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An Investment in Justice: Right to Counsel in Eviction Cases
By Christine M. Netski

As BBA President, I have been fortunate to be involved in many important advocacy efforts to improve access to our justice system. In just the last few months, the BBA has filed amicus briefs in the Supreme Judicial Court arguing for just compensation for appointed counsel representing indigent criminal defendants, advocating for the right to counsel in civil contempt proceedings where indigent defendants face a realistic risk of incarceration, and urging that unidentified IOLTA funds should revert to the IOLTA Committee for the benefit of indigent residents of the Commonwealth. Most recently, I was honored to represent the BBA at the annual Walk to the Hill for Civil Legal Aid, where we once again advocated for increased funding for legal services through our partnership with the Massachusetts Legal Assistance Corporation (MLAC). Access to justice and service to the community at large are central to the BBA’s mission and we believe that no one in need of legal help should be turned away based on the inability to pay.

Too often, however, one’s ability to access justice is directly tied to one’s financial resources and far too many indigent litigants in civil cases are forced to navigate the legal system without the benefit of counsel, often with devastating consequences. One area where the justice gap on the civil side is particularly acute is housing. Boston is in the depths of a housing displacement crisis spurred by skyrocketing rents, higher rates of eviction for profit and a severe shortage of truly affordable housing. Approximately 39,600 households in Massachusetts faced eviction proceedings in 2019[1] and 92% of these tenants were forced to defend these cases without help from attorneys. In contrast, over 70% of the landlords in these proceedings were represented.[2] Moreover, MLAC’s statistics reveal that 64% of eligible residents (those who are at or below 125% of the federal poverty level) who seek help with a housing case are turned away due to a lack of available funding.[3]

The BBA has long advocated for the right to counsel for indigent parties in civil cases and, in 2008, established a Task Force on Expanding the Civil Right to Counsel that produced Gideon’s New Trumpet, a comprehensive report outlining the arguments for a right to counsel in a variety of civil cases where basic human needs are at stake. Among other areas, the report highlighted housing law and made a compelling case for counsel as a matter of right for indigent tenants facing eviction, noting that “tenants who are represented are much more likely to obtain a better result, whether it be maintaining possession of the premises, reaching a favorable settlement or winning a trial.”[4]

Today, now 12 years after Gideon’s New Trumpet, there is reason to believe that the right to counsel for indigent parties in eviction cases will finally become a reality in Massachusetts. In June 2019, the BBA joined the Massachusetts Right to Counsel Coalition, a group of advocates and community members who support ensuring legal representation to low-income tenants, post-foreclosure occupants, and landlords. The Coalition’s proposed bill includes full legal representation for eligible individuals facing eviction in court and also calls for building the capacity of existing organizations to prevent evictions and promote housing stability, including proactive education and outreach, housing stabilization assistance, and other “upstream” support before litigation ensues.[5] At the July hearing before the Judiciary Committee, Mary Ryan of Nutter McClennen & Fish LLP (and co-author of Gideon’s New Trumpet) testified for the BBA in support of the legislation.

Chief Justice Ralph Gants of the Supreme Judicial Court also formally endorsed the bill in his October 2019 State of the Judiciary address, expressing hope that the efforts to provide legal counsel for all indigent parties in eviction proceedings “finally come to fruition.” And the Boston Globe has lauded the proposed legislation, stating that “Massachusetts residents facing eviction deserve legal representation”
and outlining how this legislation could dramatically shift the disparity in representation between tenants and landlords.

Of course, as we monitor developments on the legislative front, the BBA continues to help tackle the immediate shortage of counsel in housing cases through Lawyer for the Day in the Housing Court. For over 20 years, the BBA has collaborated with Volunteer Lawyers Project, Greater Boston Legal Services, the Legal Services Center of Harvard Law School, Harvard Legal Aid Bureau, and the Boston Housing Court to offer assistance to unrepresented tenants and landlords on Eviction Day. Since May 1999, volunteers in this collaborative program have helped more than 18,000 clients.

We are also proud of the work our BBF grantees are doing to combat evictions. As just one example, City Life/Vida Urbana is defending more than 800 Boston families fighting to stay in their homes, building anti-displacement zones in rapidly gentrifying areas, and opposing the construction of luxury housing in vulnerable neighborhoods without the addition of strong anti-displacement protections. They too believe that a right to counsel in eviction cases is an essential ingredient to addressing the current housing crisis. And there is no question that civil legal aid organizations are doing a tremendous job in protecting and securing safe and affordable housing by enforcing health, safety, and accessibility standards; advocating for reforms that promote access to affordable housing; defending clients from unlawful eviction and combatting housing discrimination; protecting tenants at risk of losing housing subsidies; and helping to place vulnerable families in emergency shelters.

But the justice gap in eviction cases cannot be solved by legal services organizations and pro bono volunteers alone. The time has come for Massachusetts to be the first state in the nation to guarantee full legal representation for all indigent litigants in eviction proceedings.

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Managing the first degree murder caseload of the Supreme Judicial Court is a challenge – interesting and usually enjoyable, but definitely a challenge. For reasons tied to the cases of Nicola Sacco and Bartolomeo Vanzetti, which began almost 100 years ago, appeals from convictions of first degree murder are different from any other type of case, criminal or civil. Moreover, both because of these differences and the seriousness of the crime and sentence involved, there are a number of different players, individual and institutional, that have strong interests in how these appeals are handled. The following discusses the unique aspects of first degree murder appeals, how they have contributed to a backlog of pending first degree murder appeals in the full court, and the court’s recent efforts to address some of the historic issues affecting its first degree murder docket.

Appeals from first degree murder convictions are entered directly in the SJC; in contrast to almost all other types of appeals, the Appeals Court does not have concurrent jurisdiction with the SJC to hear first degree murder appeals. See G. L. c. 211A, § 10. The statute governing appellate review of first degree murder convictions, G. L. c. 278, § 33E, directs the SJC to consider the “whole case,” and – unlike virtually all other appeals – review is not limited to issues that have been properly preserved. Rather, § 33E provides that “the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt.” See, e.g., Commonwealth v. Dowds, 483 Mass. 498, 513 (2019) (In the unique circumstances of this case, a “verdict of murder in the second degree is more consonant with justice than is a verdict of murder in the first degree.”).

This special, fulsome “33E review,” as it is called, has led the court to schedule longer oral arguments than is regularly allowed in any other appeal – twenty minutes per side versus fifteen. And it is this statutory duty to review the whole case combined with other provisions in 33E, particularly those governing motions for a new trial, that makes managing the first degree murder docket so challenging. Apart from any other post-conviction motion for a new trial, 33E draws a critical distinction between motions filed before the direct appeal is finally decided by entry of the appellate rescript 28 days after the appellate decision is released, and motions filed post-rescript. As to new trial motions filed before the appellate rescript, the motion must be filed with the Supreme Judicial Court for the Commonwealth, which, with rare exception, remands the motion to the Superior Court for disposition. The goal – certainly of defense counsel – is to have any appeal from the denial of such a motion in the Superior Court joined with the direct appeal of the underlying conviction because, if it is, the combined appeals both get the benefit of 33E review. And even if the appeals are not combined, an appeal from a denial of a new trial motion that is filed before entry of the appellate rescript in the direct appeal receives direct review by the full court. Commonwealth v. Raymond, 450 Mass. 729, 729-30 n. 1 (2008).

The landscape, however, changes dramatically if the motion for a new trial is filed after the full court decides the defendant’s direct appeal and the appellate rescript enters. The motion must then be filed in the Superior Court, and if denied, the defendant must apply for leave from a single justice of the Supreme Judicial Court to allow review of the Superior Court’s denial by the full court. A defendant’s desire to litigate fully a motion for a new trial before a decision on the direct appeal is understandable and borne out by the statistics on “so-called” gatekeeper petitions. From 2014 to 2018, 109 gatekeeper petitions were filed in the Supreme Judicial Court for Suffolk County (the county court), and were reviewed by a single justice. Of these, 97 were denied, 5 were allowed to be reported for review to the full court, 4 were dismissed, and 3 were withdrawn. If the single justice denies a gatekeeper petition, there is no appellate review of the denial. Commonwealth v. Gunter, 456 Mass. 1017, 1017 (2010).
Working together, these statutory provisions can cause lengthy delays in the court’s consideration of first degree murder appeals. For obvious reasons, defendants do not want their direct appeals heard before thoroughly exploring the possibility of filing and litigating motions for a new trial not only to preserve the right of appeal from any denial (and thus avoid the gatekeeper) but also to ensure 33E review. So, historically, at the request of defendants, the court has stayed direct appeals virtually indefinitely while the new trial motion is litigated in the Superior Court. Litigation in the Superior Court may take years for a variety of reasons, including (among others): the trial judge may have retired and reassignment is necessary; Superior Court judges are working to capacity on their current dockets; the parties battle over post-conviction discovery before the motion is finally presented and heard; and, because of some recent appellate decisions, there appears to be an increasing number of evidentiary hearings, which results in scheduling challenges and delays to accommodate the calendars of witnesses – expert witnesses in particular – as well as judges and counsel. As a result, appeals have been stayed for 5, 10, and at times more than 15 years.

Another cause of delay is the frequency of motions for appointment of new counsel filed by defendants or motions to withdraw filed by counsel; not infrequently, these occur multiple times in a single appeal. The Committee for Public Counsel Services must then find new counsel from its limited list of attorneys qualified to handle first degree murder appeals. Each new appointment of counsel, some many years after entry of the appeal, slows the progress of the appeal because new counsel must, at a minimum, become acquainted with a new client, meet with predecessor appellate counsel, speak with trial counsel, review voluminous files and transcripts, and decide whether to file a motion for a new trial.

The confluence of these factors led the SJC, in April 2018, to examine its first degree murder docket, identify areas of concern, and address some of the docket’s unique, systemic problems. The murder docket at the time had 129 pending appeals with the oldest of these entered in 1996. The caseload consisted of 22 appeals that were entered from 1996 to 2010, 60 from 2011 to 2015, and 47 from 2016 to 2018. Undue delay, in some but not all of these appeals, thwarts the judiciary’s obligation to provide justice fairly and efficiently: if there is error requiring a new trial, delay may jeopardize the Commonwealth’s ability to retry the defendant; delay undermines the public perception of the administration of justice, especially by the families of murder victims; and delay has caused defendants to question the fairness of a process that takes so long.

To that end, the Justices appointed retired Supreme Judicial Court Justice Margot Botsford as a special master in April 2018 to help manage the first degree murder docket and devise strategies to resolve long-standing problems. Through regular status conferences with attorneys, the special master implemented individualized case management plans in the oldest cases. These status conferences focused on: (1) the oldest murder cases; (2) newer murder cases; (3) cases in which counsel have appearances in 5 or more murder appeals; and (4) cases where the defendant’s presence was required. At this writing, the special master has held over 170 status conferences.

As part of the case management plan, the full court clerk’s office reviews every Superior Court docket where a motion is pending after remand and sends a monthly report to the Chief Justice of the Superior Court. The report includes information about motions in need of assignment, due dates for the Commonwealth’s responses, scheduled evidentiary hearings, pending motions for a new trial and for discovery, and any motions currently under advisement.

In the meantime, the full court explored the possibility of establishing special time standards in first degree murder appeals by way of a standing order. Before doing so, Chief Justice Gants and Justice Gaziano met in January 2019 with a group of stakeholders that included the special master, defense attorneys, and assistant district attorneys. This meeting provided an opportunity to discuss general concerns about the full court’s first degree murder docket and specific concerns about the adoption of a standing order for the docket.

Following this meeting, in April 2019, the court published a proposed standing order governing first degree

The standing order imposes time standards designed to remedy undue delay. Motions for a new trial must be filed “as soon as reasonably practicable but no later than 18 months after entry of the direct appeal.” However, the special master has broad discretion to allow extensions “on a substantial showing of need.” A timely filed motion guarantees that both the direct appeal and the appeal from any denial of the motion for a new trial will be considered together. If a motion for a new trial is not timely filed, there is no longer a presumption, formal or informal, that review of any denial of that motion for a new trial will be considered at the same time as the direct appeal.

