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Looking Ahead: The Judiciary’s Goals for the New Year and Beyond

by Chief Justice of the Supreme Judicial Court Ralph D. Gants

Voice of the Judiciary

The role of the Judiciary is not only to do justice but to solve problems, and the sensible resolution of problems often is how we do justice. Working in close partnership with the trial court leadership team of Chief Justice Paula Carey and Court Administrator Harry Spence, we are committed to four new initiatives that we hope will assist us in our efforts to solve problems and do justice. The judiciary, however, can achieve none of these alone; each requires collaboration with and the support of the Legislature, the Executive branch, and the Bar.

Our first initiative is in the area of sentencing reform. We need our sentences not merely to punish and deter, but also to provide offenders with the supervision and the tools they will need to maximize the chance of success upon release and minimize the likelihood of recidivism. I have asked every trial court department with criminal jurisdiction to recommend protocols for their department that will incorporate best practices, informed by social science evidence regarding which sentences reduce the risk of recidivism and which may actually increase that risk. Further, I will work with the Legislature and encourage them to abolish mandatory minimum sentences for drug offenses in favor of individualized, evidence-based sentences that will not only punish and deter, but also minimize the risk of recidivism by treating the root of the problem behind many drug offenses — the problem of addiction.

The impact of mandatory minimum drug sentences is far greater than the number of defendants who are actually given mandatory sentences. Prosecutors often will dismiss a drug charge that carries a mandatory minimum sentence in return for a plea to a non-mandatory offense with an agreed-upon sentence recommendation, and defendants often have little choice but to accept a sentencing recommendation higher than they think appropriate because the alternative is an even higher and even less appropriate mandatory minimum sentence. As a result, where there is a mandatory minimum
sentence, a prosecutor's discretion to charge a defendant with a crime effectively includes the discretion to sentence a defendant for that crime.

Mandatory minimum sentencing in drug cases has had a disparate impact upon racial and ethnic minorities. In 2013, which is the most recent year for which data are available, racial and ethnic minorities comprised 32% of all convicted offenders, 55% of all those convicted of non-mandatory drug distribution offenses, and 75% of all those convicted of mandatory drug offenses. I do not suggest that there is intentional discrimination, but the numbers do not lie about the disparate impact of mandatory minimum drug sentences.

I expect that the abolition of mandatory minimum sentences in drug cases would likely result in some reduction in the length of incarceration in drug cases. This would free up money that could be reinvested in programs proven to reduce the rates of recidivism, in treatment programs, and in long overdue salaries increases for assistant district attorneys and CPCS attorneys.

Our second initiative involves our civil justice system. We will develop a menu of options in civil cases to ensure that litigants have cost-effective means to resolve their dispute in a court of law. I do not want a Commonwealth where those with a civil dispute think that they can resolve it efficiently and sensibly only through private arbitration rather than in our civil courts. Arbitrators generally do not publish their decisions; they make use of our common law but they generally create none of their own. If complex and difficult cases no longer come to our courts, our common law does not adapt and evolve, and our legal infrastructure becomes old and outdated. We must ensure that our courts through our published decisions, especially our appellate decisions, continue to create the common law that is the legal infrastructure of our civil society.

I have asked each trial court department to devise a menu of litigation options appropriate to the cases adjudicated by that department. That menu will include the full range — from the “three course meal” option including full discovery, a jury trial (in cases where there is a right to jury trial), and full rights of appeal, to less costly and more expeditious “a la carte” options that might offer, for instance, limited discovery, a bench trial, and, perhaps, limitations on the right or scope of appeal. With a menu of options in each department, litigants can agree on the option that makes most sense in their case, with the three course meal the fallback option if they are unable to reach agreement.

Our third set of initiatives focuses on access to justice. It is not enough to establish legal rights; we need our residents to know their rights, to know how to invoke them, and to know how to find the legal assistance or information that can help them to do so. We will soon make available to all litigants an information sheet that will help self-represented litigants find the legal resources that are available to them, including lawyer for the day programs, voluntary mediation services, limited assistance representation, and court service centers, where available. We plan to expand access to court service centers by adding four more in the coming year, and to have one in each of our fifteen largest
courthouses, which serve half the litigants in the Commonwealth, by 2017. Finally, we will propose legislation to give every resident of Massachusetts access to a Housing Court. Currently, nearly one-third of our residents have no such access, which means that they have no access to Housing Court judges, housing specialists, the Tenancy Preservation Program, and no forum to enforce building and safety codes efficiently.

Our fourth initiative involves jury voir dire. An SJC Committee chaired by my colleague, Justice Barbara Lenk, is working to improve the quality of jury voir dire — to give attorneys a meaningful role in the selection of a fair and impartial jury while, at the same time, protecting the privacy and dignity of our jurors, and respecting our need to try cases in a timely and efficient manner. We shall improve the quality of voir dire in every court department, recognizing that a method of voir dire that may be sensible in one trial court department may not be sensible in all.

By February, 2015, when St. 2014, c. 254, sec. 2 takes effect, an interim Superior Court standing order will establish protocols for attorney participation in voir dire in that department. The Superior Court will also establish a pilot project in which judges who volunteer to do so will conduct “panel voir dire.” The Superior Court and the SJC Committee will monitor response to both the interim standing order and the pilot project and then make further recommendations.

As I said when I was sworn in — if we are willing to search for new ways to solve old problems, if we are willing to put our egos aside and remember that it is not about us, if we are willing to work our tails off, if we are willing to work together, I know that we can build a justice system that will not only dispense fair, sensible, and efficient justice, that will not only help to address the formidable problems faced by so many of the residents of this Commonwealth, but that will be a model for the nation and for the world.

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Rethinking Mens Rea for Extreme Atrocity or Cruelty

by Alex G. Philipson

Currently in Massachusetts, the only mens rea required for first-degree murder by extreme atrocity or cruelty is malice aforethought—the same mens rea required for second-degree murder. See Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). The mental state may be identical, but the punishment is very different: for first-degree murder, it is life imprisonment without parole; for second-degree, it is life with the possibility of parole after fifteen years. What distinguishes proof of the greater offense is evidence of extraordinary brutality or suffering. Id. at 227–228. But the Commonwealth need not prove the defendant intended, or was even aware of, this heightened savagery. Id.

Is it time to reconsider this law? At least two Justices of the Supreme Judicial Court (and one former Justice) think so. See Commonwealth v. Berry, 466 Mass. 763, 774–778 (2014) (Gants, J., concurring, joined by C.J. Ireland [now retired] and Duffly, J.). See also Commonwealth v. Riley, 467 Mass. 799, 828–829 (2014) (Duffly, J., concurring). They say it is unfair to allow a jury to find that a defendant acted with extreme atrocity or cruelty without proof that he intended, or was indifferent to, the victim’s extraordinary pain. Riley, 467 Mass. at 828–829; Berry, 466 Mass. at 776–778. The point is well taken.

Consider a hypothetical case where a jury heard evidence that a defendant killed a victim by repeatedly striking him in the head with a tire iron. On the theory of extreme atrocity or cruelty, the jury would be instructed that they could find the defendant guilty if they found any one of seven factors—only one of which is subjective: the defendant’s indifference to, or taking pleasure in, the victim’s suffering. See Cunneen, 389 Mass. at 227. The other six factors are objective: the victim’s consciousness and degree of suffering; the extent of physical injuries; the number of blows; the manner and force of blows; the instrument used; and the disproportion between the means needed to cause death and those used. Id. So, the jury could sidestep the question of the defendant’s intent or awareness of the victim’s
suffering by focusing solely on one or more of the objective factors—e.g., that the instrument used (a tire iron) can cause grotesque injuries. To be sure, there is one circumstance when a jury is required to consider the subjective factor: when there is evidence suggesting the defendant was mentally impaired. See Commonwealth v. Gould, 380 Mass. 672, 685–686 (1980). But even then, the Commonwealth is still not required to disprove the defendant’s impairment; evidence of impairment is simply a factor that the jury can weigh as they see fit.

In short, the trouble with Cunneen is that it separates the subjective factor from the objective ones. Luckily, these factors can be joined using principles from our existing law.

