, Vol 73(6), 1154-1163 (Dec 2005)(13.7% sexual recidivism in meta-analysis of 95 studies with over 31,000 sexual offenders over five year follow-up period

[4] **Fact Sheet: What you need to know about Sex Offenders**, Center for Sex Offender Management, December 2008 (estimating about 12-24% of all offenses are repeat offenders); **A Better Path to Community Safety**, California Sex Offender Management Board, available at (estimating about 95% of all offenses are first time offenders)

[5] For links to various articles on this subject, go to <http://www.usafair.org/registry_effectiveness >

[6] Prescott, JJ and Rockoff, J., *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, (2011); Tabachnick, J and Klein, A., *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse*, (2011), pg 26.

[7] *A Reasoned Approach*, *supra*, note 6.

[8] *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.*, Human Rights Watch, (2013); Justice Policy Institute, *Registering Harm: How Sex Offender Registries Fail Youth Communities* (2008).

[9] *Irreparable Harm*, *supra* note 8.

[10] *What you need to know about Sex Offenders*, *supra*, note 4; *A Better Path to Community Safety*, *supra*, note 4.

[11] Not everyone who commits an offense against a pre-pubescent child can be considered a pedophile, and persons who commit an offense against *post*-pubescent children, *i.e.* teenagers, are likewise not pedophiles.

[12] See e.g. Hanson, K.R.; Bussière, M.T., *Predicting relapse: A meta-analysis of sexual offender recidivism studies*, *Journal of Consulting and Clinical Psychology*, Vol. 66(2), Apr 348-362 (1998); Hanson, K.R.; Morton-Bourgon, K., *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, *Journal of Consulting and Clinical Psychology*, Vol. 73(6), 1154-1163 (Dec 2005).

[13] Like registration, residency restrictions are not likely to reduce sexually reoffending, largely because they apply to all offenders, regardless of risk. See *Residential Proximity and Sex Offense Recidivism in Minnesota* (2007) <[http://www.csom.org/pubs/MN%20Residence%20Restrictions 04-07SexOffenderReport-Proximity%20MN.pdf](http://www.csom.org/pubs/MN%20Residence%20Restrictions%2004-07SexOffenderReport-Proximity%20MN.pdf) >

The Buffer Zone: Where We've Been and Where We're Going

by Jonathan B. Miller

Case Focus



This past June, the U.S. Supreme Court struck down Massachusetts' buffer zone law in the case of *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). The law at issue created a 35-foot perimeter outside of the entrances and driveways to reproductive healthcare facilities, and was Massachusetts' third attempt at crafting an effective and constitutionally permissible regulatory regime for the space around those facilities. The *McCullen* decision prompted a fourth effort to create an enforcement scheme that strikes the right balance between ensuring reproductive freedom and guaranteeing First Amendment rights. On July 30, 2014, Governor Patrick signed into law the Safe Access Law which creates new protections for patients and clinic staff. This article offers a brief review of each chapter in the ongoing dialogue between law enforcement and the Legislature on the one side, and the U.S. Supreme Court on the other.

Chapter 1: Injunctions

In the 1990s, the Massachusetts Civil Rights Act ("MCRA"), M.G.L. ch. 12, §§ 11H & 11I, was the primary tool used by private parties and the Attorney General seeking injunctions against protesters interfering with patients outside reproductive healthcare clinics. The statute prohibits the use of threats, intimidation, and coercion to interfere, or attempt to interfere, with the exercise of secured rights. Despite the fact that the MCRA had been designed principally to combat bias-motivated conduct, the statute was successfully used to enjoin a variety of conduct occurring outside reproductive healthcare facilities — including lying down across the sidewalk, using bicycle locks to link protesters to one another or to buildings, and impersonating escorts. See, e.g., *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 631 N.E.2d 985 (Mass. 1994). In addition, violation of an MCRA order is a criminal offense (see M.G.L. c. 12, § 11J), and several people were successfully prosecuted under the statute despite First Amendment and other challenges to the law. See, e.g., *Commonwealth v. Fillos*, 649 N.E.2d 1085 (Mass.

1995); *Commonwealth v. Cotter*, 612 N.E.2d 1145 (Mass. 1993); *Commonwealth v. Brogan*, 612 N.E.2d 656 (Mass. 1993).

Similar efforts were undertaken in other parts of the country, and injunctions obtained against protesters in other jurisdictions went before the U.S. Supreme Court twice in the 1990s. Both times, the Supreme Court upheld, at least in part, the injunctions against First Amendment challenges. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court affirmed an injunction prohibiting members of Operation Rescue from going within 36 feet of public access points to a women's healthcare facility in Florida. Three years later, in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the Court affirmed a similar injunction while reversing a portion of the district court's order that had created "floating" buffer zones around patients and staff.