To help identify any transcription issues at an early stage of the appeal, the defendant is required to report whether all transcripts necessary for appellate review have been filed with the clerk within 4 months after entry of the appeal. Status conferences, which had previously been scheduled on an ad hoc basis, must be scheduled 6, 9, 12, and 15 months after entry of the direct appeal. At the first status conference, and if necessary thereafter, the special master will discuss with counsel the likelihood that the defendant will be filing a motion for a new trial, and if so, discuss the scheduling of that motion – all to ensure that absent compelling circumstances, any motion will be filed within 18 months of the entry of the direct appeal. Finally, where a motion to withdraw is allowed and new counsel is appointed, deadlines previously imposed remain in effect despite the change in counsel. The special master may, however, adjust the deadlines for status conferences, briefs, and new trial motions for good cause.

Whether these case management innovations lead to lasting changes to the full court’s first degree murder docket remains to be seen. It is clear, though, that it will take the concerted effort of many to balance the interests of all stakeholders and promote efficiency without sacrificing fairness.

Francis V. Kenneally is clerk of the Supreme Judicial Court for the Commonwealth. He serves on the SJC’s Standing Advisory Committees on the Rules of Civil Procedure and on the Rules of Appellate Procedure, and served as co-chair of the SJC’s Appellate Pro Bono Committee.
Practice Tips
Appellate Electronic Filing Tips for the 2020’s
By Joseph Stanton and Julie Goldman

With the Appeals Court’s implementation of mandatory electronic filing for attorneys in September 2018 coinciding with extensive updates to the Massachusetts Rules of Appellate Procedure in March 2019, as well as with the Supreme Judicial Court’s pilot allowing parties to file electronic briefs with limited paper copies, this is a good time to provide feedback to the Massachusetts bar about some of the changes. As part of this endeavor, we surveyed the Justices of the Supreme Judicial Court and the Appeals Court for their input. What follows is a compilation of their feedback and additional observations. Although the Justices’ responses were not unanimous, they revealed many common themes.

The Monospaced or Proportional Font Option. Rule 20(a) now permits filers to use either a monospaced font (such as Courier New) with page limits, or a proportional font (such as Times New Roman) with a word count maximum. Attorneys frequently ask: What type of font do the Justices prefer?

Justices were evenly split among those who prefer a proportional font and those who had no preference, with slightly fewer Justices preferring a monospaced font. The preferred monospaced font was, unsurprisingly, Courier New; the preferred proportional font was Times New Roman. Sticking to one of these two fonts in your submissions is a safe bet. If you decide to take advantage of Rule 20(a)’s flexibility and select a different proportional font to add some extra flair, heed one Justice’s comment that “if a practitioner wants to try something new, that’s fine, but it must be easy to read.”

A downside to using a proportional font is the extra space that it occupies when produced in 14 point or larger font as the rule requires. A brief that is more than the traditional 50 page limit, even when within the new word limit, may seem longer to the reader using a proportional font because of the larger type size and new pagination requirements. Therefore, it is important to be mindful that the Justices, as always, appreciate conciseness and brevity.

Visual Aids. One way to free up space in a brief is to compile and present information through the insertion of visual aids. Visual aids may include a photograph, image, diagram, chart, or table. For example, in the Statement of Facts section of a brief, filers might consider putting chronological information contained in the record into a timeline format; various criminal charges, convictions, and sentences could be presented in a chart; a family tree could be useful in a probate case; a factually complex property case might benefit from a visual plan or map. While the Massachusetts Rules of Appellate Procedure do not currently contain a provision explicitly allowing or disallowing visual aids, the appellate courts’ practice is to accept them and a future rule amendment is possible.

The Justices commented that such visual aids are “refreshing” and that, “if you created a chart to prepare yourself, then we could use the same chart.” They also observed that, if you do not provide it, they may spend time developing a similar chart or understanding on their own.

But care and attention must be used when preparing a visual aid. Justices remarked, “While it’s theoretically possible, I have rarely if ever seen a chart or graph used effectively[,]” visual aids are “generally not[]” helpful or only “[i]f well done,” and “[a] little goes a long way. Should be limited to the extraordinary and not [used] in lieu of precise text.” Any visual aid must be based on the record and contain appropriate record or source references.

Electronic Review. Virtually all of the Justices are reviewing documents electronically. There may be a misperception that Justices simply review paper printouts of electronically filed documents. That is not the practice. All Justices of the Supreme Judicial Court and the Appeals Court have iPads, as well as...
desktop computers, that contain electronic files (PDFs) of each case including the briefs, transcripts, and appendices. The Justices use different programs and applications, primarily the GoodReader app, to search for keywords, highlight text, insert notes, and copy and paste material to aid in drafting a decision. However, to enable the Justices to use these search and annotation features, the rules require that all PDFs be created and efiled using optical character recognition (OCR) technology. OCR is not optional yet many attorneys continue to submit non-OCR documents, which the courts will reject or strike when identified.

In general, Justices remarked that electronic documents are easy to read and the clarity of exhibits is enhanced in the electronic over paper form. They expounded on the unparalleled convenience of having all of the documents at the tip of their fingers to access at any time of day, whether in the office, on the train, or in the courtroom. Although paperless review has some drawbacks, the many positives of electronic accessibility and utility outweigh those shortcomings.

Overall, when asked what effect electronic document practices have had on their review of case files, an overwhelming majority of the Justices responded favorably with only one negative response. The Justices reported a positive effect on their opinion writing, explaining that text-searchable documents, navigation, copying and pasting text, cite checking, and organizing multiple cases is much easier. One Justice responded that poorly organized electronic record appendices make writing much more difficult.

Bookmarks and Internal Links. One message many Justices asked us to emphasize is to encourage electronic filers to add bookmarks and internal links in electronic documents. They assist Justices to navigate a PDF. While internal links are currently allowed by S.J.C. Rule 1:25 but not required, the Justices surveyed overwhelmingly praised the inclusion of bookmarks and internal links in a document. A guide detailing how to create them in a brief or appendix is available on the Appeals Court website.

Filers should consider adding internal links to the table of contents in their brief, addendum, and appendices that allow Justices to “jump” to the various sections of the document. Including and bookmarking the Trial Court decision in the addendum to each brief or application for direct review, or the Appeals Court’s decision in an application for further review, is of the utmost importance. One unfortunate limitation that exists with the efilng vendor’s current program is that hyperlinks cannot be used to link to different PDFs or outside sources, such as a brief’s citations to a separate record appendix or transcript volume. Nevertheless, bookmarks and internal links are critical to the Justices’ review.

The Brief’s New Standard of Review Statement. The Justices unanimously agreed that Rule 16’s new requirement that a brief contain a standard of review section is helpful. However, one Justice noted that not all briefs include the statement, and expressed hope that more briefs will include it in the future, while another Justice commented that although more briefs are including a standard of review, it is not always the correct standard. These responses reveal the importance of ensuring a brief includes a correct standard of review to assist the Justices.

Citations to the Record Appendix. Because a hyperlink cannot be used in a brief to jump to a page in a separate record appendix volume, it is important that filers ensure that record appendix citations used in their brief are crystal clear. A Justice remarked that finding citations can be difficult because of complex references. Another Justice added that it would be helpful if all parties to a case used the same citation convention.

While the rules do not require a specific record citation convention, Rule 16(e) suggests: “RAII/55 (meaning Record Appendix volume II at page 55) or TRIII/231-232 (meaning Transcript volume III at pages 231-232).” It is recommended that you use this format because it is simple, less disruptive to the reader’s flow, and counts as one “word” for length calculation purposes.
Similarly, filers in civil appeals are reminded of Rule 18(b)(1)’s requirements to confer with the other parties at the beginning of each appeal to determine the contents of the appendix. Supplemental appendix volumes are especially apt to create confusion when they needlessly reproduce documents that were already included in the appellant’s appendix.

The “New” Record Appendix. Several Justices remarked that record appendices are often disorganized, contain a poor table of contents (one example given was “Administrative Record – p 1; Judgment – p. 1,265”), and volumes are not paginated so that the document page and PDF page correspond. Rule 18(a)(1)(A)(ii)’s new requirement that the table of contents “list[] the parts of the record reproduced therein, and includ[e] a detailed listing of exhibits, affidavits, and other documents associated with those parts,” illustrates the detail sought by the Justices.

Common Oversights. In addition to the Justices’ feedback, we also surveyed personnel in the Appeals Court’s Clerk’s Office to determine the most common omissions or errors they encounter when reviewing electronically filed briefs and appendices. They are:

1. the brief or appendix is not OCR-searchable;
2. the brief fails to comply with the pagination requirements in Rule 20(a)(4)(a), which requires filers to start a brief’s numbering with the cover as page 1, and eliminate the use of lower case Roman numerals for the tables of contents and authorities; the purpose of this rule is to have the brief paginated identically to the page numbers of its PDF version so that page references are easily ascertainable by the Justices;
3. the absence of an addendum, which Rule 16(a)-(c) requires for any brief, and a table of contents for the addendum;
4. a brief’s addendum, or a portion it, is not searchable using OCR while the rest of brief is OCR-searchable;
5. Rule 16(k) brief certifications that are incomplete, specifically missing the required language identifying the filer’s calculation of the Rule 20 length limits; the court will not accept a brief without a compliant certification; and
6. failure to include a complete table of contents in the first volume of a multi-volume appendix as required by Rule 18(a)(1)(C), or not including a table of contents in each separate appendix volume for that volume.

If you need any assistance or desire to double-check the requirements before uploading your PDF, the Appeals Court website provides detailed guidance for formatting documents for electronic filing, including checklists, and Clerk’s Office personnel are available to answer any questions.

Conclusion. After decades, and even centuries, of Massachusetts attorneys submitting and Justices deciding appeals on paper, much has changed in the past year. We hope these insights into the Justices’ current practices, preferences, and challenges will assist you in updating your practice to satisfy this new age of appeals.

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Julie Goldman is an Assistant Clerk of the Massachusetts Appeals Court. She has been working on the Judicial Branch’s electronic filing program since 2013 to bring electronic filing to the state courts through drafting the electronic filings rules and working with vendors to develop and implement eFiling.
Dangerousness hearings have huge stakes for defendants: if the Commonwealth proves by clear and convincing evidence that there are no conditions that can assure the safety of the community, a defendant can be incarcerated for up to 120 days in a district court case, or 180 days in a Superior Court case. G.L. c. 276, § 58A. However, pretrial detention based on “dangerousness” is counter-balanced by the presumption of innocence that undergirds our entire criminal justice system, and criminal defendants have recently mounted successful challenges to certain applications of the statute. This article reviews the challenges, the Supreme Judicial Court’s rulings, and responsive proposed legislation.

“Dangerousness” Hearings Under G.L. c. 276, § 58A

Under General Laws c. 276, § 58A, a court may order pretrial detention of a criminal defendant if the prosecution shows, by clear and convincing evidence, that no conditions of release will reasonably assure the safety of any other person or the community. But the Commonwealth can seek such pretrial detention only if the defendant is charged with: (a) one of several predicate enumerated crimes; (b) a misdemeanor or felony that involves “abuse” (the “abuse clause” of § 58A); (c) a felony that has as an element the use, attempted use, or threatened use of physical force against another (the “force clause”); or (d) a felony that, by its nature, involves a substantial risk that physical force against the person of another may result (the “residual clause”).

The abuse clause defines “abuse” with reference to the definition of abuse contained in Chapter 209A, that is, where the charged crime is against the defendant’s “family or household member,” including somebody who is or has been in a substantive dating or engagement relationship with the defendant, and involves: 1) attempting or causing physical harm; 2) putting others in fear of imminent serious physical harm; or 3) causing another to participate in sexual relations involuntarily through force, threat, or duress (i.e., rape).