The case that established that malice is the only required mens rea for extreme atrocity or cruelty nonetheless acknowledged that another state of mind is also relevant. See Commonwealth v. Gilbert, 165 Mass. 45, 58–59 (1895). In one breath, the court declared that “[s]pecial knowledge of the character of the act,” i.e., that the killing “was attended with extreme atrocity or cruelty,” is not required. Id. at 58. But, in another breath, the court recognized that some knowledge of the crime’s brutality must exist: “The circumstances [of the killing] would give [the defendant] reason to believe that he was causing pain to his victim; the indifference to such pain, as well as actual knowledge thereof and taking pleasure in it, constitute cruelty, and extreme cruelty is only a higher degree of cruelty.” Id. at 59. The implication is that a defendant who knows his actions are cruel would also know they are extremely so. Yet, how can a jury make this conclusion unless they find that the defendant’s actions were extreme (e.g., that the defendant inflicted multiple blows with a dangerous weapon), and that the defendant had at least “actual knowledge” of the extraordinary pain the victim would suffer? Gilbert, 165 Mass. at 59. And shouldn’t the Commonwealth have to prove this mens rea, considering what is at stake: a sentence of life without parole? Put another way, when our most severe criminal punishment is on the line, is it fair to allow the jury to presume the defendant’s actual knowledge of, indifference to, or pleasure in the victim’s extreme suffering? These are the problems that Gilbert created and that Cunneen failed to solve.

So what is the answer? How about requiring the Commonwealth to prove both the first Cunneen factor and at least one of the others? That would bring together two essential components: an unusually brutal or painful manner of death (objective element), and the defendant’s indifference to or taking pleasure in the victim’s extraordinary suffering (subjective element). By analogy, our law already uses a similar hybrid of objective and subjective components for so-called “third-prong malice”: an intent to do an act which, in circumstances known to the defendant (subjective part), a reasonable person would have known created a plain and strong likelihood of death (objective part). See Commonwealth v. Stewart, 460 Mass. 817, 826 & n.9 (2011). A similar hybrid could perhaps work for extreme atrocity or cruelty too.

Some time ago, two members of the Supreme Judicial Court worried that requiring the Commonwealth to prove the defendant knew about or intended the victim’s extreme suffering would “blur the distinction” between two theories of first-degree murder: deliberate premeditation, and extreme atrocity or
cruelty. See Gould, 380 Mass. at 693 (Quirico, J., concurring in part and dissenting in part, joined by Hennessey, C.J.). The Justices did not explain what they meant by “blur.” It seems they were concerned that because deliberate premeditation is the only theory of first-degree murder that, besides malice, has a second mens rea (i.e., forming a plan to kill after a period of reflection, Commonwealth v. Caine, 366 Mass. 366, 374 [1974]), adding a second mens rea to extreme atrocity or cruelty (indifference to or pleasure in the victim’s suffering) would—by giving that theory two mens reas—make that theory too similar to deliberate premeditation. The concern, however, is not compelling. The mental state for deliberate premeditation (forming a plan to kill after a period of reflection) is quite unlike indifference to or taking pleasure in a victim’s extraordinary suffering. Thus, the purported concern with “blurring” should not stand in the way of improving our law.

The same two Justices also warned that adding a second mens rea would “rewrite [the] legislative definition” of extreme atrocity or cruelty. See Gould, 380 Mass. at 691. Perhaps so, considering that G. L. c. 265, § 1 does not provide this second mens rea. But neither does the statute define what acts objectively bespeak extreme atrocity or cruelty; the common law does that. See Cunneen, 389 Mass. at 227. Also, the Legislature has not amended G. L. c. 265, § 1 since the Supreme Judicial Court, more than three decades ago, allowed juries to at least consider evidence of a defendant’s mental state (beyond malice) to determine whether the defendant acted with extreme atrocity or cruelty. See Gould, 380 Mass. at 684–686 & n.16. Accord Commonwealth v. Rutkowski, 459 Mass. 794, 798 (2011); Commonwealth v. Urrea, 443 Mass. 530, 535 (2005). See also Cunneen, 389 Mass. at 227–228. The Legislature’s silence on Cunneen and Gould suggests it is comfortable with sensible judicial modifications of the law.

It may be some time before the right occasion arises to revisit the mens rea element of murder by extreme atrocity or cruelty. When that time comes, the Supreme Judicial Court would do well to take the opportunity to make the law more logical and fair.

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The Development and Implementation of Specialty Courts in Massachusetts
by Judge Mary Hogan Sullivan

Twenty years ago, then-Attorney General Janet Reno was instrumental in establishing the first drug court in the United States in Miami-Dade County, Florida. With financial support from the federal government, as well as technical assistance in the form of training for drug court teams, drug courts were established throughout the country. The judicial branch in many states systematically incorporated drug courts into their courts’ operations.

The situation was somewhat different in Massachusetts. Drug courts began where an individual judge undertook to join with an individual probation officer and other team members to start a drug court in a single court in the District and Boston Municipal Court Departments. There was no state-wide organized approach to setting up drug courts.

Meanwhile, the national drug court movement was expanding and refining its approach and purpose. Data collection was a key requirement of existing drug courts. As a result, successful strategies were identified and promulgated; ineffective approaches were eliminated or modified to improve results. The ten key components of drug courts were developed. From these components, a series of best practices were developed [another word]. The ultimate goal of drug courts was, and is, to break the cycle of substance-addicted individuals committing crimes, serving a sentence, committing a new crime, serving another sentence, and so on. The method of accomplishing this goal is to target high risk, high need defendants, sentence them to intensive probation supervision, mandate substance use disorder treatment, require frequent and random drug testing, and bring them before the same judge on a weekly or bi-weekly basis for support and accountability.
The data collected over the past twenty years has been subjected to meta-analysis. The evidence supports the conclusion that drug courts which target the correct participants, operate with a full team, conduct staffing, and impose appropriate sanctions and rewards, are successful in reducing recidivism.

What differentiates a drug court session from a regular criminal session in the district or municipal court? A drug court session utilizes a team approach to a targeted population of offenders. It requires intensive probation supervision, which includes mandatory substance use disorder treatment, frequent and random testing, and home visits. It enhances accountability by requiring weekly or bi-weekly court appearances before a single judge who directly interacts with the defendant and utilizes a system of graduated sanctions and incentives.

The proven success of drug courts nationally led to the creation of other specialty courts, including mental health courts, veterans’ treatment courts, prostitution courts, and homelessness courts. These courts target a specific population, and take certain components of the drug courts and apply them to the needs and circumstances of the targeted population. For example, a participant in a mental health session may be required to keep appointments with mental health providers, take prescribed medications, report on a weekly basis to probation, and be paired with a peer supporter in the community as conditions of participation in the mental health court session. Successful completion of the court results in a beneficial outcome of the criminal case, such as dismissal or reduction of the charges.

In 2013, the Massachusetts Trial Court adopted a strategic plan which outlines the Court’s goals for the next ten years. Key among its recommendations is the establishment of a cohesive approach to specialty courts. The Trial Court has defined specialty courts as follows:

Specialty courts are specialized court sessions which target individuals with underlying medical, mental health, substance use and other issues that contribute to these individuals coming before the court with greater frequency. Specialty court sessions promote improved outcomes which reduce recidivism and enhance public safety by integrating treatment and services with judicial case oversight and intensive court supervision.

The Trial Court’s strategic plan envisions that all residents will have access to appropriate specialty courts regardless of court jurisdiction, and that all high need and at-risk communities either have a specialty court or are part of a regionalized court resource model.

To this end, the Trial Court requested and received funding from the Legislature to establish new specialty courts. This funding includes allocations for probation officers and drug testing as well as funding for the Trial Court’s justice partners in the Bureau of Substance Abuse Services of the Department of Public Health, the Department of Mental Health, and the Department of Veterans Services. In the current fiscal year, new drug courts have opened or will open in the District Courts in Dudley, Lowell, Fall River, Brockton and in Taunton Juvenile Court. This will bring the total number of drug courts
in Massachusetts to thirty-five. In addition, the total number of mental health court sessions will increase from five to seven, and two additional Veterans Treatment Courts will open. The Trial Court intends to request similar funding from the legislature for FY 2016 to add an equivalent number of specialty courts. The Trial Court’s ultimate goal is to double the number of specialty courts by 2017.

A key component of the expansion effort is training and technical assistance to judges, probation officers, and other justice partners. Utilizing funds from a Bureau of Justice Assistance grant, several state-wide trainings have occurred. Here, clinicians and treatment providers as well as judges, probation officers, and court staff learn the latest information concerning the science of addiction, mental illness, and brain functioning, modalities of treatment, and effective supervision techniques. The grant also provided the foundation for the establishment of a Center of Excellence for Specialty Courts.

