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ARTICLES

Urban Educational Inequalities: Why the Growing Concern?

By Darryl Irizarry Jr. – July 2, 2015

Education is essential for personal growth and financial prosperity, but when analyzing the way education is administered in both the urban and suburban communities, a vast disparity becomes quite apparent. Visiting some inner-city schools, one can identify clear differences that inner-city students confront daily, like barred-up windows, metal detectors, and overcrowded classrooms. In this type of environment, one may ask: Are these students being prepared for college or the penitentiary? It wasn't until I began my work with the Boy Scouts of America in a suburb in Delaware County, Pennsylvania, that my eyes were opened to the lack of resources of inner-city youth. The suburban schools that I visited were physically well-maintained, the student-teacher ratio was 10:1 in every classroom, and I witnessed students at the age of seven interacting with the up-to-date technology.

The lack of resources in the inner city has also contributed to a higher dropout rate. The *New York Times* reported that "the average high school graduation rate in the nation's 50 largest cities was 53 percent, compared with 71 percent in the suburbs," an absolute growing concern. Apparently, this issue has been going on for decades. According to an article from 1968 entitled "Inequalities Between Suburban and Urban Schools" by Arthur Adkins of the University of Maryland, "[w]hile the educational needs in the city schools are greater . . . suburban schools ordinarily benefit more from state aid than urban schools."

Not only is there inequality when it comes to education, but economic empowerment is rarely spoken of in most inner-city schools. Financial literacy that would benefit youth into adulthood and improve the economy overall is not even thought of in the classroom. According to *Time* magazine, life skills are not being taught at these schools because "[o]nly one in five teachers feels qualified to lead a personal finance class, according to a University of Wisconsin study, and personal finance concepts are not part of standardized tests like the SAT or ACT" and therefore not a priority.

The Obama administration is aware of the growing concerns about higher education. One proposed solution is to make community colleges free, thereby attempting to give economically challenged students an equal playing field with those kids who can afford to pay for college. Inspired by the president's plan, Community College of Philadelphia has decided to move forward with its plan ensuring that all first-time high school grads receive this incentive with the "50th Anniversary Scholarship." Dr. Donald Generals, the college's president, said, "There are far too many students who, even with financial aid, are unable to meet the gap that exists between the financial aid they get and what final tuition would be." This year the college plans to give hundreds of students the opportunity to attain their higher education for free, providing the foundation needed before they head to their desired four-year institutions.

All students, no matter where they live or their household income, should be able to receive the same opportunities, resources, and attention needed to have a chance to prosper. The objective of the school system should not be to herd our children along and feed them information that will not directly benefit them in the future. The objective should not be for our children to be confined in environments where it is difficult to learn.

The objective is for our next generation of leaders to be equipped with life skills such as financial literacy so they are able to avoid the pitfalls that bring financial ruin to many before they even turn 18. The objective is for our youth to get educated in an environment that promotes education and not incarceration. Finally, the objective is to ensure that our youth grow up in a system that encourages them to seek higher education without the outrageous student loans that

leave many in debt for decades after they attain their degree. If we meet the above objectives, then we can contribute toward the upward mobility of this country.

Keywords: litigation, access to justice, community colleges, free tuition, student loans

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Karsjens v. Jesson: Challenging the Un-Civil Commitment of Civil Rights

By Eric S. Janus and Jon Brandt – July 2, 2015

The use of civil commitment of sexual offenders has a long, episodic, and controversial history. *Karsjens v. Jesson*, No. 0:11-cv-03659-DWF-JJK, a class action recently tried in the federal District of Minnesota, has the potential for significant developments in this complex, sensitive, and important area of law. In *Karsjens*, District Judge Donovan Frank denied most of a motion to dismiss, appointed a panel of independent experts, and heard a five-week trial. A decision is expected in June.

Background

Civil commitment is a long-established legal tool that employs deprivation of liberty to serve the parens patriae and police power. Sex offender civil commitment (SOCC) laws use it to combat recidivist sexual offenses. The key constitutional question is whether these laws are legitimate civil commitment or merely punishment masquerading as civil commitment.