The force clause focuses on whether the elements of the charged offense involve the use of force. A “categorical approach” is used to determine whether a non-enumerated felony qualifies as a predicate under the force clause. Commonwealth v. Young, 453 Mass. 707, 712 (2009). This approach assesses the elements of the felony “independent of the particular facts giving rise to a complaint or indictment.” Id. In other words, to determine whether a charge qualifies as a predicate under the force clause, the court asks not whether the defendant’s conduct involved the use of force, but rather whether the elements of the crime necessarily always involve the use of force.

Finally, the residual clause asks whether a felony “by its nature, involves a substantial risk that physical force against the person of another may result.” G. L. c. 276, § 58A.

Commonwealth v. Barnes / Scione v. Commonwealth

In January 2019, the Supreme Judicial Court ruled on the consolidated appeals of David Barnes and William Scione, each of whom had been detained following a finding of dangerousness under § 58A. Scione v. Commonwealth, 481 Mass. 225 (2019). Barnes was charged with statutory rape in violation of G.L. c. 265, § 23A, based on an allegation that he had sexual intercourse with a 15-year-old girl at a hotel after the two met online. Scione, on the other hand, was charged with using an incendiary device in violation of G.L. c. 266, § 102A, based on an allegation that he created a homemade improvised explosive device and placed it at the bottom of the driveway of his former girlfriend’s home (the record indicated that the device could have caused serious harm if it had not failed to explode). Neither of the charged crimes is an enumerated predicate charge under § 58A.
The SJC first ruled that statutory rape under § 23A is not a predicate charge under the force clause. Using the required categorical approach to analyze the elements of statutory rape under § 23A, the SJC observed that the crime requires proof that: (1) the defendant had sexual or unnatural intercourse with (2) a child between 12 and 16 years old where (3) there was a greater than 10-year age difference between the defendant and the child. Thus, force is not a required element of proof for statutory rape. The SJC noted that forcible rape of a child is its own crime under G.L. c. 265, § 22A, and that “[t]he fact that the Legislature saw fit to create two separate statutory rape offenses – one that includes the use of force and one that does not” – supported its decision to find there is no force element with respect to § 23A. Scione, 481 Mass. at 230. Justice Lowy wrote a separate concurrence “because such a counterintuitive result requires further discussion and consideration by the Legislature,” signaling to the Legislature to fix what he termed an “unfortunate” decision mandated “under the law as currently written.” Id. at 239.

The SJC next ruled that statutory rape under § 23A cannot be a predicate charge under the residual clause, because the residual clause is unconstitutionally vague. Scione, 481 Mass. at 230. To reach this conclusion, the SJC relied on the decisions of the United States Supreme Court in Johnson v. United States, 576 U.S. —, 135 S. Ct. 2551 (2015) and Sessions v. Dimaya, 548 U.S. —, 138 S. Ct. 1204 (2018) which, respectively, held that similarly-worded residual clauses in the federal Armed Career Criminal Act and the federal statutory definition of “crime of violence” were each vague because they failed to set out how to determine which crimes triggered the statute’s application. Noting that it had already followed Johnson in interpreting the Massachusetts Armed Career Criminal Act, see Commonwealth v. Beal, 474 Mass. 341 (2016), the SJC ruled that the residual clause of § 58A is unconstitutionally vague under Article 12 of the Massachusetts Declaration of Rights and, therefore, cannot be used to justify dangerousness proceedings in any case.

Turning to Scione’s case, the Court analyzed whether his charge of using an incendiary device under § 102A could trigger a dangerousness hearing under the abuse clause (which, the Commonwealth argued, applied because the alleged victim had previously been in a substantive dating relationship with the defendant). The Court held that, unlike the force clause, the abuse clause does not require use of the categorical approach. The SJC reached this conclusion in part because only one Massachusetts statutory crime—assault and battery on a household member (G.L. c. 265, § 13M)—explicitly includes abuse as an element. Id. at 236. Using statutory interpretation principles to presume that the Legislature intended to act logically, the Court opined that, “had the Legislature intended that only one crime be captured under the abuse clause,” it would have enumerated that crime rather than enact a separate “abuse” clause. Id. Instead, the SJC found, abuse “is best described as a characterization of an action or actions” and, therefore, a judge can look at the details of the defendant’s underlying conduct to determine whether the charge involves abuse. Id. Applying those principles to Scione, the SJC found that his alleged acts of placing a potentially-harmful IED on the property of his former girlfriend indeed involved abuse.

Commonwealth v. Vieira

The SJC’s decision in Barnes paved the way for its October 2019 decision in Commonwealth v. Vieira. 483 Mass. 417 (2019). There, the defendant was charged with indecent assault and battery on a child under 14 years old, in violation of G.L. c. 265, § 13B, based on allegations that he had engaged in sexual activity with a thirteen-year old boy he met online. Indecent assault and battery on a child under 14 is not an enumerated charge under § 58A, and the Commonwealth sought to treat it as a predicate charge under the force clause.

At the outset of its opinion, the SJC reminded practitioners that “pretrial detention is a measure of last resort,” and that the presumption of innocence always applies. Applying the categorical approach, the SJC observed that indecent assault and battery on a child under § 13B does not have statutory elements, but rather incorporates the common law definition of battery, including to the extent that an assault is simply a
threatened or attempted battery. The SJC explained that, at common law, there were three types of battery: (1) harmful battery, involving touching with such violence that bodily harm was likely to result; (2) reckless battery, involving a wanton, willful, or reckless act that results in injury; and (3) offensive battery, requiring “only that the defendant, without justification or excuse, intentionally touched the victim, and that the touching, however slight, occurred without the victim’s consent.” Although the first two types, the SJC found, necessarily involve the use of physical force, offensive battery does not. And, because a court evaluating bail and pretrial detention does not look to whether the charged conduct involves harmful, reckless, or offensive battery, application of the categorical approach means that a statutory crime incorporating all three types of battery does not necessarily always include force. Applying those principles, the SJC concluded that indecent assault and battery under § 14B is not a predicate charge under the force clause of § 58A.

Looking Forward

Two days after the SJC’s decision in Barnes, Governor Charles Baker submitted House Bill No. 66, An Act to Protect the Commonwealth from Dangerous Persons, which sought to change the dangerousness statute to include sex offenses involving children by adding those crimes – along with others – to § 58A’s list of enumerated crimes. This bill retains the force clause but completely removes the unconstitutional residual clause. Adding more enumerated crimes would have the effect of subjecting more individuals to dangerousness hearings and pre-trial detention. However, this approach does not address the issue that battery may not always include force, but commonly does. See, e.g., G.L. c. 265, § 13A (assault and battery). Instead, this legislation only addresses the specifics of the cases the SJC has adjudicated and misses an opportunity to draft legislation that looks forward and targets only the most dangerous of offenses and individuals.

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Boston’s Way Forward on Housing
By Councilor Lydia M. Edwards

Boston’s economy is thriving. Why then are so many residents of the City and Commonwealth struggling to find and afford housing, remain in the communities they love, become homeowners and build wealth? A shortage of housing that serves the needs of all economic classes and family structures is certainly part of the problem. But simply building across the region will not solve our state’s persistent housing affordability crisis. To house our diverse, growing population, we will need a multi-pronged approach that balances growth and prosperity with protection of all residents during both recession and economic booms and addresses the widening wealth gap that plagues our City and the Commonwealth. As Boston City Council Chair of the Housing and Community Development and Government Operations Committees, my view is that Boston can lead through housing policies that raise revenue for affordable housing, shape new inclusive neighborhoods through planning and zoning that affirmatively furthers fair housing, and stabilize communities through protections against involuntary displacement and equitable opportunities for home ownership.

Revenue for Affordable Housing

With the decades-long decline in federal funding, localities must look to other sources to finance the preservation and production of housing that is affordable to low- and moderate-income residents. Boston recently passed a home rule petition to collect a transfer fee of up to 2% on high-value real estate transactions that exceed $2 million dollars, subject to exemptions (“Transfer Fee Home Rule”). Enacted, the Transfer Fee Home Rule could generate as much as $169 million per year for affordable housing in Boston, vastly outstripping current resources at the City’s disposal. Municipalities as different as Somerville, Concord and Nantucket have also proposed transfer fees to fund their affordable housing, and 38 states and localities already have excise taxes on property sales.

Boston also has a pending home rule bill to authorize the City to update its existing Development Impact Program (“Linkage”) and Inclusionary Development Policy (“IDP”) which are each intended to mitigate the increased demands for affordable housing and job training attributable to large-scale developments. HB 4115. Enacted, HB 4115 would permit the City to make its own decisions to adjust the linkage fees to enable Boston to align more efficiently with changing market conditions and local needs without waiting for approval of the full General Court as currently required by statute; extend the IDP requirements (e.g., to create 13% of development as income-restricted units or contribute equivalent funds) which currently apply only to market-rate housing developments with 10 or more units and are in need of zoning relief, to all large projects regardless of whether zoning relief is needed; and codify the IDP into Boston’s Zoning Code.

Inclusive Zoning and Planning

Several “large projects” subject to Boston’s Article 80 Development Review and Approval process—including the former Suffolk Downs race tracks in East Boston, the Bunker Hill public housing in Charlestown, and the Mary Ellen McCormack public housing in South Boston—provide the City with unprecedented opportunities to shape entire new neighborhoods that provide an inclusive range of housing options to accommodate the City’s diverse population, while disrupting historic concentrations of poverty and patterns of racial and cultural segregation and providing access to employment and training opportunities for affected residents.

For public housing redevelopments, this may mean ensuring that income-restricted units are integrated with the market-rate units, whereas in purely private developments like Suffolk Downs, it may mean planning to ensure sufficient “affordable units” of the right bedroom size to house families and a community benefit agreement to mitigate meaningfully against adverse development impacts and hardships. I have proposed a
zoning change for Boston to systematically ensure that all developers undertake deliberate and “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” This change would amend the text of Boston’s Zoning Code to expressly incorporate our preexisting federal Affirmatively Furthering Fair Housing obligations.

Seattle and Portland, for example, already review their plans with a lens for racial equity and displacement risk along with opportunities for economic growth, to inform their choices.

The City also recently strengthened its comprehensive planning under the Climate Ready Boston Initiative by passing an Ordinance Protecting Local Wetlands and Promoting Climate Change Adaptation in the City of Boston to ensure the equitable protection of all residents from the effects of climate change.

**Community Stabilization**

Boston has been taking aggressive steps to address the chronic housing crisis since October 2014 when the mayor’s Housing Advisory Task Force issued Housing a Changing City: Boston 2030, which was updated in 2018. The original Plan called for the production of 69,000 new housing units by 2030 with specific targets for different affordability levels in an effort to create a more equitable and inclusive City. Beyond production, the City also dedicates funds to support the acquisition and deed-restriction of properties as affordable housing, regulates and restricts short-term rentals, protects against condominium conversions, and supports a right to counsel in eviction proceedings—all measures intended to protect residents, especially long-time, low-income, elderly, and disabled tenants, against involuntary displacement. The City also created the Office of Housing Stability (“OHS”) in 2016, the first of its kind in the nation, to work across City departments and with external partners to promote policies, practices, and programs that are effective in achieving housing stability for tenants at risk of eviction, which is also critical to stabilizing communities like Boston where the majority of the population is renters.

Other high-cost cities also have passed right to counsel legislation, and some states such as Oregon, California and New York are moving towards rent stabilization policies which would allow rent increases but prohibit increases as high as those experienced by many Boston residents. These states, as well as Boston, have also looked to “just cause eviction” policies in efforts to protect tenants current with rent and who otherwise have not broken their lease agreements.

Additionally, to encourage home ownership, Boston has expanded the availability of low-interest loans to moderate-income families through the ONE+ Boston program and approved zoning to allow for accessory dwelling units. Other policies which support resident-controlled housing, such as cooperatives, cohousing and community land trusts; the co-ownership of such housing by residents; and a resident’s right of first refusal to purchase, would each promote community stability, as well as individual opportunity to gain equity and build wealth.