Recently, the Trial Court has partnered with the University of Massachusetts Medical School to formalize the Trial Court’s Center of Excellence for Specialty Courts. The purpose of the Center of Excellence is to standardize proven best practices for the operation of specialty courts and to assist the Trial Court in a certification process for specialty courts. The Center of Excellence will also encourage innovative practices, support effective data collection to inform the development of best practices, and assist in ongoing training of specialty court staff and their partners.

The expansion of specialty courts throughout the Commonwealth reflects a recognition by the leadership of the Judicial Branch that the court system is called upon to address issues of mental illness, substance use disorder, and trauma in the context of criminal cases each day, and that public safety requires that the courts’ response to these issues be informed. As Chief Justice Gants said in his State of the Judiciary Address on October 16, 2014: “We need our sentences not merely to punish and deter, but also to provide offenders with the supervision and the tools they will need to maximize the chance of success upon release and minimize the likelihood of recidivism. And we need to ensure that our sentences are hand-crafted to accomplish that. This means harnessing the social science that can provide us guidance, taking advantage of the knowledge and experience of our judges and probation officers, and learning from the successes and failures of the Federal government and the other 49 states.”

The Honorable Mary Hogan Sullivan is the Director of Specialty Courts for the District Court Department of the Massachusetts Trial Court. She established the Norfolk County Veterans Treatment Court, the first of its kind in Massachusetts. Judge Sullivan was appointed to the bench in 2001 and currently presides in the Norfolk County Veteran’s Court.
Drug Courts Impact Participants, Courts, and Communities

by Sarah W. Ellis

Voice of the Judiciary

“For four months, I tried to kill myself every day,” Louis ‘Phil’ Theodore recounted to at the Lynn Drug Court graduation ceremony on October 22, 2014 reported by the Lynn Daily Item. “This drug court went to bat for me, they just never gave up. Today I can say I consider myself a citizen.”

The Massachusetts Trial Court has undertaken the initiative to expand the presence of drug courts throughout the state, consistent with the national trend toward evidence-based practices in the criminal justice system. The National Association of Drug Court Professionals indicated in 2010 that more research had been published on the effects of adult drug courts than virtually all other criminal justice programs combined. (Marlowe 2010). According to the United States Bureau of Justice Assistance, evaluation studies consistently show that while offenders are participating in adult drug courts, they are less likely to commit crime, and, consequently, states and localities save money on criminal justice system costs. (BJA citing Government Accountability Office, 2005; Huddleston, Marlowe, & Casebolt, 2008; Marlowe, 2010).

For the judges, clerks, probation officers, police officers, attorneys, and treatment providers who work in drug court sessions, these lofty aspirations are but a backdrop to the intense and daily struggles of the individuals who appear before them. As heroin and opiate overdoses reach epidemic proportions across Massachusetts, the drug courts have become a front line in fighting addiction. For those who work in drug court, drug court goes beyond preventing crime: it is a commitment to saving lives.

“When people first come into drug court, you see them at their worst. They don’t have anybody. They have stolen so much, and lied so much, and manipulated so much, they have burned every bridge they ever had. They are raw, on the street, selling themselves, stealing, living in cars, living in shelters, or lucky to be in jail,” observes Lynn District Court Probation Officer Kelley Montgomery, who has worked in
the Lynn drug court for fifteen years. “In drug court they evolve into the person they could have been, had they not gotten into taking drugs in the first place.”

In the City of Lynn, Deputy Police Chief Leonard Desmarais believes that community policing is about fixing problems. “If you’re only working on the symptoms, you’re not fixing the problem. If someone is addicted to heroin, heroin is the most important thing in their life. They’ll commit crimes of opportunity, for which they can and should be arrested. But if we don’t get them off the heroin, we’re not addressing the root cause, and we’re not fixing the problem.” Drug courts in Massachusetts are targeted at intervening in the lives of defendants who have a significant, but non-violent, criminal history. One theory supporting drug court is that targeting resources at this select group of perpetrators will impact crime reduction over all.

“Terry came, and he came with help.” When a recent drug court graduate spoke to the Lynn Drug Court, he was referring to his own arrest by the Lynn Police Department and Lynn District Court Probation Officer Terence Ward. Drug courts have fostered partnerships between local police departments and local probation officers that have strengthened information sharing and warrant response. Probation Officer Terence Ward notes that working closely with the Lynn Police department positively impacts individual probationers, and ultimately lives. “Due to the rise of heroin use and overdoses in our community, the police and the probation department have come closer, to work in concert, to impact drug addicted people who most immediately need help.”

The Lynn Police Department has been an active partner in the Lynn drug court session, bringing important law enforcement resources to bear on integrating drug court participants back into the community, arresting probationers on drug court warrants, and providing treatment information to families and victims of overdoses. “The police are very proactive on this issue,” says Judge James LaMothe, the presiding justice of the Lynn drug court. Judge LaMothe describes a process in which Lynn police officers responding to overdoses takes steps to provide patients and families with information on local treatment and counseling services. An experienced narcotics detective is also a member of the drug court, to be “our eyes and ears on the street, to provide support for drug court participants in the community.”

Substance abuse treatment providers are also invited to drug court sessions, a practice that furthers information sharing goals and provides the court with input on available treatment options. Probation Officer Kelley Montgomery emphasizes the importance of working with treatment providers to develop treatment plans specific to each individual in drug court. “A treatment placement is not just about sticking someone in any bed. Drug court works as a team to find the best possible treatment match for each person. The best match can change over time. Treatment providers have [probation officers’] cell phones and email – there is constant communication.”

The multi-agency involvement in the Lynn drug court highlights issues central to drug court success – the integration of resources and knowledge. Judge LaMothe reflects, “drug court brings together people from
all different perspectives – the defense attorneys, the district attorneys, the treatment providers, and law enforcement. Everyone understands the idea is to prevent recidivism. This unified systems approach is what makes drug court work.” Deputy Chief Desmarais sees drug court as an effort to prevent a vicious cycle. “We work hand in hand [with the drug court] because we’re dealing with the same population. If the drug court process is successful for someone, they won’t be an addict, and they’ll stop committing crimes.”

The drug court model adopted by the Massachusetts Trial Court is a post-dispositional model. After a defendant’s criminal case is disposed, usually by way of a guilty plea or a probation surrender, a defendant may be evaluated by the Probation Department for drug court eligibility. This process may be initiated by the defense attorney, but not exclusively. Often the presiding judge or probation officer will be familiar with the defendant and his or her history of addiction motivated crime, and will recommend a screening for drug court participation.

Melrose defense attorney Thomas Belmonte has been representing clients in the Cambridge District drug court for ten years. He indicates that success in drug court requires a level of commitment from the client to make sobriety a life priority. “Serving time doesn’t treat the underlying problem. That’s the reality. Drug court is not for everyone. The client has to express an interest in wanting to change their circumstances, deal with their addiction and their recidivism. A less structured probation doesn’t necessarily prevent a return to the criminal justice system. A highly structured program like drug court provides an opportunity more comprehensive in nature. Building life skills, sobriety skills, building a sense of responsibility – that’s developed through the residential treatment and counseling drug court offers.”

A defendant must enter into drug court voluntarily. The drug court model integrates treatment and services with judicial case oversight and intensive court supervision. What this means for individuals in drug court is a rigorous regimen of inpatient treatment, recovery home assignments, and eventual community re-entry. Accountability is central, with regular court appearances and drug screens. “The goal is not short term recovery. The goal is life-long freedom from addiction,” says Marie Burke, Drug Court Coordinator for the District Court. “People can stop using for short periods of time. But drug court is not just about staying clean. It addresses the underlying behaviors and emotions that lead people back to substance abuse. Drug court is about accountability and helping people to make the right choices in life.”

Attorney Belmonte, who takes drug court cases largely on a pro bono basis, emphasizes that drug court cases are very different for defense attorneys than other criminal matters. “These cases are in many ways tougher for a defense attorney than standard probation cases. The attorney spends a lot of time going over the client’s rights, and the court’s access to privileged information, which is necessary to get the best out of the drug court model. The process takes a lot of effort from defense counsel and from the drug court team. And to enter into drug court, there must be acknowledgement by the client that they
want to take this step to make significant changes. Drug court is for clients who have a longer view – grasping concepts and building a safety network in their life, that’s paramount. Those are the folks who succeed in the long term.”