This use of civil commitment began in the late 1930s through sexual psychopath laws. Enacted by about half the states, these laws were intended to address offenders "too sick" to deserve criminal punishment. The sexual psychopath laws were applied mainly to confine offenders whose actions were, at the time, considered unacceptable but not extremely dangerous. Many of those committed were men who engaged in consensual homosexual activity or child sexual molestation. *See* Neil Miller, *Sex-Crime Panic: A Journey to the Paranoid Heart of the 1950s* (Alyson Books 2009); Fredrick Weisman, *Titicut Follies*(documentary, 1967). Minnesota's law was challenged in 1939 on constitutional grounds. The law was upheld but only on a narrow construction, limiting its application to individuals whose predicted sexual dangerousness was "utterly" beyond their control. *State ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 287 N.W. 297, 300 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940). These early, first-generation laws gradually fell out of favor, and by the 1980s, many states had all but abandoned them.

Beginning in the early 1990s, a second generation of laws emerged, using civil commitment for individuals judged to represent a risk of future sexual harm. Minnesota was among the first states, along with Washington, to enact them (Minn. Stat. ch. 253D.01–253D.36), including the Minnesota Sex Offender Program (MSOP) covered by Chapter 253D; they were soon followed by several others. Unlike the first-generation laws, these laws were specifically aimed at continuing the confinement of sex offenders deemed "too dangerous" to release from prison upon completion of their sentences. Although these laws vary, those in effect in 20 states share a central characteristic: They are specifically designed to confineand treat offenders determined to have a mental abnormality and so be "likely" or "highly likely" to offend again.

The resurgence of these laws brought swift challenges, first in state courts and eventually in the United States Supreme Court. Three grounds were asserted to question their constitutionality: ex post facto, double jeopardy, and substantive due process. All three turned on the same basic question: Were the SOCC laws bona fide civil commitment laws or, rather, were they informed by an intent to punish? The initial challenges were rejected. Reflecting the reasoning of many state courts, the United States Supreme Court accepted the states' arguments that the laws' purpose was non-punitive and that they were bona fide civil commitment laws.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court noted that the "threshold matter" in determining the civil or criminal nature of commitment, hence its constitutional validity, was whether commitment focused on the retribution or deterrence elements of criminal law. *Id.* at 361–62. The Court made clear that the "punitive purpose" inquiry begins with the state's "disavow[al of] any punitive intent" but does not end there. *Id.* at 368.

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Id. at 368–69.

Punitive purpose is central to Justice Kennedy's concurrence in *Hendricks*. In a bona fide commitment scheme, the state's purpose may not be the "forbidden purpose" of punishment.*Id.* at 371 (Kennedy, J., concurring). "Confinement of such individuals is permitted . . . provided there is no object or purpose to punish." *Id.* at 372.

This was consistent with *Foucha v. Louisiana*, 504 U.S. 71 (1992), in which the defendant, charged with burglary and firearms offenses, was found not guilty by reason of insanity. The Court in *Foucha* had stated this stark syllogism: "As Foucha was not convicted, he may not be punished." *Id.* at 80.

The "forbidden purpose" test is a direct outgrowth of the state's eschewal of the strict protections of the criminal justice system for civil commitment. *Addington v. Texas*, 441 U.S. 418 (1979), in which the subject's mother sought his indefinite civil commitment for apparently non-sexual actions, is the prime example. There, the State of Texas sought to deprive people of their liberty without resort to the "beyond a reasonable doubt" standard of proof. The Supreme Court agreed, because "[i]n a civil commitment state power is not exercised in a punitive sense. . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution." *Id.* at 428 (footnote omitted). The Court held that the beyond a reasonable doubt standard, "a critical part of the moral force of the criminal law" (*id.* (citation omitted)), arises from the strict constraints that contain the state's exercise of its most awesome power. Nonetheless, the heightened standard of "clear, unequivocal and convincing" was the "constitutionally adequate" standard for civil commitment. *Id.* at 433.

