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President's Page

Living Up to Our Immigration Principles

By Chinh H. Pham

Much has changed in the United States since I arrived as an immigrant from war-torn Vietnam in 1975. While much of that change is good, I find myself sometimes disheartened by today's response to immigrants and immigration issues compared to when I arrived.

I was fortunate that, when I arrived in the US, the country overall was very welcoming; the people that helped us and sponsored us did so genuinely out of the kindness of their hearts. I think this country can still be like that—and in many cases, it is—but it's difficult not to get discouraged when one hears the rhetoric that exists around immigration today.
Immigration is, of course, not a single or simple issue. It's not something we at the BBA, or any one person or organization, can fix overnight. But at the BBA, we are in the unique position to address these issues from multiple directions. We have the resources to educate, to advocate, and to support others doing the same.

Through our educational programming, we can inform the legal and greater communities as to what these issues really are, from treatment of undocumented immigrants to the lengthy—and often delay-plagued—process of acquiring that documentation and eventually becoming a legal citizen. We can advocate—whether on a local, state, or even national level—for policy changes and enforcement that live up to the ideals set forth in the BBA's Immigration Principles. That advocacy has, in recent months, included statements on the situation that unfolded on Martha's Vineyard in September 2022, as well as comments on the Biden administration's new asylum rules proposed in February of this year.

I encourage you all to familiarize yourselves with those principles, which state that, "No person's rights or human dignity should be devalued on the basis of immigration or citizenship status," and conclude that, "As lawyers, and as a Bar Association, it is our special calling, privilege, and obligation to be vigilant guardians of the rule of law, and to ensure that it protects all people to whom it extends—including all immigrants—when their rights are under attack."

As BBA President, I also encourage all our members to stand up and get involved, however you can. Look for opportunities through the BBA or on your own to step up and do the right thing. We are blessed, not only as a country but as an organization, with both the resources and the wherewithal to help address some of these long-standing immigration issues. With 16,000 members and an alumni group that spans the legal and business landscape throughout Boston and beyond—including within the highest levels of state and city government—we have an opportunity to wield our collective influence, and we should take advantage of that. This is true not only of our more senior and experienced members, but also of our up-and-coming generation of younger attorneys and law students, who already have such a proclivity for focusing on social issues and a true desire to not only do well in their legal careers, but to do good.

We also know, however, that we cannot accomplish all we set out to alone. This is, in part, why the Boston Bar Foundation also works to support organizations working on the behalf of our immigrant neighbors, such as Rian Immigrant Center, PAIR, Project Citizenship, and others around the city and throughout the Commonwealth. While we seek to change systems, these

great organizations continue to make an impact on countless individuals victimized by our current landscape.

When my family and I arrived from Vietnam in 1975, we did so seeking a better life and greater opportunities to be our best selves. Through the kindness of local citizens, and the aid of local governments, we were able to do that. Today's immigrants—no matter from where they originate or how they get here—are seeking the same. We have the opportunity, and the obligation—as an association, a city, a state, and a country as a whole—to do the right thing and continue to fight for those who too often have no voice with which to fight themselves.

Chinh H. Pham
President

Viewpoint

Lessons Learned From a Martha's Vineyard Legal Responder

By Emily Leung

As a legal services attorney responding to the unexpected arrival in September 2022 of 49 mostly Venezuelan asylum-seekers, who were transported from Texas to Martha's Vineyard without prior notice, I witnessed the best that the Massachusetts legal community and allied support networks have to offer in terms of generosity, creativity, and compassion. I was also deeply dismayed by the incident and its attendant abuse of vulnerable individuals navigating the United States' challenging immigration system. I hope the attention generated by this incident can help improve policies and increase resources for immigrant communities in Massachusetts.

Many of the asylum-seekers were under the impression they were en route from Texas to potential work opportunities in Boston, Washington, D.C., or other locations. Consequently, their arrival on Martha's Vineyard was as much a surprise to them as it was to the residents of the island. Confusion and surprise on the day of the arrival eventually gave way to shock, as it became clear that their presence was part of a political stunt.