For those who work in drug courts, it is about the success stories. Judge LaMothe describes the impact that presiding over the Lynn drug court has had on him personally and professionally. “Drug abuse can rip a family apart. Addicts lie, steal, and completely tear apart the relationships they should hold most dear. Seeing family members invited to a drug court graduation can be the first time that a family is back together. When parents, children, or siblings say, ‘thank you, Judge, for saving this person’s life,’ I tell them, ‘it wasn’t me.’ I didn’t save anyone’s life. The participant did the work. They got themselves clean and sober. We gave them that chance, but they did the work.” Reflecting on the impact of a recent drug court graduation, Probation Officer Terence Ward states, “It is a road to recovery. Seeing someone who graduated a year ago, still clean and sober, come back to talk to other drug court graduates – that’s the reason why I continue to do what I do.”

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Mandating Recusal in the Absence of Bias: In re Bulger, 710 F.3d 42 (1st Cir. 2013)

by Martin J. Newhouse

Legal Analysis

Two policy goals require that, in certain circumstances, a trial judge should be disqualified from presiding over a case. The first goal, enshrined in both the Due Process clause of the federal Constitution and in our state constitutions, is to prevent the judge from deciding a case in which he or she is biased with regard to a party or has a personal interest. Ward v. City of Monroeville, 409 U.S. 57, 61-62 (1972); Article 29 of the Massachusetts Declaration of Rights (“[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit”). The second goal is to ensure, not only that the trial judge is personally impartial, but also that the proceedings are perceived by the public as such. As the Court of Appeals for the First Circuit has explained, “the disqualification decision must reflect . . . the need to secure public confidence through proceedings that appear impartial.” In re Allied-Signal, Inc., et al., 891 F. 2d 967, 970 (1st Cir. 1989).

This article discusses the recent application of the “appearance of impartiality” standard by the First Circuit in In re Bulger, 710 F.3d 42 (1st Cir. 2013), which demonstrates that this standard may—and in that case did—require disqualification even in the absence of any evidence that the trial judge is personally biased or has a disqualifying personal interest. This article will also address whether Bulger changed the standard for recusal, as at least one court has suggested.

The Rules Governing Judicial Disqualification in the Federal Courts

The principal federal statute governing recusal[1] is 28 USC § 455, which provides: “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” § 455(a).[2]
In contrast to the generality of sub-section (a), sub-section (b) of § 455 lists five specific circumstances in which partiality may be presumed and recusal is required. These include where a judge has a personal bias or prejudice against a party, personal knowledge of disputed facts in the case, former involvement as a government lawyer with the matter, a financial interest in the subject matter of the controversy, or when a judge’s relation is involved or has an interest in the matter.

By its terms § 455 would require a judge to recuse him or herself *sua sponte* when the statute applies. The statute may also be invoked by a party to the litigation through a motion to recuse. Any party making such a motion must consider the potential ramifications of doing so: when such a motion is made, it is the very judge whose impartiality has been questioned who, in the first instance, decides whether disqualification is required.

Under the “appearance of impartiality standard” of § 455(a) the test is “what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge’s impartiality.” *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)). Mere suspicion or unsupported allegations are not enough to support recusal under § 455(a). “[W]hen considering disqualification, the district court is not to use the standard of ‘Caesar’s wife,’ the standard of mere suspicion. That is because the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.” *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (Breyer, J.) (citations omitted) (emphasis in the original).

**In re Bulger**

The federal criminal proceedings in Boston in 2011-2013 against James "Whitey" Bulger were notable in many respects, not least for the unusual defense that Bulger raised, namely that, in return for his work as an FBI informant, Bulger had been granted immunity by the federal Government for the same crimes (including multiple murders) for which he was being prosecuted. Bulger’s criminal case was initially assigned to District Court Judge Richard G. Stearns, who, during some of the period covered by the indictment (and the immunity claim) had been, within the United States Attorney’s office in Boston, Chief of the General Crimes Unit, Chief of the Criminal Division, First Assistant United States Attorney, and Senior Litigation Counsel. Unsurprisingly, Bulger’s attorneys moved for Judge Stearns’s recusal under 28 U.S.C. § 455(a) and (b).

Under (b), Bulger alleged that, by virtue of his positions with the United States Attorney, Judge Stearns should be disqualified because of his prior involvement with the matter and the likelihood that he would be called as a witness with regard to the immunity defense. It was upon these arguments that Judge Stearns concentrated in his decision denying the motion. Judge Stearns found no merit in any of Bulger’s factual claims, noting that anything to do with Bulger at that time would have been handled by the New
England Organized Crime Strike Force (OCSF), which, by design, was completely separate from the Office of the U.S. Attorney. Judge Stearns explained that, as an Assistant U.S. Attorney “in the 1980s, supervisory or otherwise, I was not, and would not have been privy to knowledge of any OCSF investigation of the defendant.” *U.S. v. Bulger*, 2012 WL 2914463 (D. Mass. July 17, 2012), at *2.

With regard to § 455(a), Judge Stearns concluded in strong terms:

> It would be institutionally irresponsible for me, or for that matter, any judge to enter a recusal in a case where a party has chosen to make untrue accusations in the possible hope of subverting that process, or at the very best, forcing a delay of a trial by injecting a diversionary issue into the proceeding . . . .These special considerations have special force where, as here, I have no doubt whatsoever about my ability to remain impartial at all times while presiding over this case. Moreover, I am confident that no reasonable person could doubt my impartiality.

*Id.*, at *3.

Bulger’s attorneys sought review of Judge Stearns’s denial of the motion to recuse through a Petition for Mandamus to the First Circuit. And, despite Judge Stearns’s forceful opinion, the Court of Appeals, in a decision written by retired Supreme Court Justice David Souter, sitting by designation, granted Bulger’s writ and ordered that the case be reassigned. *In re Bulger*, 710 F.3d 42, 49 (1st Cir. 2013).

Judge Stearns had primarily concentrated on the questions raised by Bulger under § 455(b) about his personal impartiality, but the First Circuit avoided that subject altogether. Expressing “great respect for the trial judge,” *id.* at 43, and pointing out that “defendant has made no claim that Judge Stearns has in fact demonstrated any bias in his handling of the case,” the Court of Appeals granted the petition entirely under § 455(a), “it being understood that a reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased.” *Id.*

In reaching its conclusion, the Court of Appeals applied what it described as a difficult standard to meet in the context of a Petition for Mandamus. *Id.* at 45. In short:

> [R]elief for the defendant is only warranted if it is “clear and indisputable” that no reasonable reading of the record supports a refusal to recuse. In other words, the issue here is this: is it clear that a reasonable person might question Judge Stearns’s ability to remain impartial in hearing the case?

*Id.* at 45-46.
In answering that question, the Court of Appeals looked first at the allegations of Bulger’s immunity defense, noting that “a reasonable member of the public could easily think that anyone who held a position of high responsibility in the Office of the United States Attorney during this period would only be human in reacting to such a claim in either a defensive or adversarial way.”  *Id.* at 46. However, the Court noted, the defendant’s allegations alone cannot suffice to require recusal “lest the law confer a veto power on the assignment of his trial judge to any heckling defendant who merely levels a charge that implicates a judge’s defensive or vicariously defensive reactions.” *Id.* at 46-47. There must be independent factual support for the challenge, which in this case the Court found in “official reports and conclusions predating these proceedings, and already largely in the public domain, that disclosed disquieting links between the Government and the criminal element during the years in question, and that may fairly stimulate a critical attitude on the part of an independent observer.” *Id.* at 47.

Reviewing these sources (such as those associated with the conviction of former FBI agent John Connolly), the Court treated as undisputed the existence of a “special relationship” between Bulger and the FBI which “overlapped both the dates of the activity alleged in the defendant’s indictment and the years that Judge Stearns held supervisory position in the federal prosecutor’s office.” The Court noted that, while none of these facts proved Bulger’s immunity claim, any evidence produced by an inquiry into the relationship between Bulger and the Government during this period “could reflect on the United States Attorney’s Office, as it was constituted in those days.” *Id.* at 48. The Court concluded:

> Given the institutional ties described here, the reasonable person might well question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could suppress his inevitable feelings and remain impartial when asked to determine how far to delve into the relationship between defendant and Government, and to preside over whatever enquiry may ultimately be conducted. On this record, the question could not reasonably be avoided.