Like the United States Supreme Court, the Minnesota Supreme Court has placed the forbidden purpose inquiry at the very threshold of constitutional validity, characterizing it as the "initial question" in the determination of constitutionality. *In re Linehan*, 557 N.W.2d 171, 187 (Minn. 1996).

Karsjens

Over the years, scores of confined persons have challenged Minnesota's SOCC law. In 2012, Chief Judge Michael Davis, of the federal District of Minnesota, stayed several suits challenging Minnesota's law and appointed counsel, Gustafson Gluek, pro bono, for the plaintiffs. The broad outlines of the constitutional claim were clear: With nearly 700 men (and one woman) confined at that time, and only one person having been even provisionally discharged in the previous 20 years, the state's claim that its scheme provided for legitimate civil commitment was open to question. The court granted class certification, oversaw extensive attempted settlement negotiations, denied the majority of a motion to dismiss, appointed an expert panel to review client files, and convened a task force of diverse stakeholders. In February of this year, *Karsjens* went to trial. After five weeks of testimony and lengthy closing arguments, the constitutionality of MSOP awaits Judge Frank's decision.

In ruling on the dismissal motion, Judge Frank indicated potential agreement with the*Karsjens* class's claim of unconstitutionality, perhaps in light of the 2011 report by the Minnesota Office of the Legislative Auditor, which investigated MSOP and identified numerous concerns. In rejecting the bulk of that motion, he stated that

> MSOP may very well be serving the constitutionally impermissible purposes of retribution and deterrence. . . . If, with the benefit of discovery . . . Plaintiffs are able to demonstrate that the commitment statutes are systematically applied in such a way as to indefinitely commit individual class members who are no longer dangerous, or that MSOP is administered as a punitive system despite its statutory treatment purpose, Plaintiffs will likely prove up their claims.

Memorandum Opinion and Order (Feb. 20, 2014), at 20.

Two additional reports, from the Minnesota SOCC Task Force, provided the backdrop for Judge Frank's statements that the SOCC system in Minnesota is "clearly broken" and that MSOP might be "one of the most draconian sex offender programs in existence." Memorandum Opinion and Order (Feb. 20, 2014), at 68–69.

Thereafter, in spring 2014, the plaintiffs sought the release of two clients who were identified, in a preliminary report of the court-appointed panel of experts, as clearly inappropriately committed. Judge Frank deferred release on procedural grounds. However, he concluded that

> [i]t is obvious that but for this litigation, [the juvenile client] . . . would likely have languished for years in the prison-like environment of MSOP-Moose Lake without any realistic hope of gaining his freedom. And of course it is of great concern to the Court that this may not be an aberrant case but . . . symptomatic of a larger systemic problem of constitutional concern.

Memorandum Opinion and Order (Aug. 11, 2014), at 34.

The Trial and the Future

It took more than three years for *Karsjens* to get to trial. When it began in February 2015, polarized views of SOCC as a system, and MSOP as a program, were presented. The lead attorney for the plaintiffs, Dan Gustafson, argued that Minnesota's statutory civil commitment scheme, facially and as implemented through MSOP, was unconstitutional. The State, represented by Nathan Brennaman, Deputy Attorney General, countered that the issues presented at trial have repeatedly been upheld by the courts. The State also asserted that the plaintiffs produced little evidence that individual clients were improperly placed at MSOP. The plaintiffs acknowledged that their case was not built on the individual circumstances of the more than 700 members of the class; rather, it was built on their position that all class members are being unconstitutionally harmed by civil commitment that, when considered as a system, belies the fundamental constitutional requirement that forbids a punitive purpose.

The trial began with a week of testimony by four experts in the treatment and management of sexual offenders, appointed under Federal Rule of Evidence 706, Court-Appointed Expert Witnesses, to assist the court. The "706 Panel" testified to the results of their investigationinto MSOP, as reflected by their November 2014 report.