Impressively, the local community on the island immediately organized themselves to provide emergency shelter, food, clothing, and medical attention, and tried to make the individuals and families feel welcome. As they did so, information emerged about the circumstances of the group's arrival that revealed an elaborate scheme to make a policy point that states further from the United States' southern border should share the impact of such new arrivals to the country. Beginning in April 2022, Texas and Arizona had begun transporting busloads of asylum-seekers outside their territories. However, the September 2022 Martha's Vineyard flight from Texas marked the first publicized instance of a border-state government using a privately-chartered airplane to move asylum-seekers to other jurisdictions in the United States.

At first, the most urgent issues were not legal in nature, but concerned basic human needs. Nonetheless, many of the individuals were understandably concerned about scheduled appearances in their pending immigration cases, particularly as some had previously received instructions to report to various Immigration and Customs Enforcement (ICE) offices throughout the country just a few days later. Fortunately, I and other legal advocates successfully and quickly addressed the ICE reporting requirements, and then turned our attention to the more significant potential legal issues.

An impressive number of attorneys volunteered to assess individual legal claims, while Lawyers for Civil Rights led an investigation of potential civil claims against those who were responsible for bringing the group to Martha's Vineyard. Simultaneously, the Bexar County Sheriff's Office, the law enforcement agency for the county from where the immigrants departed Texas, launched a criminal investigation into the circumstances of the group's transport from Bexar County to the island. As this was happening, the group was once again moved, this time to Joint Base Cape Cod, where the Commonwealth stepped in to provide temporary emergency housing, food, and supportive services. In addition, numerous charitable organizations and individuals provided supplementary food, clothing, and personal items.

In the following weeks, I spent many days on Joint Base Cape Cod, helping to connect the group to pro bono legal counsel, answering their many immigration questions, liaising with nonprofit

and state agencies, aiding the civil and criminal investigations, and providing general support for the group. I did this work in conjunction with dedicated immigration staff from my organization (the Justice Center of Southeast Massachusetts) and several attorneys and volunteers who graciously offered their time and resources. I was grateful for my experience in legal aid, which, as here, demands a combination of legal skills, social work, and elbow grease to achieve goals. By the end of their stay at the base, this group received significantly more support than many other recent arrivals to the Commonwealth. Their individual cases and the civil lawsuits that ensued are ongoing.

During the past year, the influx of immigrants to Massachusetts has increased substantially. Apart from its political ramifications, the immigrant experience highlighted by the September 2022 incident raises important larger questions about how we as a community and state can and should be providing support to recent arrivals to the Commonwealth, and what policies we should enact to achieve those goals. According to the Massachusetts Office for Refugees and Immigrants, the Commonwealth received around 1,000 refugees and asylum-seekers in 2021; by comparison, an estimated 2,000 individuals, primarily from Haiti and countries in South America, arrived in the Boston area just between May and August 2022. In recent months, the Commonwealth has increased its provision of housing and other supportive services to newly arrived immigrants, but many do not qualify, and the programs still have many delays and barriers.

Massachusetts is the only state to offer a right to shelter for families and pregnant women facing homelessness, in furtherance of which the state has been providing housing and assistance for many recently-arrived families. *See* G.L. c. 23B § 30 (Emergency Housing Assistance Program). While recent moves to increase funding to this program are a step in the right direction, more is needed to assist those who do not qualify for the emergency assistance housing program. Recent arrivals to the Commonwealth also need legal assistance to navigate an ever more complex immigration legal system. Thanks in part to frequent rule changes, the increased influx of immigrants has strained both legal aid programs and private practitioners who serve them. More funding for legal services to assist immigrant communities is needed, as well as additional pro bono support. Additional funding for community-based organizations, which can provide cultural and social support to complement state agency programs, is also crucial.