*Id.* at 48-49.

In short, in the First Circuit’s view, Judge Stearns’s denial of the motion to recuse was the result of a “good-faith failure to recognize how a reasonable member of the public would perceive [his] relation to the case,” and it ordered that the case be reassigned. *Id.* at 46,49.

*Bulger* thus illustrates that under § 455(a) recusal may be required to protect the integrity of the judicial system even though the trial judge is not biased or interested. That “a reasonable person might question the judge’s ability to preserve impartiality,” *id.*, is enough.

**Did Bulger Change the Standard for Recusal under § 455(a)?**
Not long after the First Circuit’s decision, Judge Stearns, in allowing a motion to recuse in a medical malpractice case, expressed the view that Bulger had indeed eased the ability of parties to obtain recusal under § 455(a). Bradley v. Sugarbaker, M.D., 2013 WL 6279299 (D. Mass., Dec. 4, 2013). Judge Stearns first characterized the legal standard that existed before the First Circuit’s Bulger decision as “a blend of a ‘reasonable person’ and grounded-fact test,” quoting his own (reversed) decision in the Bulger proceedings as follows:

The test for . . . determining whether a judge’s impartiality might reasonably be questioned is “whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge’s impartiality . . . in the mind of the reasonable man.”


Judge Stearns then concluded that, in its In re Bulger decision, the First Circuit changed this traditional test:

It appears to be true, as plaintiffs argue, that the First Circuit’s blended test, requiring recusal where facts would create a reasonable doubt of impartiality, has been supplanted by a more expansive standard that requires recusal where “a reasonable person might question [the judge’s] ability to remain impartial in hearing the case.” In re Bulger, 710 F.3d at 46 [emphasis added by the court].

Id., at * 4. Thus, for Judge Stearns, In re Bulger had substituted a new “might” standard for what he characterized as the prior “would” standard under § 455(a), making recusal more likely even where the likelihood of perceived partiality was remote. Id.

A major flaw in this view is that the statute itself uses the word “might,” requiring a judge’s disqualification “in any proceeding in which his [or her] impartiality might reasonably be questioned.” § 455(a). (emphasis added). Furthermore, the court in Bulger uses the term “would” frequently, thus indicating that in the analysis under § 455(a) the terms “might” and “would” are basically interchangeable. See, e.g., Bulger, 710 F. 3d at 46 (“The point under § 455(a) is not [the judge’s] actual state of mind at a particular time, but the existence of facts that would prompt a reasonable question in the mind of a well-informed person about the judge’s capacity for impartiality . . . ” (emphasis added.))

In short, it does not appear that Bulger changed the recusal standard under § 455(a). However, what it may have done is to encourage trial judges in the First Circuit, in a publicly sensitive case, to err on the side of recusal under § 455(a) in order to preserve the public’s perception of impartiality. As noted,
Judge Stearns recused himself in *Bradley v. Sugarbaker*, which he apparently would not have done before *Bulger*. Similarly, Judge Saylor in a more recent (and also a fairly notorious) case, *United States v. O’Brien*, __ F.Supp. 2d __, 2014 WL 905613 (D. Mass. March 6, 2014), allowed the defendants’ motion for recusal, despite the fact that it was brought on the eve of trial.[4] The motion was based on the defendants’ intention to call as a witness another federal judge who was not only Judge Saylor’s colleague, but also his friend. *Id.*, at *1*. Largely citing *Bulger* for the standard to be applied, see *id.*, *5-* *6*, and after a thorough review of the facts, Judge Saylor wrote:

There is no completely satisfactory answer . . . and whatever choice I make may lead to some unfortunate consequences. Under the circumstances, however, I have concluded that the paramount consideration is maintaining public confidence in the fairness and integrity of this proceeding. That consideration outweighs the other factors, however strong those factors may be. Therefore, and with considerable misgivings, I feel duty-bound to recuse myself.”

*Id.*, at *10. The lead defendant, O’Brien, had been the Massachusetts Commissioner of Probation and, although his case did not have the national press that Bulger’s did, it also raised within Massachusetts an issue of public perception to which Judge Saylor was obviously sensitive.

Time will tell whether the impact of *Bulger* suggested here will continue to resonate as federal trial judges wrestle with recusal motions under §455(a), especially in highly publicized cases. Judge Saylor was troubled, as one would guess all courts are, by the specter that recusal in such circumstances “would set a new and pernicious precedent, emboldening counsel to file untimely recusal motions or otherwise seek to manipulate circumstances to their own advantage.” *O’Brien*, 2014 WL 905613, at *10. His answer to this concern is perhaps the best we can hope for at the moment:

As to the possible precedent, it is perhaps enough to say that each case must rise and fall on its own facts, and that I have great confidence in the wisdom and good judgment of my colleagues in making appropriate decisions in future circumstances.

*Id.*

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Endnotes

[1] The terms “disqualification” and “recusal” are equivalent and are used interchangeably by the courts (see Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1 (2013), n. 5.) and in this article.

[2] In addition to § 455, two other federal statutes address recusal, but on a more limited basis. 28 U.S.C. § 144 requires recusal upon the filing of a “timely and sufficient” affidavit that the judge is personally biased or prejudiced with regard to a party. 28 U.S.C. § 47 prohibits any judge from hearing the appeal of a case or issue that the judge has tried.

[3] The language of the § 455 is clear on this point: “Any justice, judge, or magistrate of the United States shall disqualify himself . . . .” (emphasis added). Similarly, under Canon 3C of the Code of Conduct for United States Judges, a judge is required to recuse him or herself under the circumstances listed (as are Massachusetts judges under the analogous Canon 3(E) of the Massachusetts Code of Judicial Ethics).

[4] In general, timeliness is essential for a successful motion to recuse. See, e.g., In re United States, 666 F.2d 690, 694 (1st Cir. 1981). Lack of timeliness creates that impression that the motion has been strategically filed “to recuse a judge whose rulings have gone against the party.” In re United States, 441 F.3d 44, 65 (1st Cir. 2006). Thus, generally a party must raise the question of disqualification “at the earliest moment after acquiring knowledge of the relevant facts.” In re Abijoe Realty Corp., 943 F. 2d 121, 126 (1st Cir. 1991). In O’Brien, Judge Saylor concluded that “because of the high stakes involved, I am reluctant to deny the motion solely on the ground that it is untimely,” and proceeded to decide the motion on its merits. 2014 WL 905613, at *5.
An Overview Of The New Massachusetts Domestic Violence Leave Law

by Robert A. Fisher & Rebecca Sivitz

Heads Up

On August 8, 2014, Governor Patrick signed into law “An Act Relative to Domestic Violence.” The law, passed in the wake of the brutal murder of Jennifer Martel by Jared Remy, focuses primarily on criminal justice system reform in the area of domestic violence. It also, however, creates Section 52E of Chapter 149 of the General Laws, which requires covered employers to provide up to 15 days of job-protected leave to an employee who, or whose family member, is a victim of “abusive behavior,” including domestic violence.

Who Is A Covered Employer?

The law, which became effective immediately, applies to “employers who employ 50 or more employees.” An Advisory from the Office of the Attorney General (“OAG”) states that the 50 employees must be “in Massachusetts.”

Who Is A Covered Employee?

The statute defines an “employee” as any individual who performs services for and under the control and direction of an employer for wages or other remuneration. Unlike other federal and state leave laws, there is no required minimum hours of service or length of employment for eligibility. It is unclear whether the employee must live and/or work in Massachusetts. In the wage-and-hour context, Massachusetts courts have applied Massachusetts law to certain individuals living and working outside of the Commonwealth. See, e.g., Taylor v. Eastern Connection Operation, Inc., 465 Mass. 191 (2013) (individuals living and working in New York could bring wage-and-hour claims where the written employment contract called for the application of Massachusetts law); Dow v. Casale, 83 Mass. App. Ct. 751 (2013) (Florida resident could bring a Massachusetts Wage Act claim where employer was
headed in and there was a substantial connection between the employment relationship and Massachusetts).