The plaintiffs presented substantial evidence to support their claims. Other experts, many MSOP staff, and more than a dozen MSOP clients testified. Their testimony developed a picture of how and why Minnesota's SOCC might be compromised:

- The Minnesota SOCC Task Force noted that "[t]here is a broad consensus that the current system of civil commitment of sexual offenders in Minnesota captures too many people and keeps many of them too long."
- Many experts and MSOP staff testified that "politics" are blocking the exits. Executive orders (2003, 2013) by the last two Minnesota governors effectively placed a moratorium on MSOP releases.
- Per Minnesota statutes, once civilly committed, the burden of proof for release transfers to the clients.
- The statutory standard for release from commitment is more onerous than the standard for initial commitment.

- Some MSOP staff, responsible for evaluating clients, admitted that they did not get any training about or did not understand the legal criteria for release.
- MSOP staff broadly acknowledged that the program does not routinely determine whether clients continue to meet criteria for commitment and that only about 10 percent of clients have had a forensic risk assessment at MSOP.
- There are more than 60 clients whose sexual offending occurred only as juveniles.
- There are many physically infirm clients, the oldest being 92.
- MSOP has not been able to attract or retain sufficient, qualified clinical or psychiatric staff. Staff turnover appears to play a role in causing clients to get bogged down in treatment.
- MSOP uses a subjective system of behavioral reports and an unproven "matrix" of cognitive-behavioral objectives to determine phase progression. "Completion of treatment" seems both subjective and elusive.
- Several MSOP staff agreed that there are many clients who could be safely treated in a less-restrictive setting.
- Unless clients are in the final phase of treatment, and MSOP staff are recommending a reduction of custody, clients do not get support or assistance with petitioning or preparing for release.
- The arduous pathway out of MSOP requires hearings before a Special Review Board and a Judicial Appeal Panel. While the one-page petition is easy to complete, the entire process typically takes months or years.
- In 20 years, only three clients have ever gained even a provisional release, and one release was revoked.
- The State acknowledged that it could provide community-based placements for only perhaps 3 to 4 percent of the more than 700 clients currently at MSOP.
- Many MSOP clients and staff testified to a pervasive, counterproductive level of "hopelessness."

Much of the testimony about MSOP revealed problems in the overarching system. The plaintiffs' attorneys called several out-of-state experts. The State called mostly current MSOP staff, who testified to their adherence to best practices and to changes under way.

Despite statutory requirements that treatment be designed to "render further supervision unnecessary," the State argued that the constitutional right to treatment is governed by the minimalist "shocks the conscience" standard cited in Strutton *v. Meade*, 668 F.3d 549, 558 (8th Cir.), *cert. denied*, 133 S. Ct. 1124 (2012). (*Strutton* was a case originating in Missouri. Similar to Minnesota, Missouri has not released any clients from its SOCC program in more than 15 years. The federal Eastern District of Missouri is reviewing that program's constitutionality.) The plaintiffs argued that the "professional judgment" standard, articulated in *Youngberg v. Romeo*, 457 U.S. 307, 320–22 (1982), should govern.

In addition, an amici brief, filed by Eric S. Janus and the ACLU of Minnesota, argued that *Strutton* was irrelevant to the plaintiffs' "systemic" claims. Those claims invoked two distinct constitutional contexts: (1) the "validity context," in which the stable, two-decades-long pattern of executive and judicial implementation, combined with the state legislature's knowing failure to act, proved that the MSOP is constitutionally invalid; and (2) the "residual context," in which the class members' rights survive the massive deprivation of liberty inherent in civil commitment, so that the plaintiffs may assert that they have been violated. Amici posited that the "validity context" is governed by *Foucha v. Louisiana*, 504 U.S. 71 (1982), and its antecedents, and focuses on whether the MSOP is a bona fide civil commitment program, informed by a non-punitive purpose. *Strutton*, to the extent that it is good law, refers only to the "residual context." (Brief of Amici Curiae Eric S. Janus and MN-ACLU at 1–2.

The evidence posed additional questions about whether forensic psychology and risk assessment can meet the legal requirements for civil commitment or sufficiently predict future sexual reoffending. With many valid competing legal and societal concerns, the challenge will be to achieve a constitutional balance among public safety, reliable risk estimation, legitimate treatment, and the civil rights of MSOP clients. A judgment of unconstitutionality might result in a range of remedies, from injunctive relief and the appointment of a special master, as in the state of

Washington from 1994 to 2007, to invalidation of Minnesota's SOCC and MSOP system. The current step in finding a way forward for Minnesota is now with Judge Frank.