Chapter 2: Bubble Zone

Despite successful criminal and civil prosecutions under the MCRA, the statute had limited practical effect. Protesters subject to injunctions were readily replaced by others. Moreover, civil and criminal enforcement efforts under the MCRA required the dedication of significant resources from police, government attorneys, and private counsel for the healthcare facilities. A different approach, therefore, was needed. The framework for such an approach came from the Supreme Court's decision of *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld a Colorado law prohibiting individuals from approaching without consent another person who was within 100 feet of any healthcare facility. Notably, the Colorado statute applied to all healthcare facilities, not just reproductive healthcare clinics.

Modeled on the statute upheld in *Hill*, a law enacted by the Massachusetts Legislature in 2000 created an 18-foot zone outside of reproductive healthcare facilities entrances and driveways inside of which no person could without consent approach within six feet of another person or an occupied vehicle. Mass. Stat. 2000, ch. 217. The law was challenged on First Amendment grounds both facially and as applied, but was upheld by the First Circuit. As a practical matter, though, the law had only a minimal impact on preserving patient and staff access to reproductive healthcare facilities. Protesters routinely blocked the doorways and driveways because the law did not prohibit stationary protests. Current Boston Police Commissioner William Evans testified at a 2007 legislative hearing that it was "hard to determine" what constituted an "approach" under the law and that it required the police, essentially, to act as "basketball referees" to ascertain a violation. This made prosecution under the law nearly impossible.

Chapter 3: Fixed Zone

Due to the enforcement challenges and limited effect of the 2000 law, there was a renewed effort to revise the law in 2007. That resulted in the establishment of the 35-foot zone that was the subject of the *McCullen* litigation. The buffer zone prohibited entry to the area surrounding the entrances and

driveways of all reproductive healthcare facilities during business hours, except for (1) people entering and exiting the facility; (2) clinic employees or agents (meaning escorts) acting in the scope of their employment; (3) law enforcement, municipal, utility, and emergency workers acting within the scope of their employment; and (4) individuals passing through the zone.

The plaintiffs in *McCullen*, a group of individuals who protest regularly outside the Planned Parenthood facilities in Boston, Springfield, and Worcester, challenged the 2007 law on First Amendment grounds. In addition to arguing that the law was not appropriately tailored, the plaintiffs asserted both content- and viewpoint-based claims. They contended that because the law applied only to reproductive healthcare facilities, it was an impermissible content-based restriction on speech. They also argued, among other things, that the employee exemption mentioned above allowed for viewpoint discrimination because employees of the clinic were allowed to be inside of the zone (and, at least theoretically, engaged in speech), but protesters were not.

The plaintiffs prevailed on their argument that the law was overbroad, and the statute was struck down. In its decision, however, the Court squarely rejected their contention that the law was an impermissible content-based restriction on speech. The Court explained: “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.” 134 S. Ct. at 2531. Moreover, in quoting *Burson v. Freeman*, 504 U.S. 191 (1992), a case concerning 100-foot electioneering buffer zones outside of polling places, the Court indicated that it was appropriate for Massachusetts to focus its law on reproductive healthcare clinics (as opposed to all healthcare facilities or all buildings more generally) since “[t]he First Amendment does not require States to regulate for problems that do not exist.” 134 S. Ct. at 2532. The Court likewise rejected the viewpoint discrimination claim. Nevertheless, the Court concluded that the law went too far in restricting the plaintiffs’ ability to engage in conversation on a public sidewalk, and that there were less intrusive alternatives available.

Chapter 4: Safe Access Law

Less than three weeks after the *McCullen* decision was handed down, the Safe Access bill was introduced into the Massachusetts Senate by Senator Harriette Chandler. It was modeled largely on statutes and ordinances the Supreme Court cited as examples of less restrictive alternatives than the buffer zone. The Court had offered a road map, and the Legislature was intent on following it.

The Safe Access Law (codified primarily at M.G.L. ch. 266, § 120E½) contains a variety of provisions that respond to documented problems arising at the facilities. To address the problem of blocking entrances and driveways, the new law includes a withdrawal order. This provision allows the police to order any individual or group substantially impeding access to a facility to move at least 25 feet from the door or driveway for eight hours, or until the facility closes. (A violation of such an order is a criminal offense.) Other provisions, borrowed from the federal Freedom of Access to Clinic Entrances Act,

criminalize using force to injure or intimidate patients or staff. In addition, the Safe Access Law prohibits knowingly impeding access to an entrance or driveway and recklessly interfering with the operation of a motor vehicle that is nearing a facility. These provisions address, among other things, a history of slow-moving protesters effectively blocking driveway access and the throwing of literature directly at drivers whose car windows are open. The provisions of the new law are enforceable both civilly and criminally. The Safe Access Law also enhances remedies available under the MCRA so that the Attorney General may obtain damages, attorneys' fees, and, in some instances, civil penalties against individuals who interfere with the constitutionally protected rights of others.

Will this be the final chapter? It is too soon to tell. Hopefully, by following the road map offered by the Court, the right balance has been struck and the law will afford ample protection to patients and facility staff with minimal, if any, restriction on protected speech.

Jonathan B. Miller is Chief of the Civil Rights Division of the Massachusetts Attorney General's Office. This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.