**Conclusion**

Boston’s housing affordability crisis is not abating, and our response has not scaled up to protect all residents. With bolder action, we can create lasting stability in neighborhoods and reverse historic patterns of discrimination and dispossession in our real estate market, as well as in zoning and planning decisions. To achieve community stability we need a multifaceted approach to the housing shortage that is responsive to the diverse needs of all residents and to historic inequities and barriers to enabling them to remain in place and housed in their communities of choice.

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Case Analysis

SJC Addresses the Enforceability of Settlements Entered Without Insurers’ Consent

By Austin Moody

The Massachusetts Supreme Judicial Court (SJC) recently issued an important decision addressing three issues that can arise in the fairly common scenario in which an insurer recognizes its duty to defend its insured, does so under a reservation of rights, and then brings a separate action seeking a declaratory judgment that it owes no duty to indemnify its insureds.

In Commerce Ins. Co. v. Szafarowicz, 483 Mass. 247 (2019) the court addressed 1) whether the lower court properly denied the insurer’s motion to stay the underlying action until the question of its duty to indemnify had been determined in a declaratory judgment action, 2) whether the lower court properly denied the insurer’s motion to deposit its policy limit with the court – which would prevent the accrual of postjudgment interest, and 3) whether the insurer was bound by the settlement/assignment agreement the insured reached in the underlying matter.

The underlying case involved a wrongful death suit brought by the estate of David M. Szafarowicz. On August 3, 2013, shortly after a verbal altercation at a bar, Mr. Szafarowicz was struck and killed by a vehicle operated by Matthew Padovano. The vehicle was owned by Matthew’s father, Stephen Padovano, who had purchased an automobile insurance policy from Commerce Insurance Company (Commerce). Id. at 249 – 50.

Commerce agreed to defend the Padovanos in the underlying case. In addition, Commerce agreed to pay the $20,000 in compulsory insurance offered by the policy. However, it issued a reservation of rights regarding $480,000 in optional insurance based on the fact that the policy did not cover intentional acts and there was substantial evidence that Matthew Padovano struck the decedent intentionally. Commerce subsequently brought a declaratory judgment action seeking to establish that it had no duty to indemnify the Padovanos. Id. at 250 – 51.

Less than three weeks before the trial of the underlying action, Commerce filed a motion to intervene in the case based on its claim that both plaintiff and defendants were presenting Mr. Szafarowicz’s death as arising out of negligence rather than an intentional act – ostensibly to maximize the available insurance coverage. The judge denied the motion but held that Commerce would be allowed to challenge the fairness of the underlying litigation in the future. Id. at 252 -53. After the denial of its motion to intervene, Commerce moved to stay the wrongful death trial until after the question of insurance coverage was resolved in the declaratory judgment action. Again, Commerce’s motion was denied. Id. at 253.

Shortly before trial, the wrongful death action was settled. Matthew Padovano agreed that he was grossly negligent, the estate agreed not to enforce any judgment beyond the amounts payable by the insurance policy, and the Padovanos agreed to assign all rights under the Policy to the estate. Commerce objected to the settlement, but again, its motion was denied. Judgment ultimately entered in the amount of $7,669,254.41 – $5,467,510 in damages plus prejudgment interest in the amount of $2,201,744.41. Id. at 254.

Commerce appealed, challenging the denial of its motions to stay the wrongful death action so that the declaratory judgment action could be adjudicated first, and the overruling of its objections to the settlement. In addition, it sought to deposit the policy limits plus accrued postjudgment interest with the court. Commerce’s objective was to limit its liability for future postjudgment interest under a policy provision stating “[w]e will not pay interest that accrues after we have offered to pay up to the limits you selected.”
Commerce’s motion to deposit the funds was denied and Commerce filed an interlocutory appeal. On its own motion, the SJC transferred both appeals to its court. Id. at 254 – 56.

During the pendency of the appeal, Commerce prevailed in its declaratory judgment action in which the trial court held that the death was caused by Michael Padovano’s intentional conduct. The SJC therefore found that Commerce had no duty to contribute to the judgment above the $20,000 in compulsory insurance it had already paid. However, under the terms of the policy, Commerce still had an obligation to pay postjudgment interest on the entire judgment.

In its decision, the SJC addressed three issues. First, the SJC found that the lower court did not abuse its discretion by denying Commerce’s motion to stay. The Court found that Commerce did not suffer prejudice when the judge refused to stay the wrongful death action pending a resolution of the coverage dispute. Commerce was protected from prejudice based on the fact that it was subsequently permitted to challenge any underlying findings of negligence in the wrongful death action and was not bound by that court’s findings. In fact, Commerce had successfully done so and prevailed in the coverage litigation. Additionally, the Court found that it would be unfair to the claimant to delay the wrongful death action pending the resolution of the coverage case. Id. at 257 -58.

Second, the SJC found that the court did not abuse its discretion by denying Commerce’s motion to deposit the policy limits and accrued interest. Commerce was not permitted to prevent the accrual of postjudgment interest by conditionally depositing the policy limits plus accrued postjudgment interest with the court. The Court held that in order to prevent the accrual of postjudgment interest, Commerce would have to agree to pay its limits without conditions or qualifications. However, Commerce was actively seeking a declaratory judgment that it did not owe indemnity due to the intentional acts exclusion and, if successful, it planned to seek the return of the policy limits. Therefore, Commerce could not prevent the accrual of postjudgment interest. Id. at 259.

Finally, the Court found that Commerce was only bound by the underlying settlement/assignment agreements to the extent that they were found to be reasonable by the trial court. The SJC ruled that reasonableness should be considered based upon the “totality of the circumstances” including the facts bearing on the liability and damage aspects of plaintiff’s claim, as well as the risks of going to trial. Id. at 265. Because no reasonableness hearing was conducted by the trial court in this case, the SJC remanded for a hearing on the reasonableness of the settlement/assignment agreements. Id. at 267.

The SJC declined to consider an alternative inquiry into whether the settlement was collusive, because it opined that all settlement agreements of this nature – in which only the insurer is at risk of paying the plaintiff’s damages – can be characterized as somewhat collusive. It held that any concern an insurer may have that the plaintiff and the insured defendant have colluded to improperly inflate a settlement or stipulated judgment may be addressed as part of a reasonableness hearing. Id. at 266 – 67. Presumably, any settlement that was reached as the result of improper collusion would be determined to be unreasonable. The Court also declined to join a minority of states that in all circumstances, “because of the risk of collusion, declare such settlement/assignment agreements to be unenforceable where an insurer has honored its duty to defend.” Id. at 264.

The SJC noted that “the procedure we direct on remand is different from what we expect to happen in the future where an insurer successfully challenges a settlement/assignment agreement before judgment.” Id. at 267. In that event, the trial court “may decline to enter judgement in that amount and invite the parties to renegotiate “an agreement that might prove reasonable in amount”. Id. at 267 – 68.

Ultimately, the SJC’s opinion provides helpful guidance as to how an insurer offering an insured a defense under a reservation of rights in Massachusetts should proceed. It recognizes that the insurer will not always be bound by the findings of fact in an underlying case and preserves an insurer’s ability to challenge
unreasonable settlements.

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**Case Focus**


By: Julia Devanthery, Dan Daley, and Lisabeth Jorgensen

*Boston Housing Authority v. Y.A.*, 482 Mass. 240 (2019), is the most recent guidance from the Supreme Judicial Court concerning the application of the federal Violence Against Women Act (VAWA), 34 U.S.C. §§ 12291 et seq., to summary process (eviction) cases. Among other safeguards provided under VAWA, the statute protects victims of domestic violence from eviction from federally subsidized housing so long as the basis for the eviction is a direct result of domestic violence. *Boston Hous. Auth. v. Y.A.*, 482 Mass. 240, 245 (2019); 34 U.S.C. § 12491(b)(1) (2018); 24 C.F.R. § 5.2005(b).

**Summary of Case & Applicable Law**

In *BHA v. Y.A.*, the housing authority brought a motion to issue execution against one of its tenants who failed to adhere to the payment schedule in a court approved agreement for judgment (the “Agreement”) the tenant had signed. At the hearing, the tenant testified that it was because she was in an abusive relationship. The trial court granted the housing authority’s motion, finding that the tenant’s failure to pay her rent was a substantial violation of a material term of the Agreement under M. G. L. c. 239, § 10. However, the judge did not take into account the tenant’s testimony about domestic violence. On appeal, the tenant—represented by counsel for the first time—argued that the judge failed to consider whether the tenant’s alleged breach of the Agreement was related to domestic violence or whether she was protected from eviction by VAWA.

The application of the VAWA defense to tenants of public housing facing eviction for non-payment of rent after having signed an agreement for judgment was a matter of first impression for the SJC. See *BHA v. Y.A.*, 482 Mass. at 247. In *BHA v. Y.A.*, the SJC held that the trial court should have determined whether the tenant was entitled to VAWA protection from eviction, reversed the housing court’s decision allowing the housing authority to evict the tenant and remanded it “for further inquiry and findings whether domestic violence contributed to Y.A.’s failure to make agreed-upon payments.” *Id.* at 248.

**Key Holdings**

*BHA v. Y.A.* will have far-reaching implications for victims of domestic violence across Massachusetts and, perhaps, nationally. The holding affirms many core principles that will protect victims and their families from eviction and homelessness.

First, the SJC’s holding that a tenant may raise a VAWA defense to eviction at any time during an eviction proceeding, even after multiple years of nonpayment and signing multiple agreements for payment plans, will help ensure that victims can raise the defense whenever it is safe to do so, or when they learn of their right to do so. See *BHA v. Y.A.*, 482 Mass. at 248. The SJC’s decision confirmed that a tenant in federally financed housing can raise a VAWA defense for the first time in response to a landlord’s claim of a violation of an agreement for judgment. *Id.* at 246-247.

Y.A. had never raised the issue of domestic violence before appearing in court for the hearing on the housing authority’s motion for issuance of execution. See *BHA v. Y.A.*, 482 Mass. at 247. The SJC held “that Y.A.’s statement at the hearing that she was in an abusive relationship and that her partner “would take everything” from her was not untimely.” *Id.* In fact, the SJC held that Y.A. was permitted to raise her VAWA defense on the enforcement of the fifth court agreement between the parties. *Id.* at 248. So long as the nonpayment is a
direct result of domestic violence, the VAWA defense can be raised even in instances of chronic non-payment of rent. *Id.* at 249. According to *BHA v. Y.A.*, in which Y.A. did not refer to VAWA at all, a tenant is only required to give the judge “reason to believe that domestic violence … might be relevant to a landlord’s basis for eviction.” *Id.* at 247. This more flexible approach to raising a VAWA defense is consistent with the fact that most tenants go unrepresented in summary process cases and is very similar to the standards used in cases involving disabled tenants and reasonable accommodations.

Finally, the Court gave significant guidance to both covered housing providers and judges when presented with evidence of domestic violence. The Court held that covered housing providers are not only barred from evicting tenants for reasons directly related to domestic violence, but are also required to relocate a tenant to a safe unit, upon request, where there is a reasonable belief that there is a threat of imminent harm from staying in the same unit. *Id.* at 244-45. Additionally, it held that judges, upon hearing evidence of domestic violence, are obligated to inquire further in order to fully evaluate the applicability of VAWA and write findings before issuing a decision. *Id.* at 247.

**Practical Lessons**

**Providing notice to a landlord prior to action for eviction**

It is clear from the principles set forth in *BHA v. Y.A.* that, in a federal housing eviction case, a tenant has the right to raise a VAWA defense to an allegation of a breach of a lease agreement without having sought any VAWA protection from the landlord beforehand. However, as a practical matter, practitioners should advise clients to notify their landlords that domestic violence has affected the tenant’s ability to pay rent or has otherwise caused the tenant to violate the terms of the lease as soon as it is safe to do so. When landlords are informed about domestic violence issues affecting a tenancy, VAWA expressly encourages housing providers to “undertake whatever actions permissible and feasible under their respective programs” to assist domestic violence victims living in their housing units to remain in their housing. See 24 C.F.R. § 5.2009(c). For example, under VAWA, and upon request, a covered landlord is required to relocate a tenant to a safe unit (or may remove a household member from a lease) in order to mitigate the threat of imminent harm from further violence.