Keywords: litigation, access to justice, sex offenders, civil commitment, sex offender program

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We Have Preventive Healthcare—Now How about Preventive Legal Aid?

By Julia Huston – July 2, 2015

We've come to recognize the value of preventive medicine as a society. We know that patients do better and our government saves money when people get annual checkups and screenings so that we are able to avoid the costly and sometimes deadly issues that arise if we wait until they arrive in the emergency room.

What would it look like if we took the same approach for legal help? What if we recognized that people are more likely to be able to stay in their homes if they have access to adequate legal assistance for wrongful evictions or foreclosures, rather than spending millions of taxpayer dollars on shelters once people have lost their homes and have nowhere else to turn?

As it turns out, three independent economists who conducted separate evaluations—in the areas of evictions and foreclosures, domestic violence, and federal benefits—found that greater funding for civil legal assistance actually saves taxpayer money and supports the economy.

In Massachusetts, the Boston Bar Association (BBA), which I currently lead, recently released a task force report that shows that taking a preventive approach to legal issues, in the same way we do for public health, would help families, save government funds, and ensure fairness in our justice system. Simply put, investing in civil legal aid programs can pay dividends by avoiding back-end costs, just as early diagnosis and treatment can keep a patient out of the emergency room.

The task force report, *Investing in Justice—A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts*, is based in part on the results of several statewide studies aimed at measuring the economic impact of civil legal aid in Massachusetts.

- The Analysis Group studied the impact on state expenditures of representation by a civil legal aid attorney in eviction and foreclosure cases. They concluded that for every dollar spent on civil legal aid in eviction and foreclosure cases, the state stands to save $2.69 on the costs associated with the provision of other state services, such as emergency shelter, healthcare, foster care, and law enforcement.
- Alvarez & Marsal analyzed the costs of domestic violence and what savings could occur if additional civil legal aid representation was available in such cases. They determined that each $1 of investment in civil legal services saves approximately $2 in healthcare costs, $1 of which is borne by the federal government and $1 of which is borne by the state government based on the current Medicare reimbursement rates.
- NERA evaluated the economic benefits to low-income state residents, and to the state overall, from the provision of civil legal aid representation to residents seeking to obtain wrongfully denied federal benefits. NERA concluded that for every dollar invested in civil legal aid directed to recovery of federal benefits, nearly $5 is returned to the state as immediate direct benefits to individuals and resultant economic benefits to the state.

The BBA report—which represents the work and opinions of legislators, judges, business leaders, academics, and legal services representatives—is the result of 18 months of intensive research into the problems and unseen costs that arise because so many people don't have access to adequate legal assistance.

We started by surveying judges, and the responses were alarming. As an article in *the New York Times* pointed out, this problem is not confined to Massachusetts, although there are valuable lessons for other states in what we learned through our study.

Across the various regions and court departments, judges reported a rise in unrepresented litigants, particularly among low-income and moderate-income people. Nearly 90 percent of judges surveyed said that their courts are being bogged down, the staff is spending more time assisting self-represented litigants, and evidence is being presented improperly in court because not enough people have access to a qualified lawyer when they need one.

We need to listen to our judges at the front lines. They're telling us that the proper and efficient administration of justice is in jeopardy when we leave so many people to their own devices in our courts.

How many people are we talking about? Our task force undertook an extensive statewide survey of legal services providers in Massachusetts and discovered that 64 percent of qualified applicants—those who meet the income eligibility requirements and face legitimate legal problems—are turned away simply because there isn't adequate funding to take them on as clients. These are people being wrongfully evicted from homes, people trying to escape abusive partners, and people trying to secure the federal benefits that are rightfully theirs.

This turn-away figure—a total of 54,000 people in Massachusetts annually—represents a significant increase from 50 percent in 2007 and is partly attributable to the fact that growing poverty means that there are more people than ever who can't afford the legal assistance that they need.