Many recently-arrived individuals and families are fleeing violence, persecution, extreme economic or food insecurity, or failed and corrupt governments, and are ultimately seeking humanitarian assistance from the United States. While these issues implicate broader federal immigration policy, states and cities also have a role to play. Leaders in Massachusetts have pledged to be welcoming to immigrants, including former Mayor Marty Walsh, who offered to house immigrants in Boston City Hall, and then-Attorney General Maura Healey, who frequently sued the federal government over policies that adversely affected immigrant communities. The example of Martha's Vineyard demonstrated what we can do when resources are rallied, and provides a guide for how the Commonwealth can improve upon its longstanding support of our immigrant neighbors who continue to face a labyrinthine immigration system and serious humanitarian challenges.

Emily B. Leung is the Director of Immigration Advocacy for the Justice Center of Southeast Massachusetts, a subsidiary of South Coastal Counties Legal Services.

Guest Voice of the Judiciary

Interview with Boston Police Commissioner Michael Cox

Interview by Hon. Debra A. Squires-Lee

It was my pleasure to interview Boston Police Commissioner Michael Cox about his career, police reform, his return to Boston, and a host of other topics. The following is an excerpt of our discussion, condensed and edited for clarity. – Hon. Debra A. Squires-Lee

Q: I have a list of questions, but because I am a fanatical football fan, I have to start with the last question first. So, Commissioner, I understand your son played for the New York Giants, yes?

Commissioner: Yes, he did.

Q: All right, well, as a third-generation Bostonian, my father having gone to the very first Patriots game at B.U., which is it: Giants or Patriots?

Commissioner: You know, I've always been a Patriots fan my whole life because I'm from here. And there's a certain amount of loyalty that goes to the organization that actually chooses to draft your child. Although the Patriots did speak to him before the draft, they did not draft him. So, the Giants will always have a very good place in my heart. I guess as long as they're not playing the Patriots, I am a Giants fan now in a lot of ways, and always a Patriots fan.

Q: That is a wise and fair answer, Commissioner.

Commissioner: (Laughter) Thank you.

Q: You have been in law enforcement for many, many years, but if you can think back, why did you choose to go into law enforcement?

Commissioner: When I was younger, I didn't exactly know what I wanted to do in life, but I did know that I like people. I like giving back to society in some way. And when someone presented the idea to me, I didn't really know any police other than one individual, and so it was kind of a big deal. Because as a young black man growing up in Roxbury there weren't a lot of role models in the policing field in general. I took the exam, I went through that process, but I still didn't know if I could do it. This person who is now deceased, Will Saunders, spent a lot of time saying, "You'd make a great police officer, because of the fact that you care about people, and I think you'd be tremendous on the job." I came on the job and then I really understood the need for law enforcement with compassion. I saw the need, for people who really, really need help in so many different ways, and there were not a lot of people out there giving help.

And the community would see me as a young person coming on the force, you know, a person of color, and working in neighborhoods that were all people of color, and they were just like, "I love to see you. Thank you for doing what you're doing." There was a need for certain people of color to be in law enforcement, because of the fact that they understood, I understood, maybe,

some of the plight of what they were going through.

Q: You left the BPD to be chief of police in Ann Arbor, Michigan. Why did you decide to come back to Boston?

Commissioner: Ann Arbor is a tremendous city and clearly I had very good seats for all the football games, but it wasn't home. So, one, I saw an opportunity to come back home after I'd been isolated from my family for a three-year period because of Covid, and, two, the opportunity of a lifetime. If I'm going to be in law enforcement, why not come to one of the best cities in America, to deal with all of the challenges and problems that are in policing in a place that I know pretty intimately. For me, the answer was a no-brainer if they'd have me.

Q: So powerful. What are your priorities as Boston Police Commissioner?