**The VAWA defense in a court proceeding**

In Massachusetts, a defendant normally raises defenses to possession through an answer to the complaint. See Uniform Summary Process Rule 3 and Uniform Summary Process Rule 10(a). However, as explained above, the VAWA defense may now be raised at any time during an eviction from federally subsidized housing.

**Conclusion & Tips for Effective Counseling**

Certain safety repercussions need to be considered in counseling a client with a potential VAWA defense. As explained above, the defense can be raised directly with the housing provider pre-eviction, in an answer or in subsequent pleadings, during a hearing, trial, or post-judgment. To qualify for the defense, a practitioner should seek to admit one of the VAWA-approved forms of verification but should also carefully consider whether the client’s testimony is necessary. Advocates should also evaluate the client’s options to impound the file, identifying information, or other specific documents that contain sensitive information about domestic violence. Finally, tenant advocates should counsel the client to seek safety-planning support from a domestic violence service provider before deciding whether to raise the defense, and throughout the case.

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After Goodridge: the Potential of Equal Protection Challenges Under the Massachusetts Constitution Involving Non-Economic, Personal Interests

By Steven E. Gurdin and Kelly A. Schwartz

Massachusetts courts apply an enhanced version of rational basis review where regulations infringe on non-economic, personal interests. In light of Goodridge v. Department of Public Health, 440 Mass. 309 (2003), this analysis has the potential to support constitutional challenges on equal protection grounds to two existing Massachusetts statutes related to families. They are: (1) M.G.L. c. 119, § 39D, the grandparent visitation statute; and (2) M.G.L. c. 209C, § 10, custody of children born out of wedlock.

Equal Protection and Enhanced Rational Basis Review in Massachusetts

Equal protection requires “that all persons in the same category and in the same circumstances be treated alike.” Opinion of the Justices, 332 Mass. 769, 779-80 (1955). The standard of review in Massachusetts for equal protection claims that do not involve a fundamental right or suspect class is rational basis review. See Tobin’s Case, 424 Mass. 250, 252-53 (1997).

The Massachusetts Constitution requires that a regulation be “rationally related to the furtherance of a legitimate State interest.” Mass. Fed’n of Teachers, AFT, AFL-CIO v. Bd. of Educ., 436 Mass. 763, 777 (2002) (quoting Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm’n, 429 Mass. 721, 722 (1999)). However, the Supreme Judicial Court (SJC) has determined that in cases involving non-economic regulations, Massachusetts’s Constitution “may guard more jealously against the exercise of the State’s police power” than the Federal Constitution.[1] That is, the SJC has applied an enhanced version of rational basis review where classifications affect personal, non-economic interests that are not considered fundamental. See Friedman, supra note 2.

The most prominent example of this analysis is Goodridge.[2] There, same-sex couples alleged that the denial of their access to marriage licenses and the status of civil marriage violated the Massachusetts Constitution. The Court held that this exclusion violated equal protection. The Court concluded that “[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason,” noting that “[t]he absence of any reasonable relationship between” the exclusion of same-sex couples from marriage and the protection of the general welfare. Goodridge, 440 Mass. at 341 (emphasis added).

As exemplified by Goodridge, enhanced rational basis review under the Massachusetts Constitution requires that there be an actual, rather than merely a conceivable, connection between the government’s legitimate regulatory interest and the imposed regulation, and that the connection be reasonable. See Friedman, supra note 2 at 418. Moreover, Massachusetts’s rational basis review for equal protection claims, “requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” Goodridge, 440 Mass. at 330 (emphasis added) (internal quotations omitted) (quoting English v. New England Med. Ctr., Inc., 405 Mass. 423, 429 (1989)).

Grandparent Visitation

Under this enhanced rational basis review, Massachusetts’s grandparent visitation statute, as-applied, arguably violates equal protection under the Massachusetts Constitution.

M.G.L. c. 119, § 39D states in relevant part:
If the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased, or if said unmarried minor child was born out of wedlock whose paternity has been adjudicated by a court of competent jurisdiction or whose father has signed an acknowledgement of paternity, and the parents do not reside together, the grandparents of such minor child may be granted reasonable visitation rights . . . upon a written finding that such visitation rights would be in the best interest of the said minor child . . . .

(Emphasis added.)

The statute, as interpreted by Blixt v. Blixt, 437 Mass. 649 (2002), essentially imposes two conditions for grandparents to seek visitation: that the parents are separated or divorced; and that the grandparents have either a significant preexisting relationship with the grandchildren, or that the grandchildren will suffer significant harm absent visitation with the grandparents. Under Blixt, the second condition amounts to a heightened pleading requirement that grandparents must meet in order to seek visitation.

As-applied, the law discriminates against grandparents of grandchildren whose parents are not divorced or separated with respect to their ability to seek visitation when it is in the grandchildren’s best interest. The statute creates two classes of grandparents: (1) those who can seek visitation because the parents are divorced or separated; and (2) those who cannot because the parents are not divorced or separated. The classes are similarly situated because both sets of grandparents would presumably seek visitation regardless of the parents’ marital or living status on the grounds that it would be in the best interests of their grandchildren.

Applying enhanced rational basis review, the statutorily-created classifications of grandparents do not rationally serve a legitimate public purpose that transcends the harm in denying the opportunity for grandparents of parents who are not separated or divorced from seeking visitation when it is in the grandchildren’s best interest. Three potential rationales for the discrimination are: preserving judicial resources; preventing infringement of parental rights; and safeguarding the welfare of children and giving deference to Blixt’s rationale “that the burden of the traumatic loss of a grandparent’s significant presence may fall most heavily on the child whose unmarried parents live apart” in using parental status to distinguish between classes of grandparents. 437 Mass. at 664; see Goodridge, 440 Mass. at 331. Each of these rationales likely fails enhanced rational basis scrutiny.

First, the requirements for visitation would continue to preserve judicial resources even if grandparents of parents who are not separated or divorced petitioned for visitation because the heightened pleading requirements would serve as a gatekeeping mechanism. Second, the heightened pleading requirements would protect the rights of parents to make child-rearing decisions because only grandparents who can demonstrate that there was a significant preexisting relationship with the grandchildren, or that the grandchildren will be significantly harmed, could seek visitation. Finally, denying certain grandparents the right to seek visitation when it is in the grandchildren’s best interests would not safeguard children’s interests, especially when Blixt acknowledges that there may be children whose parents are not divorced or separated who would be harmed without visitation with their grandparents. See 437 Mass. at 664. It is precisely these factual circumstances that would serve as the basis for an as-applied challenge to the statute, where a court can reconsider the law in the context of an actual dispute. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50, 457-58 (2008).

Custody of Children Born Out of Wedlock

Similarly, Massachusetts’s statute pertaining to custody of children born out of wedlock arguably violates equal protection under the Massachusetts Constitution pursuant to enhanced rational basis review analysis.

M.G.L. c. 209C, § 10(a)-(b) provides in relevant part:
(a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or the father or to them jointly . . . as may be appropriate in the best interests of the child . . . . In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child’s best interests.

(b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

(Emphasis added.)

As-applied, the law denies unwed fathers not cohabitating with the mother,[4] the right to equal protection by discriminating against these fathers as compared to divorcing fathers when joint legal custody is in the child’s best interest.[5] Pursuant to M.G.L. c. 208, § 31, divorcing fathers are presumed to have joint legal custody of a child until otherwise ordered and need only prove that it is in the child’s best interest for it to be awarded. Whereas, pursuant to M.G.L. c. 209C, § 10(a)-(b), unwed fathers not cohabitating with the mother are not presumed to have joint legal custody and must meet additional and burdensome requirements to have it awarded.[6] The fathers are similarly situated because both groups are men whose parentage has either been assumed due to their marital status or established by adjudication or acknowledgment, and whose children would presumably benefit from their involvement in their life.[7]

To be awarded joint legal custody absent an agreement with the mother, in addition to satisfying the best interest standard, an unwed father not cohabitating with the mother is required to prove that he and the mother “have successfully exercised joint responsibility for the child prior to the commencement of proceedings;” and he and the mother have “the ability to communicate and plan with each other concerning the child’s best interests.” M.G.L. c. 209C, § 10(a). A divorcing father, however, enjoys “temporary shared legal custody of any minor child of the marriage” and he need only ultimately prove that an award of joint custody is in the child’s best interest. M.G.L. c. 208, § 31.

Under an enhanced rational basis review analysis, the different treatment of unwed fathers not cohabitating with the mother and divorcing fathers pursuant to M.G.L. c. 209C, § 10(a)-(b) likely does not rationally serve a legitimate public purpose that transcends the harm in requiring that unwed fathers meet more onerous requirements.[8] Potential public purposes that may be advanced to justify the discrimination are: preserving judicial resources; and safeguarding the wellbeing of children.[9]

First, judicial resources would not be further expended if both classes of fathers were afforded the same presumption and held to the same standard to be awarded joint legal custody. In fact, judicial resources may be conserved if all fathers were afforded the presumption and only the child’s best interest governed. Second, the wellbeing of children is not enhanced by requiring that unwed fathers not cohabitating with the mother meet more burdensome requirements or be denied a presumption of joint legal custody because an analysis of the child’s best interest should afford all children the same protection, especially where there are divorcing fathers who do not have a history of successfully exercising joint responsibility for the child and cannot communicate or cooperate with the mother. If children of unwed fathers not cohabitating with the mother are afforded greater protections than children of divorcing fathers, this likely violates “the Commonwealth’s strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors.” Goodridge, 440 Mass. at 325 (citations omitted); see M.G.L. c. 209C, § 1 (“Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children.”). Further, these
additional and burdensome requirements may discourage fathers whose children would benefit from their participation in important decisions from pursuing these rights. See Cuadra, supra note 6 at 634-35.

Conclusion

Looking to Goodridge as a roadmap for an enhanced rational basis review analysis, some Massachusetts statutes impacting personal interests, like a grandparent’s ability to pursue visitation or an unwed father’s ability to participate in important child rearing decisions, may well be vulnerable to challenges on equal protection grounds. This kind of judicial review recognizes that there may be instances in which legislative classifications draw lines that infringe on personal interests without adequate justification. This review does not mean every statute that differentiates among significant personal interests will fail—just that the Commonwealth must be able to articulate a reason for the discrimination that has a basis in fact. On the right facts, an enhanced rational basis review analysis has the potential to push the legal landscape to better serve families by pushing the Commonwealth either to justify the discrimination or abandon distinctions that no longer make sense.

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[1] See Blue Hills Cemetery, Inc. v. Bd. of Reg. in Embalming & Funeral Directing, 379 Mass. 368, 373 n.8 (1979); Coffee-Rich, Inc. v. Comm’r of Pub. Health, 348 Mass. 414, 421-22 (1965); Lawrence Friedman, Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation, 69 Albany L. Rev. 415 (2006) (discussing history of Massachusetts cases in which courts applied less deferential rational basis review under the Massachusetts Constitution); see also Goodridge, 440 Mass. at 328 (“The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”), n.18 (“We have recognized that our Constitution may more extensively protect individual rights than the Federal Constitution in widely different contexts.”).


[3] Of note, Massachusetts House Bill No. 1534, which was submitted in the current session on January 18, 2019, provides that any grandparent may file an original action for visitation rights if it is in the child’s best interest and if, among other conditions, “the child is living with biological parents, who are still married to each other, whether or not there is a broken relationship between either or both parents of the minor and the grandparent and either or both parents have used their prenatal authority to prohibit a relationship between the child and the grandparent.”