**When Is An Employee Entitled To The Leave?**

An employee is entitled to the leave when the employee or a “family member” (which is broadly defined) is the victim of “abusive behavior” and the purpose of the leave is to address issues related to the abusive behavior. “Abusive behavior” is any behavior constituting “domestic violence,” stalking, sexual assault or kidnapping. “Domestic violence” is “abuse” directed against an employee or his or her family member by a current or former spouse; a relative by blood or marriage; a person with whom the employee or the family member shares a child; a current or former cohabitant of the employee or the employee’s family member; or a person with whom the employee or family member had a dating or engagement relationship. “Abuse” encompasses a wide range of conduct, such as causing or attempting to cause physical harm, forced sexual activity, mental abuse, and restraint of liberty. An employee is not entitled to the leave if he or she is the alleged perpetrator of the abusive behavior.

The employee must use the leave to address issues relating to the abusive behavior. The statute provides a non-exhaustive list of permissible reasons for a leave, which includes to seek medical treatment, counseling, victim services or legal assistance; to secure housing; to appear in court or obtain a protective order; to meet with law enforcement officials; and to attend child custody proceedings.

A covered employee is entitled to up to 15 days of leave in any 12-month period. The employer has sole discretion as to whether the leave is paid or not. Regardless, an employee must exhaust all paid leave, such as vacation or sick time, before using the new statutory leave unless the employer waives this requirement.

**How Must An Employee Request Leave?**

An employee must provide advanced notice of the need for a domestic violence leave unless there is a threat of imminent danger to the employee or a qualifying family member. In such case of emergency, notice may be provided within three workdays of the leave, and may be provided by either a family member or a professional assisting the employee.

An employer may require documentation supporting the need for a domestic violence leave. Qualifying documents include a protective order, a court or public agency letter, a police report, medical records, witness statements, or a sworn statement by either a professional or the employee. An employer may not require documentation of an arrest, a conviction or a police report. In general, documentation must be supplied within a reasonable time after it is requested by the employer. If, however, the absence is unscheduled (such as when there is a threat of imminent danger), an employee has thirty days from the last unauthorized absence to supply sufficient documentation before he or she may be disciplined.
What Are Employers’ Obligations Under The Statute?

An employer must allow an eligible employee to take the requested leave, and is prohibited from discharging or discriminating against an employee for exercising his or her statutory rights. Employers also may not coerce, interfere with, restrain or deny the exercise of any rights under the statute. When an employee returns to work, the employer must reinstate the employee to his or her original job or an equivalent position. Moreover, the statute imposes strict confidentiality obligations on an employer and permits disclosure of information relating to a leave only under limited circumstances. Covered employers must notify employees of their rights under the statute. The OAG has not mandated a particular manner or form for such notice.

What Are The Enforcement Provisions?

The OAG is empowered to enforce the law and may seek injunctive or other equitable relief. The Fair Labor Division has developed a form for employees to report an employer’s failure to provide leave under the statute.

Employees may also bring a private civil action. The law amended the Massachusetts Wage Act, G.L. c.149, §150, to include claims relating to domestic violence leave. As a result, a plaintiff who establishes a violation of the domestic violence leave law is entitled to automatic treble damages for any lost wages or other benefits, and reasonable attorneys’ fees.

What Are Some Best Practices for Employers?

The new domestic violence leave law creates challenges for employers. Most importantly, employees seeking leave may need to disclose to their employer information that is highly personal and that involves difficult and potentially life-threatening situations. Employers may not want to know the details of the employee’s situation and thus may decline to request supporting documentation. Further, many employers may need to revise the way in which they address employee absences to ensure that requests for domestic violence leave are treated with sensitivity and confidentiality. Finally, employers may want to maintain a written policy regarding domestic violence leave. In addition to notifying employees about whether the leave is paid or unpaid, the policy might address whether employees will need to exhaust paid leave first and might designate an employee as being responsible for processing leave requests.

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The Business Litigation Session Turns 15
by Judge Mitchell H. Kaplan

*The following judges have served in the BLS since its inception: Allan van Gestel; Margot Botsford; Ralph Gants; Nonnie Burnes; Susan Garsh; Margaret Hinkle; Judith Fabricant; Stephen Neel; Christine Roach; Janet Sanders; Peter Lauriat; Thomas Billings; and Mitchell Kaplan

The Business Litigation Session of the Superior Court received its charter in 1999, and although Judge Allen van Gestel did not preside over the first BLS hearing until 2000, those of us currently charged with the care and maintenance of the BLS believe it to be celebrating its fifteenth birthday. On November 18, 2014, the New England Law Foundation and Boston Bar Association were kind enough to give the BLS a birthday party at the Boston College Club. The celebration included a panel discussion moderated by Paul Dacier, executive vice president and general counsel of EMC Corporation and past president of the BBA. The panelists including six sitting or retired judges, all of whom served at one point as the administrative judge of the BLS and whose service on the BLS collectively spanned the fifteen years that it has been in existence: Judges Allen van Gestel, Margaret Hinkle, Judith Fabricant, Janet Sanders, and now Chief Justice of the Supreme Judicial Court, Ralph Gants. Judge van Gestel was warmly recognized as the “father” of the BLS. Chief Justice Rouse was applauded for her steadfast support for the BLS during her entire tenure as Chief of the Superior Court. The room was full of well-wishers, and, I think it fair to say, a good time was had by all.

A fifteenth birthday is also a good occasion to reflect on how well the BLS has met the needs for which it was created. I am able to consider this question from two different courtroom vantage points: the well and the bench. I was appointed to the Superior Court in 2009; prior to that I represented clients in many BLS cases during the first nine years of its life. For the past two years I have presided in BLS-1, sharing the session with Judge Tom Billings. I should point out that these observations are my reflections and not those of any other BLS judges or an institutional report.
In the late 1990’s, I was among the lawyers advocating for the creation of a dedicated session for business cases. The Delaware Chancery Court had, of course, long since become the court of record for interpreting business law and defining the relationships between corporations and their boards and shareholders. Other states were then beginning to establish specialized courts or sessions for business cases. At that time, whether it was fact or self-interested perception, some attorneys who handled business cases believed that those cases did not receive the attention that they required in the very busy time standards sessions. There was also a concern that attorneys with options to file their cases in other states, federal court or private arbitrations were going to other forums, with the result that Massachusetts appellate courts did not have the opportunity to write on many of the developing issues in business law. Other attorneys with different practices rightfully argued that many other kinds of cases, such as medical malpractice, products liability and employment disputes, presented equally complex issues. Whatever the merits of those differing positions, the BLS was established in 1999 and heard its first motions in 2000, and a second BLS session was added in January 2002.

Is the BLS achieving its mission? Given my present assignment as a BLS judge, it is apparent that I am no longer an unbiased observer, but I believe that it is. We can start with an objective measure: as of July 1, 2014, the BLS had disposed of 3,698 cases since inception. A review of the currently pending cases is illustrative of the types of cases the BLS handles, which are very much broader than what I might think of as classic “business” disputes. As could be expected, there are a number of cases involving corporate governance, both securities class actions as well as disputes between stakeholders in closely held companies and partnerships; there are also several professional malpractice claims including legal, accounting and engineering services; there are a substantial number of consumer class actions involving products and services; there are a number of trade secret cases, often presented in the context of covenants not to compete, and other intellectual property cases arising in the context of breach of contract claims; there are a number of insurance coverage disputes, and, of course, a broad variety of commercial contract disputes. As always, there are cases arising out of some government action or program. At present, the licensing of medical marijuana dispensaries has generated many BLS cases, and the Attorney General’s proposed settlement with Partners is receiving much media attention.

Regardless of the subject matter of any particular case, I think that the BLS is at its best when it assists the parties in managing the complex case with multiple moving parts and often multiple parties. Blessed with a smaller case load than the time standards sessions, every case begins with a Rule 16 conference scheduled as soon as issues are joined. All BLS judges encourage the parties to consider participating in what we used to call the Pilot Project, but now refer to as the Discovery Project, in which the parties expressly agree on the scope and methods of discovery. However, we work with the attorneys in every case to tailor a pretrial schedule and discovery plan to the needs of the case. We will want to know if there will be contentious issues because of the volume of electronically stored data. Does it make sense to sequence discovery? Does it make sense to tee-up resolution of a particular claim or defense that might dispose of the case, or perhaps facilitate settlement, before discovery proceeds on other
issues? Because we have the time to work closely with counsel and to understand the issues presented by a case, we are able to resolve many discovery disputes expeditiously and sometimes without the need for formal motion practice.