Commissioner: I want to take a police department that's always been pretty good, more so in recent history, and make it better. I want to make sure that every person who comes in and swears the oath to serve the citizens understands what that means from the beginning of the job until when they retire, so that we don't lose sight of the public that we serve. I want to make sure that we're an organization, where people want to work. Even though there may be difficult circumstances that we don't lose sight of the mission. I want to make sure that the department is always at the forefront, evolving with citizens' demands and needs. And that's tough for law enforcement, because we traditionally have been very slow to change. And, I want to make sure that the members here develop and grow and adapt and are a lot quicker about that change in general.

People keep saying 're-imagine policing.' I don't know that we need to 're-imagine' it. I think we need to be really good at what we're supposed to be good at, and the number one thing that we're supposed to be good at is listening and trying to prevent crime. And that's really systemic change. I mean it takes a lot to do that. You're talking about changing a culture. I thought what better time than now to try to do this, and with the support of the Mayor, and with the support of a lot of other folks, I think we can do it.

Q: In that regard, do you have any thoughts on the Peace Officers Standards and Training Commission, how it could be most successful?

Commissioner: I appreciate that they started POST. I think law enforcement needs standards. We need it across the board, not just in this state. I think across the country we need standards because every law enforcement agency is judged on the weakest law enforcement agency in the country. Period. When something happens in Arkansas, people are going to say, "the Boston Police Department needs to do better because look what they did there, and you all do the same." And so having standards and certification around our profession is really important.

I just hope that as they create standards and certification for officers that we don't lost sight that we're an organization made up of human beings. And the standards cannot get too specialized, like we need to have special rules just for

the police. The reality is we're an organization made up of humans, and whatever makes the legal world better, the medical world better, the business world better, social workers better, is going to make us better, too. So let's figure out what those are and not just create special, one-off rules that only pertain to police because they tend not to work, because I've seen where, in quick response to something, you make a special exception for a small group of people and history has shown that it usually hasn't worked. Show me where it makes another place better and has lowered the error levels, and it will work in policing as well. But if you haven't shown that, I would prefer it not be tried first in law enforcement because the consequences can be too great.

Q: What are the most significant challenges currently facing law enforcement, or in particular the BPD?

Commissioner: One of the biggest challenges, as a result of, certainly, the George Floyd protests and things of that nature, is our ability to recruit and retain officers. You have two things going on. One, there's a lot of officers that are retiring now, and some are retiring early. And second, is how we attract people to do this job, particularly young people. This is one of the few jobs where people come on at twenty-one and usually stay until at least fifty-five. But young people don't want to come on this job at all because they are so influenced by what other people think. The reality is this is a noble profession. It is absolutely needed and we have a positive impact on the community that people don't necessarily understand, but more importantly, we provide public safety. If we can't attract young people, the right people who want to give back, like I did when I first came on, then, you know, we're going to be attracting a different kind of person – a mercenary.

Q: What would you say to a young person who might be thinking of a police career?

Commissioner: I would say that there are a lot of people who like to volunteer their time to feed the homeless or give to someone who is in need. If you want to help people, this job does that in so many different ways, in so many different outlets, that it is tremendously rewarding. Pretty much every day is an opportunity to help. Not only every day, multiple times a day, could be multiple times an hour that you are tremendously helping somebody who is having the worst moment maybe in their life. And if you want to do public service, or want to give back to the world, there's no better way to do that than to do this job. Because, history has shown that when you get a large group of people together, there does need to be some kind of public safety, because human nature has a dark side. We provide safety and support for the rest of society so people can live their lives in a good way. And also, these young people can know that it is a job where they can actually take care of their family; they're not going to get rich, that's for sure, but they will have a living wage.

And it's mission-driven. When I first came on here, I found that, when you understand your purpose, and why you're here, and your mission, life is just

easy. You don't have false expectations. You tend to not abuse people. If your mission is to take care of the public that you serve, you understand that you have to be flexible because the conditions change, and have the ability to deal with all of the pressures that come with the job. But, more importantly, you'll have an appreciation of what you're doing daily.