But another key reason that civil legal aid programs are unable to keep up with the growing demand for their services is the drastic decline in their primary funding source, the Interest on Lawyers Trust Accounts (IOLTA) program. IOLTA gives the interest generated from client funds being held by lawyers to civil legal aid programs to support their services. The economic downturn has devastated IOLTA funding across the nation; in Massachusetts, we saw it drop from $31.8 million in 2007 to $5.7 million this year. Although the economy may have rebounded in terms of growth, interest rates remain at historic lows since the financial crisis and are unlikely to return to prior levels anytime soon—making clear that IOLTA is an unreliable and inadequate source of funding.

We need to make the case that ensuring that every American has access to justice is not only a just cause but a sound investment that is worth our resources.

Prior to the work of the task force, there had never been a comprehensive study of civil legal aid in Massachusetts, and very few other states have undertaken a similar analysis comparable in terms of depth and breadth. From the moment it was released to the public,*Investing in Justice* changed the way people advocated for and perceived civil legal aid.

We have long argued that providing legal assistance is the right thing to do for the neediest among us, those who are struggling to deal with issues that go to the heart of their families and livelihoods, like housing and personal safety. But with this game-changing report, we can now make the case that it is also the fiscally prudent thing to do. That's what we are showing policy makers in Massachusetts—and we hope that our approach can be a model for the rest of the nation.

Keywords: litigation, access to justice, civil legal aid, IOLTA, self-represented litigants

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Five Things You May Not Know about Deferred Action

By Erika L. Glenn – July 2, 2015

Much of America has grown familiar with the term "deferred action" as a result of President Obama's Executive Action on Immigration, which was announced on November 20, 2014; however, few know that deferred action has deep roots that actually date back to the 1970s.

Here are five interesting facts you may or may not know about deferred action:

1. John Lennon is believed to be among the first group of individuals to benefit from deferred action. John Lennon entered the United States in the summer of 1971 as a visitor and was later placed in deportation proceedings for overstaying his visa. At the time, deferred action existed as a "non-priority program" under legacy Immigration and Naturalization Service (INS) that had not yet been disclosed to the public. Seeking to find relief for his client at all costs, Lennon's attorney performed a FOIA (Freedom of Information Act) request and found unpublished INS Operations Instructions describing non-priority as "an act of administrative choice to give some cases lower priority." In 1975, non-priority was renamed "deferred action" under new and publicly released operations instructions, which stated, "in every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."And it is here that deferred action became known as a form of administrative relief to individuals facing deportation.For further details on the Lennon case, see Shoba S. Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," 9 *Conn. Pub. L.J.* 243 (2010).

2. Deferred action does not create any affirmative right. Deferred action status amounts to a temporary reprieve from deportation, which is highly discretionary and granted on a case-by-case basis. Federal appeals courts have long held that a grant of deferred action does not have the force and effect of substantive law, which means that a non-citizen cannot sue for denial of deferred action because it creates no property or liberty interest. *Romeiro de Silva v. Smith*, 773 F.2d 1021 (9th Cir. 1985); *Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983); *Dong Sik Kwon v. INS*, 646 F.2d 909 (5th Cir. 1981); *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). Today within the Department of Homeland Security (DHS), all three of the immigration-related agencies—U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP)—possess the authority to grant deferred action at their discretion. This discretion is not appealable to any court, which means that individuals who are denied deferred action do not have a legally cognizable claim to sue for denial of an affirmative benefit.

3. Deferred action is premised on many internal guidance and policy memoranda. Deferred action is a form of prosecutorial discretion that an agency can exercise on an individual, case-by-case basis. Under 8 C.F.R. § 241.6, DHS can grant a stay of removal to a non-citizen who has been ordered deported or removed from the United States. The authority to issue deferred action is well documented in agency manuals and internal memoranda such as the following:

- ICE Detention and Removal Operations Policy and Procedure Manual
- The Cooper Memo, INS Exercise of Prosecutorial Discretion
- The Meissner Memo on Exercising Prosecutorial Discretion
- The Howard Memo, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases
- The Myers Memo, Prosecutorial and Custody Discretion
- The June Morton Memo, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

- The August Morton Memo, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions

4. USCIS and DHS have a long history of using prosecutorial discretion in the cases of individuals in a wide range of circumstances. The executive branch has provided blanket deferrals of deportation numerous times over the years. Starting in 1976, USCIS (then called INS, the Immigration and Naturalization Service) issued extended voluntary departure to Lebanese nationals who were otherwise deportable from the United States on a case-by-case basis. To date, prosecutorial discretion has been applied in the following situations:

- Prior to the repeal of the widow penalty, DHS granted deferred action to U.S. citizen widows and widowers and their children under 18 years of age in the United States, who were facing deportation because they had been married to their deceased U.S. citizen spouses for less than two years.
- International students who had been affected by Hurricane Katrina were granteddeferred action.
- On some occasions, DHS has agreed to not deport individuals with criminal records, the mentally deficient, the physically impaired, notorious drug traffickers, and other aggravated felons, using prosecutorial discretion.

5. *Plyler v. Doe*, 457 U.S. 202 (1982), is believed to be the catalyst behind Deferred Action for Childhood Arrivals (DACA). In 1975, Texas passed the Alien Children Education (ACE) law withholding state funds for the education of illegal immigrant children and authorizing local school districts not to enroll these children in public schools. In 1977, lawyers filed suit in district court on behalf of Mexican children who could not prove that they were legal immigrants and who had been excluded from the Tyler School District, claiming that ACE violates the rights of these children under the Equal Protection Clause of the Fourteenth Amendment. Similar suits were filed across Texas in 1978 and 1979. In 1980, a district court found that ACE was unconstitutional.

In 1981, the Fifth Circuit Court of Appeals agreed, and Texas appealed. The case was accepted by the U.S. Supreme Court, which affirmed (by a vote of 5–4) the judgment of the appeals court in 1982.

On June 15, 2012, nearly 30 years after Plyler v. Doe, then-DHS Secretary Janet Napolitano issued a memorandum announcing that DHS would offer deferred action (DACA) for two years to certain young people who came to the United States as children and who meet other eligibility criteria.

Many individuals view the 2012 DACA program as an extension of the victory obtained in Plyler v. Doein 1982, because it allows undocumented immigrants to obtain an education regardless of their immigration status. More importantly, it helps to remove the stigma associated with being an undocumented student within the United States.

In light of President Obama's recent initiative to offer deferred action to undocumented parents of U.S. citizens, it has proven to be an ever-evolving and much needed act of discretion. Due to its highly controversial nature, the president's initiative is currently pending a temporary injunction and its future is unknown. In the meantime, proponents for immigration reform remain hopeful it will someday go into effect.

For information on common myths about deferred action, see Executive Actions on Immigration, a DHS webpage.

Keywords: litigation, access to justice, deferred action, immigration, DACA, DHS, USCIS, President Obama, administrative relief, prosecutorial discretion, ICE

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NEWS & DEVELOPMENTS

May 27, 2015

Responsibilities When Arresting a Mentally Ill Suspect

We have talked, seen, and heard about police brutality so often this past year; it has become almost "normal." Transparency and social media ensure—or are in the process of ensuring—that police officers take proper steps for their own safety and others' on calls. Often, mental illness is an aspect that police officers must consider when arresting suspects.

Recently, the U.S. Supreme Court found for the petitioners in *San Francisco v. Sheehan*; two San Francisco police officers were entitled to qualified immunity from a lawsuit seeking redress for a mentally disabled woman's injuries. The woman had threatened to kill her social worker with a butter knife while he attempted to perform a welfare check on her. She had not taken her medication and was reported to the police. When the police arrived, the woman charged at them with a knife. The officers called in for backup. Instead of waiting for backup to arrive, one officer pepper-sprayed her as the other officer shot the woman, resulting in injuries. *See San Francisco v. Sheehan*, 575 U. S. ____ (2015).