[4] See Dep’t of Revenue v. C.M.J., 432 Mass. 69, 77 (2000) (determining that under M.G.L. c. 209C, § 10(b), an unwed father cohabitating with the mother and providing support to his children was presumed a custodial parent even absent a court order regarding custody); Trial Court Judgment of Dismissal and Memorandum of Decision (Gibson, J. Nov. 5, 2013); see also Com. v. Gonzalez, 462 Mass. 459, 464 & n.12 (2012); 14B Mass. Prac., Summary of Basic Law, § 8:264 (5th ed. 2019) (“[I]f the father is living with the mother and the child or children born out of wedlock, the mother’s custody is not sole custody, but joint custody with the father.”) & nn.4-5.


[6] Department of Revenue v. C.M.J. did not, however, address whether unwed fathers cohabitating with the
mother must also meet the additional requirements outlined in M.G.L. 209C, § 10(a) to be awarded joint legal custody.

[7] See Cuadra, supra note 6 at 633-34 (“Joint legal custody has been shown in the context of divorce to increase a father’s involvement with his child, including parenting time and overnights. Subsequent research suggests the same outcome for unwed fathers.”).

[8] See Goodridge, 440 Mass. at 330; see also Cuadra, supra note 6 at 639 (suggesting that Massachusetts’s different treatment of divorcing and unwed fathers should be examined pursuant to a rational basis review where the statute would “be scrutinized with something greater than sweeping deference.”) & n.251 (citing and quoting Goodridge).

[9] See Goodridge, 440 Mass. at 331; Blixt, 437 Mass. at 663; Trial Court Judgment, supra note 5.
Case Focus
Reid v. City of Boston: Extending the Massachusetts Tort Claims Act’s Interpretive Complexity
By Andrew Gambaccini

The Legislature enacted the Massachusetts Tort Claims Act (“MTCA”), G.L. c. 258, §§ 1 et seq., to replace a crazy quilt of judicially created exceptions to governmental immunity and provide a “comprehensive and uniform regime of tort liability for public employers.” Lafayette Place Associates v. Boston Redevelopment Auth., 427 Mass. 509, 534 (1998). Since its initial enactment, what has developed is a further set of immunity principles, exceptions to those principles, and exceptions to the exceptions to the principles that has led to uncertainty for courts and practitioners, which continues with the decision in Reid v. City of Boston, 95 Mass. App. Ct. 591, rev. denied, 483 Mass. 1102 (2019).

The Evolution of Governmental Immunity in Massachusetts


The MTCA followed, allowing for limited governmental tort liability as well as setting out the procedures through which claims were to be presented and pursued. The statutory scheme provides generally that public employers are liable for the negligent or wrongful acts or omissions of public employees acting within their scope of employment, while public employees are shielded from personal liability for negligent conduct. G.L. c. 258, § 2. At the same time, several statutory exceptions to the general waiver of governmental immunity were created. See G.L. c. 258, § 10.

It was not long before case nuances again created interpretive difficulties. In 1982, the SJC applied the “public duty rule” to protect governmental units from liability unless a plaintiff demonstrated that a duty breached was owed to that plaintiff, and not simply to the public at large. See Dinsky v. Framingham, 386 Mass. 801 (1982). Within a short time, the SJC endorsed a “special relationship” exception to the public duty rule, permitting governmental liability where a governmental actor reasonably could foresee both an expectation to act to protect a plaintiff and the injury caused by failing to do so. See Irwin v. Ware, 392 Mass. 745 (1984). When subsequent judicial gloss through the “public duty-special relationship dichotomy” failed to produce “a rule of predictable application[,]” the SJC announced its intention to abolish the public duty rule altogether. Jean W. v. Commonwealth, 414 Mass. 496, 499 (1993) (Liacos, C.J. concurring); see also 414 Mass. at 514-15 (Wilkins, Abrams, J. concurring) and 523-25 (Greaney, J. concurring). The Legislature responded by amending the MTCA, most notably by adding six new § 10 exceptions, (e) through (j), to the general waiver of governmental immunity, modification that has done little to diminish the vexing complexities of governmental liability and immunity.

Reid v. City of Boston

Reid features the latest judicial foray into two of the knottiest statutory exceptions concerning governmental immunity, §§ 10 (h) and 10 (j). Plaintiff Reid received a call from her sister, during which the sister was heard asking someone to stop following her and why that person’s hands were behind his back. Knowing her sister had a troubled relationship with her boyfriend, Reid drove to her sister’s home, where she saw her...
sister’s boyfriend, Cummings. Reid engaged him in a conversation that was neither heated nor worrisome for Reid. As they spoke, Reid’s sister called 911 and reported that Cummings had threatened to kill her.

Three Boston police officers responded and came upon Reid and Cummings. The officers perceived the two to be speaking calmly, noted no injuries and saw no indication of either being armed, something both Reid and Cummings denied. As the inquiry continued, one officer approached Cummings from behind, suddenly grabbed him and reached for his waist, intending to frisk Cummings for weapons. Cummings pushed the officer away, drew a firearm from his waistband and opened fire. The officers returned fire. Cummings was killed, one officer was shot in the leg and Reid also was shot in the leg by Cummings.

Reid sued the officers and the City. The Superior Court dismissed the claims against the officers, but the negligence claim against City proceeded to trial. Reid claimed that the attempt to frisk Cummings created a harm that otherwise did not exist, escalating a controlled encounter into a shootout, and that such negligence caused her injury. By special verdict form, the jury found the City liable, concluding the police pre-shooting negligence was a substantial contributing factor in causing Reid’s injury. The City filed a motion for judgment notwithstanding the verdict, arguing that it was immune pursuant both to G.L. c. 258, § 10 (h), which, among other things, immunizes municipalities from claims based upon failure to provide police protection, and § 10 (j), which, in part, forecloses claims against a governmental agency based upon a failure to prevent violence by a third party not originally caused by a government actor. The Superior Court denied the motion and the City appealed.

The Appeals Court affirmed the denial of the motion, turning away both of the City’s § 10 arguments. As to immunity for failure to provide police protection under § 10 (h), the tip of the City’s spear was Ariel v. Kingston, 69 Mass. App. Ct. 290 (2007). Ariel involved a plaintiff who was a passenger in a motor vehicle approaching an intersection where police officers were directing traffic in the vicinity of an accident. Proceeding with a green light, the driver of the plaintiff’s vehicle entered the intersection while contemporaneously an officer waved, against a red light, another vehicle into the intersection, leading to a collision. The Ariel Court determined that the town was immune pursuant to § 10 (h) because controlling traffic was a form of police protection to the public.

Analyzing the § 10 (h) exception in Reid, the Appeals Court stated that, while § 10 (h) “shields municipalities from claims where police officers negligently failed to prevent harm posed by third parties[,]” Reid’s “successful theory of liability was not that the police officers failed to protect her from a threat, but rather that the officer’s affirmative conduct created a danger that did not previously exist.” Reid distinguished Ariel by noting the officers directing traffic were providing police assistance to mitigate a dangerous condition while, in Reid, the officers encountered a calm situation and it only was police action that created the danger.

Concerning immunity for the failure to prevent violence by third parties not originally caused by government actors under § 10 (j), Reid avoided the intensely problematic determination of whether the officers’ actions “originally caused” Reid’s injury, instead drawing on a statutory exception to this immunity. Specifically, the Appeals Court found that subsection § 10 (j) (2)’s exception to immunity applied because the officer’s intervention had “place[d] the victim in a worse position than she was in before the intervention[.]” In broad stroke, Reid concluded that the City could be liable because its officer had engaged in an “affirmative act” that contributed materially to create the danger from which the plaintiff sustained injury.

It long has been difficult to chart a predictable course through the statutory and judicial landscape of governmental immunity. Reid’s interpretation of § 10 (h) adds another layer of complexity to this area of law. While Ariel involved an officer engaging in the affirmative act of waving a car into a police-controlled intersection, there was no municipal liability in that case because the circumstance was “dangerous” however municipal liability existed in Reid because a police response to a 911 call featuring an allegation of
domestic assault somehow took place in “calm” conditions. Further, because Reid passed on its opportunity to clarify §10 (j), including, for example, a discussion of factors relevant to determining whether the officers’ actions were the original cause of injury, §10 (j) remains a morass of cascading exceptions to the MTCA’s general waiver of immunity.

Cummings was armed and prepared to shoot. If he had fired before any attempt at a frisk, there seems little doubt that the City could not have been found liable. That Cummings made his choice to shoot after an officer tried to frisk him for purposes of weapon detection and disarmament rendered the City liable for Cummings’ shooting of Reid. In the last analysis, Reid’s interpretation of §§ 10 (h) and 10 (j) leaves the principles of governmental immunity as it found them – a complex, nuanced and often confusing “process of defining the limits of governmental immunity through case by case adjudication.” Whitney, 373 Mass. at 209-10.

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Heads Up

Massachusetts Wage and Hour Laws Apply to Au Pairs
By Andrea Peraner-Sweet and Lauren D. Song

On December 2, 2019, in Capron v. Attorney General of Massachusetts, 944 F.3d 9 (2019) (“Capron”), the First Circuit Court of Appeals held that federal laws regulating the J-1 Visa Exchange Visitor Program for au pairs (“Au Pair Program”) do not preempt Massachusetts wage and hour laws applicable to domestic worker arrangements: Massachusetts Domestic Workers Bill of Rights Act (“DWBRA”), G.L. c. 149, §§ 190–191, and the Massachusetts’ Fair Wage Law, G.L. c. 151, § 1. This means that host families in the Commonwealth are obligated to pay au pairs at least the state minimum wage ($12.75/hour effective January 1, 2020) and overtime, higher compensation than the federal $7.25 hourly rate currently required under the Au Pair Program. It also means that host families—as employers of domestic workers—must become familiar with the DWBRA’s requirements because failure to comply with Massachusetts wage and hour laws can expose host families to substantial damages, including treble damages, attorneys’ fees and costs. See Andrea Peraner-Sweet, How to Hire a Domestic Worker and Stay Out of Trouble, 62 Boston Bar J. (Summer 2018).

The Au Pair Program And Its Compensation

As described in Capron, the Au Pair Program is a cultural exchange program regulated by the United States Department of State (“DOS”) through which foreign individuals can obtain J-1 Visas and be matched with United States host families to provide up to 45 hours a week of child care services while pursuing a post-secondary education. 22 C.F.R. § 62.31. The DOS administers the Au Pair Program through private placement agencies it designates to conduct DOS-approved exchange programs (“Sponsors). The Sponsors select and match participants with host families. 22 C.F.R. § 62.10.

The Au Pair Program regulations require Sponsors to ensure that au pairs are compensated “at a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the [Department of Labor (DOL)].” 22 C.F.R. § 62.31(j)(1). The DOL has determined that Au Pair Program participants are “employees” within the meaning of FLSA and, thus, entitled to federal minimum wage. 29 U.S.C. § 206(a). The FLSA, however, exempts live-in domestic workers from overtime payment. 29 U.S.C. § 213(b)(21). DOL regulations also permit deductions for the costs of room and board: either a fixed credit amount that is tied to a percentage of the federal minimum wage, or the actual, itemized costs, provided the itemized deductions are supported by adequate records. 29 C.F.R. § 552.100(c)–(d). Importantly, as the First Circuit notes, the FLSA contains a savings clause that “[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter.” 944 F.3d at 18 (quoting 29 U.S.C. § 218(a)).

Massachusetts Au Pair Compensation

The DWBRA defines au pairs as “employees” and “domestic workers” and their host families as “employers.” G.L. c. 149, § 190(a). Under the DWBRA and Fair Wage Law, au pairs are entitled to the state minimum wage and overtime pay at 1.5 times the hourly rate for “working time” over 40 hours per week. G.L. c. 151, § 1; 940 C.M.R. 32.03(3). An au pair’s “working time” includes all hours that the au pair is required to be on duty including meal, rest and sleep periods unless during those periods the au pair is free to leave the host family’s premises, use the time for their sole benefit and is relieved of all duties during these time periods. Id., 32.02. Host families are required to keep records of an au pair’s hours worked. Id., 32.04(2). The DWBRA also permits deductions for lodging and food, if agreed to in advance and in writing by the domestic worker, which are at a fixed credit amount of $35 per week for a single-occupancy room and $1.25 for breakfast, $2.25 for lunch, and $2.25 for dinner. Id., 32.03(5)(b)-(c).
Additionally, au pairs are entitled to at least 24 consecutive hours of rest when working 40 hours per week, workers’ compensation, sick time, and notice of why and when the host family may enter their living space.