You know, as officers, we are humans and sometimes we do feel sorry for ourselves in some way. We lose our sense of purpose, and start to think nobody understands what we're going through. Yes, this is a difficult job. But it's always been a difficult job. If you understand the mission of why we're here, to help people and provide public safety, then you're able to be a lot more resilient. You're able to serve the public in the way that I think they should be served. The business world has customer service; our version of that is staying mission-driven around who are we here to serve. It's not ourselves. We're here to serve the public.

Q: Given that, what do you think is the best, most effective way for the Boston Police Department to engage the community?

Commissioner: I'm trying to go back to an older school way of policing where officers are directly communicating with the public. And I don't mean stopping somebody to see if they've broken the law in some way. Just personal contact. Whether you knock on the door of businesses and just introduce yourselves, so they get to know you and that we're there for them and then also understand what their problems are. When we do that, I think the public feels better. I think officers feel better, they understand their mission a lot more because they understand the problems from the perspective of the citizens. There's a lot more trust involved because the citizens will actually know the officers by name. When people know your name, you tend to be a little less flippant, a little less sarcastic, a little less, you know, edgy in some ways. And I think that goes a long way in making sure that officers always behave in that way as well.

We're trying to get our officers back in touch with the community that we serve, and we're going to do it multiple ways. We'll be going to the community groups, educating them on what our crime statistics are and then getting feedback from them on what they would like us to do. We should be listening to the public before we make our priorities because that is why we're here. And we can't do that unless we hear from the public and have a relationship with them. We have a lot of information, and I don't think that we have done a good job in recent history of sharing that. That's the short version of what we are trying to do: meeting the public where they are, sharing who we are, engaging them, and also passing on information and knowledge that we have so we can all stay safe.

Q: What did you learn from getting your MBA degree in terms of organizational management that you can bring to your role?

Commissioner: The MBA program lets you see how organizations deal with problems across the board. Problem-solving is a skill that can be learned. CEOs of organizations

can lead a science organization one day and a coal mine the next. You don't have to necessarily know how to do the actual work, you have to know how to bring people together, gather resources, motivate, how to get an organization to change its culture or move in the right direction. I think in some ways law enforcement has become too specialized and forgotten who the customer is. As a law enforcement agency, we need to be a lot more agile, and that comes from listening to our customer: the public.

Q: On the 1995 incident that you were involved in as an officer, is there anything that you would want to share about that, today, in 2023, with members of the bar?

Commissioner: I was a much younger person. I was an officer when it happened, but it was extremely personal to me. I can't emphasize enough how extremely personal it was, while at the same time, it was an extremely well-known, national story. But for me, I was the victim of something and didn't feel comfortable in accepting my victimization. I felt embarrassed and ashamed in so many different ways around that. And I had a hard time talking about it for a very long period. For some, I think it was perceived as me being loyal to a disloyal organization. That was not the case. I was just a victim and had gone through something and there was a lot of worrying about my own personal safety and my family's lives. I was figuring out that, yes, I want to do something, but not knowing how to go about it, and my privacy meant a lot to me.

The legal process -- which was the only process I had to move that forward -- as most people know, can already be a very painful process. As a victim, going through the criminal justice system in general never feels good. It seems like everyone I ran across had an agenda, wondering whether I was going to catch the person who did it no matter what it takes, or if I was going to litigate and try to get the most money in the world regardless of what it takes. I spent a lot of time trying to remind folks that at the end of the day, it has to be dealt in a way that I can live with. I don't think people understood that and maybe still don't understand that. It was not an easy thing then and it's still not an easy thing now. But I do understand that it was important and I guess I am thankful for the folks that thought it was important and kept pushing the issue even though I wasn't ready for it to be pushed or able. But I am appreciative of those who did care enough to try to do that.

Now, here I am as an adult, I still don't like talking about it, but I understand the importance of acknowledging and learning from this history. Telling the story lessens the likelihood of it happening again because people need to be cognizant of that so they can actually do something in law enforcement around it. Policing still needs to change. It's like all organizations: the goal is to get better.