I attended a conference of business law judges from across the country last year. There was a panel addressing issues arising out of electronic discovery. (I think every conference has a panel like that now.) The lawyers on the panel both emphasized that in their experience the biggest factor in the expeditious resolution of a data driven litigation is the trial judge’s willingness to be involved in discussions concerning the scope and timing of electronic discovery from the outset of the case. Beginning well before my service on the BLS, the BLS judges have been ahead of the curve on this aspect of case management. At the fifteenth anniversary event, several of the judges on the panel described mammoth cases over which they presided some years ago in which they conducted multiple hearings and worked with counsel to adopt discovery plans in which the process was broken down to manageable bites (or bytes).

We do not have as many jury trials in the BLS as are tried in the time standards sessions. From my perspective as a BLS judge that has benefits and detriment5s. I like jury trials; however, having unscheduled time many mornings helps in preparing adequately for afternoon motions and delivering written opinions in a timely manner. All of the BLS judges try to provide written, and hopefully reasoned, opinions explaining our rulings. We send them all to the Social Law Library so that attorneys appearing in the BLS can have a sense of where a particular judge stands on certain kinds of issues and cases.

When the cases do try, they will typically take three to four weeks. In a time standards session it is difficult to devote a month to a single case, but the BLS does that regularly; and, as was true when I was trying BLS cases, when a case is scheduled for trial in the BLS, even for a lengthy trial, it is a hard date. You can use it to reserve hotel rooms for your out-of-state witnesses. And, we will give you a timely trial, regardless of its anticipated length.

Another benefit of having unscheduled time is the ability to fill it with matters needing immediate attention. A great many of the cases accepted in the BLS include requests for preliminary injunctive relief. Indeed, for a lot of those cases the definitive ruling will be the grant or denial of a preliminary injunction. I am coming to believe that in many of those cases at least a brief evidentiary hearing promptly scheduled can help me better understand the case and be more confident in my decision. I am increasingly offering the parties the opportunity to present or cross-examine key witnesses, particularly experts, at preliminary hearings.

In the years that I have been a judge, I have learned to be judicious in telling jokes or war stories from the bench because the lawyers always laugh, in the first instance, and look interested, in the second, regardless of whether the joke is funny or the story boring. Nonetheless, I conclude with a couple stories from my years of practice in the BLS. My hope is that I, and the other current custodians of the BLS
sessions, are doing the job as well as the judges who presided in the early years of the BLS: the giants on whose shoulders we stand.

When I was in practice, I remember on a number of occasions explaining to clients with general counsel offices in other states that we should file our case in the BLS, even though we had diversity jurisdiction and could file in federal court. There were only two BLS sessions, the judges were both really smart and hardworking, it didn’t matter who we drew, and if we had to try the case they would give us a prompt trial date. I no longer have clients (which I must admit is a nice part of my job), so I don’t have that conversation any more, but I hope there are lawyers who practice in the BLS still having it with their clients.

Sometimes, the BLS works too efficiently. At our fifteen year celebration, the panelists were seated in front of a large window that looked out on the roof-tops of International Place. As I listened to Judge van Gestel speak, I was reminded of a jury waived case I tried before him a decade or so ago involving that building. I represented one of the two partners in the partnership that owned the building. They had a dispute about their respective rights under the partnership agreement and that led to a trial that took a week. A few days after it ended, I left for a short vacation. It never occurred to me that Judge van Gestel would render a decision in less than a week, but he did, many pages, and my side didn’t do well. While the young lawyers who had helped me try the case were debating whether to call me on vacation with the unhappy news, my client’s general counsel, who had already heard about the decision from the gloating, victorious partner, called me. He was not happy about the decision, but more than unhappy that he hadn’t first heard about it from me.

I try hard to work quickly and never keep matters under advisement for lengthy periods, but I can’t say that I am as efficient as Judge van Gestel was—maybe sometimes that is a good thing. In any event, I trust that the bar and the business community believe that the BLS session is continuing to meet the important needs for which it was formed fifteen years ago.

Mitchell Kaplan is a justice of the Superior Court and currently sits on the Business Litigation Session of the court. He was previously a partner at Choate, Hall, & Stewart and served as a law clerk to Hon. Joseph L. Tauro, USDC.
Should Massachusetts Put Women with a Substance Abuse Problem in Prison?: A Critique of the Use of G. L. c. 123, § 35 to Involuntarily Commit Female Drug and Alcohol Abusers

by Jennifer Honig

Legal Analysis

The scourge of substance abuse afflicts women in the Commonwealth in alarming numbers. In 2012, one-third of all adults admitted to treatment programs in Massachusetts were women. And even before the Commonwealth was hit with the recent opioid crisis, the overall demand for substance abuse treatment for both men and women exceeded the state’s available capacity. Now, the system is strained yet further. “The epidemic is growing at rates that are faster than we can provide support services,” lamented the head of the Association of Behavioral Healthcare, in March, 2014. Here’s the broader perspective: on a national level, only 11% of people with substance abuse problems receive the treatment they so desperately need.[1]

In light of this crisis, the time has come to reevaluate the Commonwealth’s use of Section 35 of General Law Chapter 123 to civilly commit people in need of substance abuse treatment. Most disturbing, for women, the use of this statute leads to housing women in state prison when they have committed no crime. There, women receive deficient treatment while enduring the trauma of imprisonment.

The Legal Basis for Involuntarily Committing Substance Abusers

The Massachusetts Legislature first addressed substance abuse in 1885. St.1885, c. 339, §§ 1, 2. Nearly a century later, our modern authority for civilly committing substance abusers (passed in 1970) is General Law Chapter 123, Section 35. Section 35 provides for the involuntary commitment and treatment of a “person who chronically or habitually consumes alcoholic beverages … or consumes or ingests controlled
substances ...." To commit a person, the court must find that she is an alcoholic or substance abuser and there is a likelihood of serious harm as a result of her alcoholism or substance abuse.

Many other states passed similar provisions after 1962, when the U.S. Supreme Court held that although treating addiction as a crime was unconstitutional, a state could establish a program of compulsory treatment, including periods of involuntary confinement. *Robinson v. California*, 370 U.S. 660, 665 & n.7 (1962). Consistent with *Robinson*, the Supreme Judicial Court, in 1968, held that civil commitment was justified, but only for the protection and treatment of the individual and the protection of the public, and only if it had a rehabilitative focus. *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 610-11 (1968) (noting the practice, at other public mental health hospitals in Massachusetts, of “encourage[ing] patients to [make] progress towards out-patient status”).

A decade after *Robinson*, the U.S. Supreme Court spoke of involuntary civil commitment as a “massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The Justices also explained that although a court may involuntarily commit a person under a state’s *parens patriae* interest in providing care to its citizens who are unable to care for themselves, such action requires a showing that the person is incapable of understanding and protecting her own interests and safety because of a mental disability. *Id.* at 509, n.4. Also, under its police power, a state may involuntarily commit an individual who, as a result of mental illness or mental abnormality, poses a serious danger to self or others. *Addington v. Texas*, 441 U.S. 418, 426, 427-28 (1979) (person with mental illness); *O’Connor v. Donaldson*, 422 U.S. 563, 570 (1975) (same); *Kansas v. Hendrick*, 521 U.S. 346, 360 (1997) (sex offender). These interests imply that the state has an obligation to offer care and treatment consistent with the judgment of qualified professionals. [2]

These common-law principles are incorporated in our current statutory law. Section 35 permits a court to involuntarily commit an abuser of alcohol or drugs for up to ninety days—even absent any criminal behavior—when that abuse: (1) substantially injures the person’s health or substantially interferes with her social or economic functioning; or (2) has resulted in the person’s loss of self-control. The statute appears grounded primarily in the exercise of *parens patriae* authority: “[s]uch commitment shall be for the purpose of inpatient care in public or private facilities … for the care and treatment of alcoholism or substance abuse.” G. L. c. 123, § 35, par. 4.

The statute also dictates where a person should be civilly committed: the court must first seek placement at an inpatient facility approved by the Department of Public Health (DPH). G. L. c. 123, § 35, par. 4. However, when a DPH-approved facility is unavailable, the court may commit a man to the Massachusetts Alcohol Substance Abuse Center (MASAC) treatment facility located in Bridgewater State Hospital, and a woman to state prison (to be housed separately from inmates, if she is not a pretrial detainee or convicted criminal). *Devlin v. Commonwealth*, 83 Mass. App. 530, 534 (2013). The person’s commitment must be reviewed by the superintendent of the facility after 30, 45, 60, and 75 days to
determine whether continued commitment is necessary to ensure the person's health and safety. After ninety days, DPH must provide one year of case management to arrange and coordinate support and services in the community.