The Court did not address whether police should have taken Title II of the Americans with Disabilities Act (ADA) into consideration when arresting Sheehan. Instead, the case was decided based solely on Sheehan's Fourth Amendment constitutional rights. According to Justice Alito's opinion, Sheehan's rights were not violated. Scalia filed an opinion concurring in part and dissenting in part, joined by Kagan, arguing that the writ of certiorari should have been dismissed and the case should not have been heard if the question put forth into the court would have been answered. It begs the question as to why the petitioner, City and County of San Francisco, failed to mention the ADA in their oral argument when their opening brief clearly asks for the Court to look upon the ADA issue.

The Ninth Circuit, along with a majority of circuits, has opined that Title II of the ADA applies to arrests. "Ignoring the basis of the case and key questions about the ADA and law enforcement puts into society's minds that discrimination by public officials and brutality of those who are disabled are a non-issue," says Amanda O'Neal, special education attorney.

See Title II of the Americans with Disabilities Act for more information on what accommodations are provided to a qualified individual with a disability seeking to be put in custody by governmental authority.

— *Stella Kim , Mission Financial Services, Corona, CA*

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Should We Provide Extra Protection to Transgender Inmates?

The law has not caught up with certain societal changes or shifts. Our concept of what is acceptable for each gender is ever expanding and transforming. In the last couple of years, several cases have captured the public's attention with respect to the rights of transgender inmates. These cases are controversial in part due to our notions of crime and punishment and our inherent failure to empathize with those who believe that they are born into the wrong gender. Transgender individuals who find themselves under the thumb of the criminal-justice system are often the target of vicious brutalization by other inmates.

In a lawsuit against the Georgia Department of Corrections (GDC) filed by a transgendered woman, Ashley Diamond, who reportedly began taking hormone therapy at age 17, asserts that her Eighth Amendment rights have been

violated. Essentially, Diamond argues that the GDC fails to protect her as a non-violent offender, medium-security inmate, and transgender female as she has been housed with closed-security inmates (which are considered the most violent) and sexually assaulted by them. See *Ashley Diamond v. Commissioner Brian Owens, et al*, No. 5:15-cv-50 (M.D. Ga.) at ¶¶1–43.

Diamond was convicted of committing burglary and placed on probation. However, as a first-time offender, she was sent to a maximum-security prison for subsequently violating the terms of her parole in 2011. The facts of the complaint allege that she has been raped, sexually assaulted, and sexually harassed countless times and lives in constant fear of being brutalized by violent inmates. As a result, the complaint alleges that Diamond has suffered depression, anxiety, and thoughts of bodily harm as she even unsuccessfully attempted to castrate herself. The complaint also recounts that corrections officials have mocked, degraded, and retaliated against Ashley for raising awareness concerning the rapes and other heinous acts that she experienced from fellow inmates. Although, Diamond alleges that she properly notified prison authorities upon admission into the prison system that she was transgender and therefore vulnerable to attack, she was still placed into general population at a high-security lock-up. Sadly, there are many stories like Ashley's and it presents an example of how these types of cases fall through the cracks.

There are several cases and statutes that already address prison rape and transgender status, such as the Prison Rape Elimination Act and *Farmer v. Brennan*, 511 U.S. 825 (1994). The Prison Rape Elimination Act's findings demonstrate that as a general matter, rape in prison undermines the health and welfare of the inmate population because of the spread of sexually transmitted diseases, such as HIV or AIDS; spread of other diseases, such as Hepatitis B and C; and the mental-health risks that rape poses to victims, such as anxiety and depression. See 42 U.S.C.A. § 15601 (2003). Moreover, it also threatens the safety of the public, as the aggressor inmates who are released tend to be more violent because of their involvement in this rape culture, have a higher recidivism rate, have an increased likelihood of homelessness, and are less likely to become productive and stable members of our society. *Farmer*, 511 U.S. at 847. *Farmer* establishes that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.

Some states have responded to *Farmer* and other similar cases by establishing special units for transgender inmates. For example, New York opened a transgender unit in Riker's Island last year and special training was also given to the prison guards assigned to the unit. Similarly, a separate transgender unit was established in a downtown Los Angeles detention center. As our understanding evolves with our social construction of acceptable gender roles, state and federal lawmakers will have to decide how far the protection should extend for transgendered inmates.

— *Nikaela Jacko Redd, Washington, D.C.*

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