Q: I want to thank you for being willing to answer that question. It is really powerful to hear from you about such a personal and painful situation. Thank you. Are there any final words that you want to share with the members of the

Bar of the Commonwealth?

Commissioner: Everyone in the legal field, certainly from judges to attorneys, have such powerful positions that can serve the public. I thank all of the attorneys out there for what they do in defending people or prosecuting people who have been breaking the law, or on the civil side, where you can really truly help people in a lot of ways. I am appreciative of all that lawyers do. If I got to live life over again, I probably would have become a lawyer.

Hon. Debra A. Squires-Lee is an Associate Justice of the Superior Court and a member of the Board of Editors of the Boston Bar Journal.

Case Focus

District Court Cuts Litigants No Slack for Failing to Produce Corporate Instant Messaging Data Resulting in Default Judgment

By John B. Koss

With the rapid emergence of COVID and the resulting rush to accommodate remote work, many corporations swiftly implemented corporate instant messaging applications such as Slack. Slack is a cloud-based instant messaging application that allows users to communicate on a one-to-one basis or in larger groups in dedicated "channels," which are permissioned chat groups that can be commissioned for corporate teams, departments, or parties outside an organization.

While applications like Slack can facilitate remote collaboration and feel familiar to younger workers used to social media messaging, some of their unique features, including the way in which Slack organizes and catalogues individual and group messages as well as programmatic options for identifying, searching, and preserving communications, create strategic risks when such data is implicated in civil discovery. It is crucial that attorneys are mindful of these unique characteristics and understand the preservation and collection pitfalls associated with applications like Slack before advising clients and attempting to collect data to meet discovery obligations.

The importance of this messaging evidence and the litigation risks of failing to properly preserve, review, and produce it were on full display in a recent decision issued by the United States District Court for the District of Massachusetts in the matter of *Red Wolf Energy Trading, LLC v. BIA Capital Management, LLC*, 19-cv-10119-MLW, 2022 WL 4112081 (D. Mass. Sep. 8, 2022). In this case, the Court entered default judgment against the defendants for repeated discovery lapses and misrepresentations associated with the failure to produce responsive Slack communications.

Facts and Procedural History

This remarkable decision arose from a lawsuit brought in January 2019 by an energy trading firm, Red Wolf, against a former employee trader, his new employer, Bia Capital Management ("Bia"), and five of its employees (collectively, the "defendants"). The suit alleged the defendants schemed to create and develop a competing business by misappropriating Red Wolf's trade secrets and taking its software and other assets. The software at issue allowed Red Wolf traders to test the future profitability of a trade model without entering the trade into the energy market.

Red Wolf alleged that from the summer 2017 until December 2018, the former employee used Red Wolf's software to place mock trades to test trading strategies to facilitate Bia Capital Management's entry into the market as a Red Wolf competitor. *Id.* at *4. In October 2019, Red Wolf served its first set of document requests on the defendants. These requests specifically targeted "[a]ll communication with or between the named defendants or anyone working for, with, or on behalf of Bia via Slack […]." *Id.* at *5.

On two occasions, once in April 2021 and again in September 2021, the defendants filed sworn affidavits attesting to compliance with their Federal Rule of Civil Procedure 26 production obligations, including production of all relevant Slack channel communications. Nevertheless, in response to identified discovery deficiencies, continued concern with missing Slack messages, and a Motion to Compel, the Court in March 2022 ordered the defendants to produce all relevant Slack communications. *Id.* at *10. The Court found the defendants' repeated failure to produce the required communications exasperating and, at the hearing on the Motion to Compel, it stated: "[…] I rarely

have a discovery dispute. I've spent more time on discovery disputes in this case than I may have certainly in any case in my 37-year career. […]. [T]his is not a game of hide and seek.... I issue an order and you have to disclose [the required documents]." *Id.* at *11.