Finally, involuntary civil commitment may only occur when less restrictive alternatives to commitment are unavailable. *Donaldson*, 422 U.S. at 576; see also *Commonwealth v. Nassar*, 380 Mass. 908, 917-18 (1980). Thus, judges hearing Section 35 petitions should consider whether less restrictive alternatives to civil commitment are feasible to address the presenting addiction problem.

**For Many Women, Section 35 Commitments Provide Deficient Treatment**

Under Section 35, the first choice for housing a civilly-committed woman for substance abuse is a DPH-approved facility, such as the Women's Addiction Treatment Center (WATC). This center is a ninety-bed, staff-secure treatment facility in New Bedford. At WATC, women receive detoxification services and post-detoxification treatment. Eventually, women are allowed to leave the facility to participate in community activities. Upon discharge, women may participate in additional step-down programs providing treatment and support services in the community.

Although a DPH-approved facility like WATC is the preferred place to house civilly-committed women, WATC consistently operates at capacity and cannot accommodate all of the women committed under Section 35. In February, 2014, a WATC representative stated, “Our beds are filled every day, all our beds ....” When WATC is full, courts send women—even those with no connection to any criminal activity—to MCI-Framingham, a locked, medium-security prison operated by the state Department of Correction (DOC). At least 60% of women housed at MCI-Framingham under Section 35 have no criminal basis for being housed there.

But MCI-Framingham cannot and does not provide adequate treatment for civilly-confined women. As a state prison, MCI-Framingham follows DOC treatment/detoxification protocols, which are more limited than those available at DPH-licensed facilities. For instance, women withdrawing from heroin at MCI-Framingham receive only over-the-counter medication, such as acetaminophen and ibuprofen, rather than federally approved drugs for the treatment of opioid addiction, such as methadone, Suboxone, or Vivitrol. Moreover, although detoxification takes one week or less, the average duration of recent confinements ranges from 8 to 22 days.

In addition, MCI-Framingham, unlike WATC, offers no post-detoxification treatment to women without criminal involvement committed there pursuant to Section 35. Instead, the prison moves civilly-committed women to a modular structure with no post-detoxification services—one that also houses pre-trial detainees—to await discharge. [3]
To be sure, in 2013, MCI-Framingham began referring discharged, civilly-committed women to services provided by community programs. But women who receive these services fare much worse than those who receive post-detoxification treatment from WATC. [4]

Deficiencies in treatment aside, what is more troubling for women civilly committed to MCI-Framingham is the trauma and stigmatization of imprisonment. The shame and humiliation that go along with being housed with criminals significantly impedes these women’s attempts to recover from their serious substance abuse problems.

**Committing Substance Abuse Victims to State Prison May Be Unconstitutional**

A group of women civilly committed to MCI-Framingham under Section 35 (with no criminal basis for their commitment) has recently filed a class action in federal court, alleging that their commitment violates substantive due process. They claim that their imprisonment is incompatible with the statutory purpose of inpatient substance abuse treatment, and substantially departs from any current professional standard of care for helping people recover from addiction. [5] According to the plaintiffs, Massachusetts is the only state that imprisons women on the purely civil basis of substance abuse disorders. The suit also alleges disability discrimination under federal law, on the theory that commitment under Section 35 criminalizes addiction, and thus unnecessarily stigmatizes women for their disease. The suit was filed on the heels of at least nine reports (written between 1987 and 2011) recommending that Massachusetts stop using Section 35 to commit women to MCI-Framingham on purely civil grounds.

In light of these problems, the Legislature should amend Section 35 so that women without criminal involvement cannot be sent to MCI-Framingham. [6] At the same time, the Legislature must ensure sufficient funding for court-ordered detoxification, both at DPH-approved facilities, and after a patient’s release from such a facility. Although the Legislature did augment funding for WATC in June, 2014, it remains to be seen whether the additional monies will suffice to prevent women from having to be committed to state prison under Section 35. [7]

**Beyond Section 35: Voluntary Substance Abuse Programs**

Involuntary commitment does not best address the problem of substance abuse facing Massachusetts women. Since Section 35 was enacted, research has shown that, whenever possible, treatment should be: (1) voluntary; (2) available long-term; and (3) community-based. Accordingly, in addition to amending Section 35 to eliminate the danger of housing women in state prison solely for substance abuse, Massachusetts should shift resources to programs that meet these treatment criteria.

First, the Commonwealth should devote its resources to voluntary treatment. Indeed, a review of thirty years of research into the efficacy of coerced substance abuse treatment found no consistent
evidence that involuntary treatment produced better outcomes than voluntary treatment.[8] Besides affording women additional opportunities to overcome their addictions, voluntary treatment would also save money. In fiscal year 2012, DPH spent $34 per day for each person committed under Section 35, to cover the expense of “civil commitment level of care.”[9] And this expenditure does not include the additional costs associated with the judicial process.

Additionally, the Commonwealth should expand access to longer-term post-detoxification care. While treatment duration varies, for most people, long-term or repeated episodes of care are essential for enduring abstinence.[10] Today, it is more difficult to access post-detox care than detox care, in part because insurance usually covers detox care (although, curiously, not at MCI-Framingham), but does not cover longer-term care, which is funded by DPH. Effective October, 2015, insurance coverage for detox and step-down services will expand, but coverage will still be limited to the initial phases of treatment.

Finally, Massachusetts should shift resources from inpatient to community-based care, particularly for opioid addiction, which has surpassed alcoholism among women committed under Section 35.[11] Recent guidelines on opioid treatment, issued by the Institute for Clinical and Economic Review (ICER), suggest that, for most patients, long-term medication is more effective than short-term inpatient detoxification.[12] Concerning post-detoxification treatment, ICER’s founder argues that most patients get equal or better results from long-term outpatient treatment than from inpatient rehabilitation.[13] Increasing community-based care also makes sense given many women’s roles as caregivers—53% of women admitted to WATC have children.[14] Finally, outpatient care benefits the large number of women with co-occurring mental-health and substance abuse disorders, a combination that is associated with poorer treatment outcomes and higher rates of dropout from substance abuse treatment.[15]

In conclusion, Section 35 needs immediate revision to end civil commitment of women to MCI-Framingham. Beyond that change, our growing understanding of women’s substance abuse treatment should promote an examination of the legitimacy of the Section 35 treatment model and a thorough review of the options available to women, and men, for voluntary, community-based treatment.

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Endnotes


[3] Although General Law Chapter 125, Section 16, requires that DOC maintain at MCI-Framingham “a facility for the treatment and rehabilitation of alcoholics,” it never established such a facility. To the extent that MCI-Framingham has substance abuse programs for sentenced prisoners and pretrial detainees, DOC does not allow civil committees to participate (although civil committees are allowed to come mingle with pretrial detainees).

[4] As of June 2013, more women are referred to residential treatment from MCI-Framingham (43%) than from WATC (21%), fewer women from MCI-Framingham are released to an outpatient facility (32%) than from WATC (58%), and more women from MCI-Framingham return to court (11%) than from WATC (3%) or to an awaiting trial unit (5% compared to 0%). Erika Kates, Moving Beyond Prisons: Creating Alternative Pathways for Women: Briefing Note #1 Civil Commitments for Women in Massachusetts (2013), https://www.wcwonline.org/pdf/ekates/CivilCommitmentsForWomenInMArev.pdf, at 2.


[7] Even if the Legislature approves spending, ongoing funding is susceptible. The acute treatment system was downsized in the early and mid-2000s, resulting in an increase in commitments to MCI-Framingham.

[8] Jeffry C. Eisen, Civil Commitment for Substance Abuse, 15 Virtual Mentor 844 (Oct. 2013), http://virtualmentor.ama-assn.org/2013/10/pdf/ecas4-1310.pdf, at 847. One might argue that the state could wholly abandon involuntary treatment without ill effect. Although most substance abusers are not dangerous, a shift to voluntary services would still allow the confinement of persons who have evidenced dangerousness through the commission of a crime. Limiting confinement to individuals who enter the criminal justice system is preferable to a system that involuntarily confines a broad swath of people who suffer from addiction, a medical condition.


[11] In Fiscal Year 2012, almost half of the women admitted to WATC were addicted to opiates and only 38% to alcohol. Mass. Dep’t Pub. Health, supra note 9, at 13.