The Litigation

In 2016, in response to enactment of the DWBRA, Cultural Care, Inc., a Sponsor au pair placement agency and two former Massachusetts hosts (“Plaintiffs”), sought declaratory and injunctive relief from the United States District Court claiming that the federal laws governing the Au Pair Program impliedly preempted Massachusetts wage and hour laws with respect to au pairs. The District Court found no preemption and dismissed the action, and Plaintiffs appealed.

The Plaintiffs claimed that the Au Pair Program preempted Massachusetts wage and hour laws under “field preemption” and/or “obstacle preemption.” Under “field preemption,” Plaintiffs argued that the detailed regulatory scheme governing the Au Pair Program together with the federal interest in regulating immigration and managing foreign relations evidenced the federal government’s intent to “occupy the field” of regulation of au pairs, thereby preemption state laws and regulations that might otherwise apply to au pairs. 944 F. 3d at 22. Under “obstacle preemption,” Plaintiffs argued that compliance with Massachusetts wage and hour laws would create an obstacle to achieving the underlying purposes and objectives of the Au Pair Program by frustrating the federal intent to “set a uniform, nationwide ceiling” on compensation obligations and recordkeeping and administrative burdens. Id. at 26-27.

The First Circuit rejected Plaintiffs’ arguments, concluding that Plaintiffs failed to sustain their burden of proving either field or obstacle preemption. The Court determined that Plaintiffs’ reliance on the DOS’s comprehensive and detailed regulations was insufficient to demonstrate a federal intent to oust a whole field of state employment measures, a “quintessentially local area of regulation.” Id. at 22. Rather, the Court opined: “It is hardly evident that a federal foreign affairs interest in creating a ‘friendly’ and ‘cooperative’ spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing the same work.” Id. at 26.

The Court also rejected Plaintiffs’ obstacle preemption claim that enforcement of Massachusetts’ employment laws would frustrate a federal objective of establishing a nationally uniform compensation scheme for au pair participants. Noting that “the text of the au pair exchange regulations…does not supply the requisite affirmative evidence that the state law measures would pose an obstacle to the accomplishment of the purposes and objectives of the Au Pair Program,” the First Circuit concluded, “[i]n fact, the text of the regulations reflects the DOS’s intention to ensure that the regulations would accommodate the DOL’s [Department of Labor] determination that au pair participants are employees who are entitled to be protected by an independent wage and hour law that is not itself preemptive…. [and] that the DOS contemplated that state employment laws would protect exchange visitor program participants from their employers.” Id. at 32-33 (underline in original).

What do host families need to know now?

It is not yet clear whether Capron will apply retroactively or whether Massachusetts host families will be liable for back wages for au pairs who were not compensated in accordance with state wage and hour laws. The Attorney General’s office has indicated that, “at this time,” its focus is on ensuring that au pair agencies bring their programs into compliance with Massachusetts laws and it does not intend to enforce the DWBRA or other wage and hour laws against host families. The Attorney General’s office does note, however, that it has no control over private litigation. As of the time of this writing, at least three putative class action suits and one other action, all by private individuals, have been filed in Middlesex Superior Court against several Sponsor au pair agencies. No action has yet to be filed against any host families.
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Case Focus

Student Disciplinary Proceedings Revisited: A Responding Party is Not Entitled to “Quasi-Cross-Examination” in Private School Disciplinary Proceedings

by R. Victoria Fuller

Until recently, a key procedural issue in disciplinary proceedings administered by educational institutions—whether the responding party was entitled to conduct cross-examination—remained unclear in Massachusetts and the First Circuit. A pair of recent First Circuit decisions provide some clarity for Massachusetts public and private institutions, respectively. First, in Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019), discussed in the Fall issue of the Boston Bar Journal, the First Circuit Court of Appeals addressed the obligations imposed by the Due Process Clause of the Fourteenth Amendment on public educational institutions in disciplinary proceedings. There, the Court held that the responding party did not have a right to cross-examine the reporting party or other adverse witnesses in such proceedings, even where credibility was at issue, and that a public educational institution could implement a non-adversarial, “inquisitorial” system without violating the federal Due Process Clause so long as the educational institution adequately questioned the reporting party.

Most recently, in John Doe v. Trustees of Boston College, 942 F.3d 527 (1st Cir. 2019), the First Circuit addressed the same issue, but in relation to disciplinary proceedings in private educational institutions. As discussed below, the responding party argued that he was entitled to real-time examination of the reporting party and adverse witnesses through a neutral—or as the First Circuit called it, “quasi-cross-examination.” The Court rejected that argument. It held that private school proceedings are governed by state law, not the federal Due Process Clause, and that applicable Massachusetts contract law did not recognize a right of cross-examination.

The Complaint and Disciplinary Proceedings

In John Doe, the disciplinary proceeding was triggered by a complaint by a female student that a male student—the responding party—had sexually assaulted her. The complaint was governed by the university’s Student Sexual Misconduct Policy (the “Policy”), which established the university’s procedure for the adjudicating sexual misconduct complaints. Under the Policy, sexual misconduct complaints were to be investigated by one (or more) internal or external investigators. The Policy did not permit either party to cross-examine the other party or adverse witnesses.

In the case of John Doe, once the investigators completed the investigation, they prepared a written report. Applying a preponderance of the evidence standard, the investigators found that several of the responding party’s statements lacked credibility, or failed to support his defense that the sexual contact at issue was consensual, and concluded that the responding party had violated the Policy. Based on the investigators’ findings and conclusions, the university imposed an immediate one-year suspension on the responding party.

After exhausting his appeals at the university, the responding party sued in the District of Massachusetts, seeking an injunction staying his suspension. The responding party argued that he was entitled to a form of real-time examination, including:

- Contemporaneous questioning by a “neutral” (who may be a hearing officer or an investigator) of both the reporting party and the responding party (though not necessarily in the same room);
- Disclosure of the exact statements of the adverse party in real time; and
- The opportunity to submit questions to the neutral, either orally or in writing, to be put to the other party.
The District Court agreed, and granted the requested injunction, thus staying the responding party’s suspension. The university appealed.

**Private School Disciplinary Proceedings Are Governed by State Law**

The First Circuit disagreed and vacated the injunction. The Court held that Massachusetts private schools are not obligated to provide *any* form of cross-examination, let alone the “real-time examination” sought by the responding party (and which the First Circuit referred to as “quasi-cross-examination”).

The Court explained that Massachusetts private school disciplinary proceedings are not governed by the federal Due Process Clause, but instead by applicable Massachusetts contract law. *See* 942 F.3d at 529. In Massachusetts, courts use two analyses to determine whether a private institution has breached its contract with a student: (1) whether the reasonable expectations of the parties have been met; and (2) whether the procedures implemented by the school were conducted with “basic fairness.” *Id.* at 533-34. First, the Court rejected the responding party’s argument that he reasonably expected he would be afforded the opportunity to conduct a form of quasi-cross-examination. Nothing in the Policy’s detailed procedures provided any basis for such an expectation.

Second, the Court stated that Massachusetts concept of “basic fairness” does not require quasi-cross-examination. “Basic fairness” requires only that a public institution act in good faith and on reasonable grounds, and that its decision must not be arbitrary and capricious. *See* Covency v. President & Trs. of The Coll. of The Holy Cross, 388 Mass. 16, 19 (1983); Driscoll v. Bd. of Trs. of Milton Acad., 70 Mass. App. Ct. 285, 295 (2007). The Court also clarified that its recent decision in *Haidak v. University of Massachusetts-Amherst* was inapplicable: Boston College was neither a public university nor a government actor, and therefore was not subject to the federal Due Process Clause. The Court also noted that the Massachusetts Supreme Judicial Court had specifically held in *Schaer v. Brandeis University*, 432 Mass. 474 (2000) that the obligations imposed by basic fairness on private institutions were not equivalent to those imposed by the federal Due Process Clause on public institutions, and Massachusetts state courts had not recognized quasi-cross-examination as an obligation imposed by the basic fairness requirement.

Perhaps anticipating that its decision in *John Doe* would not be the final word on the matter, the First Circuit concluded that “whether Massachusetts in the future will wish to redefine the requirements of contractual basic fairness in college and university discipline matters poses important policy choices for the Supreme Judicial Court and/or state legislature to make.” *Id.* at 536.

**Conclusion**

With its decision in *John Doe*, the First Circuit clarified the distinction between the obligations imposed on public educational institutions by the federal Due Process Clause, and those imposed by Massachusetts contract law on private schools.

Importantly, the First Circuit also noted that “[f]ederal courts are not free to extend the reach of state law.” 942 F.3d at 535. While no previous Massachusetts case has held that “basic fairness” includes a right to cross-examination in private school disciplinary proceedings, the right of cross-examination in both public and private school disciplinary proceedings has become a hot topic across the country. Indeed, the law is rapidly evolving, and not always cohesively. *Compare* Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (2019) (holding no absolute right to cross-examination in public institution disciplinary proceedings) *with* Doe v. Baum, 903 F.3d 575, 582-3 (6th Cir. 2018) (recognizing a right to cross-examination in public institution disciplinary proceedings).

Perhaps not surprisingly, then, after the case was remanded by the First Circuit, lawyers for John Doe requested that the District of Massachusetts certify to the Massachusetts Supreme Judicial Court the
question:

[Whether basic fairness, implied in the contract between a student and a college or university, requires an opportunity for parties in a college or university disciplinary process, to have their questions put to each other and witnesses in real time, even if only through a neutral person, particularly in matters that involve credibility determination, such as the Title IX investigatory setting.]

See Civ. A. No. 1:19-cv-11626-DPW, Dkt. 73. The District of Massachusetts has not yet decided whether it will certify the question in John Doe. One way or the other, given the recent changes and clarifications in this area of the law, we can expect unsatisfied responding parties in private school disciplinary proceedings to continue to raise the issue in Massachusetts courts until the Supreme Judicial Court directly addresses it.

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[1] “Basic fairness” applies not only to colleges and universities, but to all private educational institutions. See, e.g., Discol v. Bd. of Trs., 70 Mass. App. Ct. 285, 295 (2007) (applying “basic fairness” standard to disciplinary proceedings in private school that admitted students from kindergarten through grade twelve).
Legal Analysis
Fair Housing Enforcement in the Age of Digital Advertising: A Closer Look at Facebook’s Marketing Algorithms
by Nadiyah Humber and James Matthews

Introduction

The increasing use of social media platforms to advertise rental opportunities creates new challenges for fair housing enforcement. The Fair Housing Act, 42 U.S.C. §§ 3601-19 (“FHA”) makes it unlawful to discriminate in the sale or rental of housing on the basis of race, color, religion, sex, familial status, national origin, and disability (“protected classes”). The FHA also prohibits discriminatory advertising, including distributing advertisements in a way that denies people information about housing opportunities based on their membership in a protected class. Accordingly, advertisers and digital platforms that intentionally or unintentionally cause housing advertisements to be delivered to users based on their membership in a protected class may be liable for violating the FHA.