Despite having previously attested, twice, to compliance with production obligations, in April 2022, the defendants produced additional Slack messages responsive to the original document requests from 2019. A month later, during a May 2022 deposition, one of the individual defendants testified that Slack messages were omitted from earlier productions due to a "mistake" made by a contractor in Kazakhstan he had hired to write a program the defendants used to search and produce Slack messages. *Id.* The deponent further testified he chose not to hire a messaging application expert because of a "limited budget" that would not allow the defendants to hire a "top tier firm" to search Slack. *Id.* The deponent also claimed he could not find any outside vendors who could do the work. *Id.*

Following the deposition, Red Wolf filed a motion for sanctions in June 2022, requesting a default judgment based on the defendants' repeated failure to produce relevant Slack communications despite the judge's orders to supplement their production and sworn statements that the relevant Slack messages had been produced. Even after filing of the sanctions motion, the defendants identified and produced additional previously unproduced Slack messages in July and August 2022.

In August 2022, the Court ordered the defendants to provide Red Wolf with a copy of the 2019 Slack Archive (the full content of the specific Slack instance) to be searched by Red Wolf's litigation data vendor. This search and analysis identified at least 128 relevant messages from the defendants' Slack account that should have been produced. *Id.* at *15. Most problematically, one of these messages constituted the "proverbial smoking gun" – a communication dated January 22, 2019 (only a few days after Red Wolf originally filed suit) in which two defendants discussed creating a new algorithm to hide the fact that their original algorithm was derived from Red Wolf technology. *Id.*

In addition, Red Wolf filed an affidavit from their discovery vendor who conducted its own search of the Slack Archive in which the vendor disputed the defendants' claim of the difficulty and non-standard nature of Slack collections. The vendor stated that, even in 2019, the defendants could have used "a standard eDiscovery processing tool" to search and produce Slack messages for $10,000. *Id.* The vendor further noted that the defendants' search of its Slack messages by their independent contractor in 2019 was "outside of universally accepted standards and best practices for legally defensible data collection" and "not technologically sound." *Id.* at 16. Finally, the vendor described an "anomaly" in the defendants' production — 87 empty folders in the 2019 Slack Archive — which supported an inference that deletion of channel data occurred after export from Slack but prior to the transfer to Red Wolf. *Id.*

In ruling on the motion for sanctions, the Court found that the serious sanction of a default judgement – along with attorneys' fees and costs associated with the motion to compel – was appropriate given the prejudice suffered by Red Wolf, which was long deprived of documents evidencing the merit of its claims, as well as the fact that the defendants' violations of multiple discovery orders constituted extreme misconduct. *Id.* at 24.

In rendering a default judgment against Defendants, the Court was clear that its decision should "encourage litigants to understand that it is risky business to recklessly or deliberately fail to produce documents, and perilous to disobey court orders to review and, if necessary, supplement prior

productions." *Id.* at 25.

Takeaways and Considerations When Dealing with Instant Messaging Applications Like Slack
As with discovery in any case, it is imperative that counsel develop a deep and comprehensive understating of their client's communication systems. This understanding enables counsel to ensure that all systems are addressed in the context of both applying legal holds when and where appropriate and successfully collecting, analyzing, and reviewing data outputs from those systems when called for in discovery.

With regard to instant messaging systems such as Slack (as well as other similar messaging applications such as Microsoft Teams), it is important to keep in mind that these applications store communications and associated data very differently than traditional email or document storage systems and may offer more limited preservation and search capabilities. And, while it can be inferred from the facts of *Red Wolf* that a certain element of deliberate bad faith affected the defendants' conduct and likely compounded the Court's frustration, it is equally likely that a lack of familiarity with these differences also contributed to the defendants' clear production shortcomings.