In March 2018, in response to what they perceived to be discriminatory advertising on Facebook, the National Fair Housing Alliance (“NFHA”) and several housing organizations filed suit in federal court in New York City.[1] The lawsuit alleged that Facebook’s advertising platform enabled landlords and real estate brokers to prevent protected classes from receiving housing ads. Facebook settled the suit on March 19, 2019.[2] As part of the settlement, Facebook agreed to make a number of changes to its advertising portal so that housing advertisers can no longer choose to target users based on protected characteristics such as age, sex, race, or zip code. Facebook also committed to allow experts to study its advertising platform for algorithmic bias. It remains to be seen whether this agreement goes far enough in curtailing discriminatory advertising practices, as Facebook is confronting further enforcement action from a government watchdog in respect to similar issues. Moreover, a recent research study found that Facebook’s digital advertising platform may still lead to discriminatory outcomes despite changes already made.

On August 13, 2018, the Assistant Secretary for Fair Housing and Equal Opportunity filed a complaint with the Department of Housing and Urban Development (“HUD”) alleging that Facebook is in violation of the FHA. The Office of Fair Housing and Equal Opportunity determined in March, 2019 (the same time as the settlement agreement with NFHA) that reasonable cause exists and issued an official Charge against Facebook.[3]

Notwithstanding these suits and administrative actions, it remains that, for fair housing claims to survive in court against media giants like Facebook, HUD and future plaintiffs must first successfully argue that Facebook is not protected by the Communications Decency Act (“CDA”).[4]

Communications Decency Act

Congress enacted the CDA, in part, to prohibit obscene or indecent material from reaching children on the internet, and also to safeguard internet ingenuity.[5] What was meant as a protectionist measure for the young, impressionable, and inventive, however, evolved into a powerful defense tool used by web applications, like Facebook. Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties. To overcome the CDA hurdle, litigants have to demonstrate that Facebook “materially contributes” to the management of content on their platform. Fair Hous. Counsel of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008). While many online service providers have successfully used Section 230 in their defense, the protections offered to internet service providers are not absolute.

The CDA contains requirements that restrict the application of Section 230.[6] The language in Section
230 prevents a “provider or user of an interactive computer service” from being “treated as the publisher or
speaker of any information” that is exclusively “provided by another content provider.”[7] The U.S Court
of Appeals for the Ninth Circuit concluded that publishing amounts to “reviewing, editing, and deciding
whether to publish or to withdraw from publication third-party content.” Barnes v. Yahoo!, Inc., 570 F.3d
1096, 1102 (9th Cir. 2009). The idea is that website operators would no longer be liable for deciding to edit
or remove offending third-party content.

Based on this reading, the law immunizes only “certain internet-based actors from certain kinds of
lawsuits.”[8] The statute, as discussed in Roommates.com, LLC, 521 F.3d at 1162, provides no protection
to online content that was created by a website operator or developed – in whole or in part – by the website
operator. Courts have reaffirmed the CDA’s limited scope to protect self-policing service providers that act
as “publishers” of third-party content, as opposed to liability against all categories of third-party claims (i.e.
vioations of civil rights laws at issue in this article). Barnes, 570 F.3d at 1105; Accord Doe v. Internet
Brands, Inc., 824 F.3d 846, 852-53 (9th Cir. 2016). These limitations are crucial. If a plaintiff can show
that Facebook developed the content on its platform in whole or in part or, content aside, that Facebook
produces discriminatory outcomes via mechanisms on its platform developed by Facebook, it may be
excluded from Section 230 immunity.

Optimization Discrimination Study

In a recent study by researchers at Northeastern University, [9] evidence of Facebook’s control over ad
dissemination demonstrates how Facebook manages output of information based on headlines, content, and
images, using “optimization.”[10] In short, the Study set out to determine how advertising platforms
themselves play a role in creating discriminatory outcomes. The Study highlighted the mechanisms behind,
and impact of, ad delivery, which is a process distinct from ad creation and targeting. For example, the
Study found that inserting musical content stereotypically associated with Black individuals was delivered
to over 85% Black users, while musical content stereotypically associated with White people was delivered
to over 80% White users. The researchers concluded that “ad delivery process can significantly alter the
audience the ad is delivered to compared to the one intended by the advertiser based on the content of the ad
itself.” The study also simulated marketing campaigns and found that Facebook’s algorithms “skewed [ad]
delivery along racial and gender lines,” which are protected categories under the FHA. These results
suggest that, even if a housing advertiser can no longer choose to explicitly target ads based on attributes
like age, gender, and zip code, a housing advertiser could still use Facebook’s marketing platform to steer
ads away from protected segments of users by manipulating the content of the ad itself. Moreover, the
platform may cause such discriminatory outcomes regardless of whether or not the advertiser intended such
results.

Case Law Interpreting CDA

The Study’s findings set the foundation for evaluating Facebook’s control over the manipulation of content
and ad distribution on their platform. Two seminal cases, Zeran v. America Online, Inc., 129 F.3d 327 (4th
Cir. 1997) and Roommates.com, LLC, 521 F.3d 1152 (2008), outline tests to determine when online
platforms are considered content managers versus content providers.[11] The Study makes a strong case
for why Facebook is a content manager, eliminating immunity under Section 230. Litigants can also
persuasively distinguish their arguments against Facebook from a recent decision interpreting Section 230
Circuit ruled in favor of Grindr (a same-sex dating application) on all but one of the plaintiff’s claims. The
plaintiff had argued that Grindr failed to monitor and remove content created by the plaintiff’s ex-partner,
and the court concluded that Section 230 barred several of his claims because they were “inextricably
related” to Grindr’s role in editing or removing offending content (which is protected conduct under the
CDA). Herrick v. Grindr, LLC, 306 F. Supp.3d 529, 588. The Supreme Court denied Herrick’s petition to
review on October 7, 2019.[12]
A major distinguishing feature between the facts in *Herrick* and the Study’s findings against Facebook is how the two websites handle third-party content. In *Herrick*, the claim against Grindr was based on Grindr’s failure to remove content generated by a third-person. The issue with Facebook exists in the use of optimization algorithms. The point is that discriminatory outcomes are ultimately a result of Facebook’s manipulation of ad delivery for the purpose of reaching certain groups at the exclusion of others in protected categories. Facebook’s tools go well beyond the function of “neutral assistance,” because its platform directs advertisements to sectors of people using discriminatory preferences created by Facebook, not third-parties.[13]

**Intentional Discrimination**

If it can be successfully argued that Facebook is not immune from suit under the CDA, housing advertisers and digital platforms that intentionally or unintentionally target ads to certain groups of users based on their membership in a protected class may be sued for violating the FHA. As described above, the Facebook Study determined that housing advertisers may still be able to use Facebook’s marketing platform to steer housing ads away from protected classes of tenants by manipulating the content of the ad. In such circumstances, the housing advertiser who uses the ad’s content as a covert method of discriminatory distribution may be violating the FHA. The digital platform may also be liable either because they are actively involved in facilitating the selective distribution of ads, or as an agent vicariously liable for the advertiser’s conduct.

**Disparate Impact**

Even if it cannot be shown that a housing advertiser intended to discriminate, if the ad delivery mechanism has the effect of distributing housing ads in a discriminatory way, the advertiser and platform may still be liable for violating the FHA under a theory of disparate impact. Disparate impact discrimination occurs when a neutral policy or practice has a discriminatory effect on members of a protected class. *See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015); *see also* 24 C.F.R. § 100.500. A three-part burden shifting framework is used to evaluate liability. *Id.* Protected class members have the initial burden of establishing that a practice has a disproportionate adverse effect on a protected class. To meet this initial burden, a plaintiff must “allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection” between the policy and the disparate impact. *Inclusive Communities*, 135 S. Ct. 2507, 2523 (2015).

If a protected class member makes out a prima facie claim of disparate impact, the burden then shifts to the accused party to show that the practice is necessary to achieve a valid interest. *See* Robert G. Schwemm, Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U.J. Legis. & Pub. Pol’y 685, 696-697 (2016). The protected class members then have an opportunity to show that the interest could be achieved through less discriminatory means. *Id.*

In the digital advertising context, protected class members would have the initial burden of showing that they were denied equal access to information about a housing opportunity as a result of a housing advertiser’s marketing campaign.

**Statistical Evidence**

While the Facebook Study was able to demonstrate the potential for “skewed” ad delivery based on protected characteristics, further research is needed to determine how a plaintiff might marshal statistical evidence to support a particular claim. As the Facebook Study notes, without access to a platform’s “data and mechanisms” it may be difficult to assess whether or not a particular advertising campaign has led to discriminatory outcomes.[14] Therefore, it may be challenging for adversely affected users to develop the
necessary data at the pleading stage to make out a prima facie claim of disparate impact. This might explain why HUD is continuing to pursue its legal challenge against Facebook despite the remedial measures it has already agreed to undertake, including allowing research experts to study its advertising platform for algorithmic bias. In other words, HUD’s intent may be to better understand how Facebook’s ad delivery algorithm works now so it can limit its discriminatory impact.

Causal Connection

Because digital advertising companies play an active role in the ad delivery process, it follows that a discriminatory distribution of ads could be attributed to the platform. While there are limited case decisions involving FHA liability and algorithmic decision-making programs, the court in Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols, LLC, 369 F. Supp. 3d 362 (D. Conn. 2019), found that plaintiffs had pled sufficient facts to establish a causal connection between a tenant screening company’s alleged activity and unlawful housing denials to support a claim of disparate impact based on race. Id. at 378-379. The court found that the defendant had created and provided the automated screening process, suggested the categories by which the housing provider could screen potential tenants, made eligibility determinations, and sent out letters to potential tenants notifying them of these decisions. Id.

Digital advertising companies similarly create the marketing platform for housing advertisers to use, provide criteria from which to choose the users, and design and maintain the algorithms that decide to whom the ads will be delivered. Therefore, a sufficient nexus should exist between the advertising platform’s activity and the selective distribution of ads to support a disparate impact claim.

Valid Interest

Housing providers and digital advertising platforms arguably have a “valid interest” in being able to effectively market their housing services, and ad delivery algorithms are an efficient way to reach relevant users. However, given the abundance of print and online advertising options available for housing advertisers that do not rely solely on ad delivery algorithms, such as Craigslist, Zillow, Trulia, and Apartments.com etc., less discriminatory means exist by which housing advertisers can successfully market their services.

HUD recently proposed a new disparate impact rule that would raise the bar even higher for plaintiffs bringing disparate impact claims and provide housing advertisers with a defense if a digital advertising platform’s algorithmic model was the cause of a discriminatory outcome. A number of tenant advocacy groups and other stakeholders, such as Harvard Law School’s Cyberlaw Clinic, have submitted comments opposing the proposed rule, arguing, among other concerns, that it would perpetuate discrimination by “significantly reduc[ing] incentives for algorithm users and vendors to test their tools for bias” contrary to the purpose of the FHA.

Conclusion

The FHA was designed to provide all home-seekers, who have the resources, with equal access to housing stock and opportunity. It seems clear that online platforms in the business of designing and maintaining their algorithms have an impact on large segments of protected populations. The tension between the need for more information to combat discriminatory algorithms and propriety interests remain. However, one important way to move forward is to balance these interests by staying within the bounds of the FHA, including incentives for platforms to evaluate their ad delivery tools for distribution bias, and ensure a more inclusive participation in the housing market for all social media users.
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[10] Id. at 7 (explaining optimization on Facebook).

[11] See Nadiyah J. Humber, In West Philadelphia Born and Raised or Moving to Bel-Air? Racial Steering as a Consequence of Using Race Data on Real Estate Website, 17 Hastings Race & Poverty L.J. 129, 153-155 (2020) (analyzing pertinent case law precedent for Section 230 immunity). There is a difference between online services that manage content (content provider) on their sites versus those that act more as a store house of information (service provider). Id.


(proposed Aug. 19, 2019) (for example, providing a defense where a “(2) plaintiff alleges that the cause of a
discriminatory effect is a model, such as a risk assessment algorithm, and the defendant . . . (ii) Shows that
the challenged model is produced, maintained, or distributed by a recognized third party that determines
industry standards, the inputs and methods within the model are not determined by the defendant, and the
defendant is using the model as intended by the third party . . .”)
[17] See Cathy O’Neil, Comment Regarding Docket No. FR-6111-P-02,
(last visited Jan. 20, 2020).