For this reason, counsel must have a good understanding of how these applications work and what limitations exist as to preservation and collection. In that spirit, some of the central questions and considerations that a practitioner confronting the discovery of Slack or other messaging application data should bear in mind include:

- What does your client's document retention and permissible use policies say with respect to the preservation and use of the instant messaging applications?
- What is the size and reach of the instant messaging application (i.e., is it used by relevant employees, teams, departments, etc.)?
- Are in-house lawyers members of any particular chat channels or communications that may require consideration of privilege?
- What is the subscription package that your client has for its instant messaging application?
- What are the preservation options for the data contained in the instant messaging application based on the client subscription? Different pricing packages come with different features with e-discovery preservation and search functionality often reserved for higher priced packages.
- Have you identified and collected all of the relevant components of the messaging, both person-to-person and in group channels, including any attachments and non-messaging content?
- What will be your approach to processing the data for further analysis and review, especially the application of search terms?
- Will an e-discovery expert or professional be required to assist with defensible collection using an industry-acceptable application and to help you understand options and risks?
- Have you captured everything that is relevant and how can you document that confirmation?
- To the extent any Slack data appears to be missing and/or is going to be withheld from production, do you have a valid basis for that lack of messaging or its withholding from production?

While there is no way to guarantee that zero spoliation allegations will arise from complex discovery from modern sources, practitioners should do what they can to safeguard against such issues by taking the time and care to truly understand sources of relevant data. This should include taking adequate preservation steps as soon as practicable, ensuring that data is properly staged for searching, and that relevant results are identified in full and produced. The foregoing considerations and a full understanding of each will help ensure your reasonable basis at each of these phases and avoid an outcome like the one in *Red Wolf*.

John B. Koss is the Managing Director of Mintz's E-Data Consulting Group. John's practice focuses on counseling clients on information governance, e-discovery readiness, and the utilization of technology to manage large data matters. He speaks and writes frequently on these issues and teaches e-discovery law at Suffolk University Law School.

The Profession

Utilizing and Normalizing Personal Pronouns in Legal Filings, Proceedings, and Communications

By Joseph Stanton (he/him) and Yoshiko Taylor (they/them)

The Justices of the Supreme Judicial Court ("SJC") recently recognized the value of including personal pronouns in legal filings by amending SJC Rule 1:08, *Case and Filer Information on Papers Filed in All Courts*. Effective October 1, 2022, Rule 1:08(1)(H) gives attorneys and self-represented litigants the option to list their personal pronouns along with other information required by Rule 1:08(1), including their name, Board of Bar Overseers number, mailing address, the name of their law firm (if any), telephone number, and business email address, in any document filed in any court in the Commonwealth. Specifically, Rule 1:08(1)(H) states that "if the self-represented litigant or attorney elects, the self-represented litigant's or attorney's personal pronouns" may be included in a court filing's signature block.

The amendment serves multiple purposes. Primarily, the provision allows people of any gender identity, whether cisgender, transgender, non-binary, gender fluid, or otherwise, to include their personal pronouns on a court filing. This is important because it can help prevent inadvertent mistakes of persons being misgendered during a legal proceeding. As the SJC Standing Committee on Lawyer Well-Being's *Report Summarizing Affinity Bar Town Hall Meetings* (2021) noted, misgendering of attorneys and court participants such as witnesses and parties occurs. Misgendering someone because of assumptions about their name, appearance, or past societal standards can be hurtful, insulting, distracting, and embarrassing for both parties. **[1]** Of course, providing opportunities for people to share their pronouns does not mean that everyone must share their pronouns or would feel comfortable doing so. **[2]** Indeed, Rule 1:08(1)(H) is optional.

Using personal pronouns **[3]** recognizes the person and provides them confidence that they will not be marginalized unintentionally by assumptions or misunderstandings. [4] As legal employers and the Massachusetts judiciary rightly emphasize diversity, equity and inclusion to make our legal system and courthouses more representative of our communities, efforts for inclusion require conscientious action across a range of topics. Treating litigants, attorneys, witnesses, and court personnel respectfully and courteously is critical to forging an inclusive environment in all aspects of our system – from our courtrooms to law firms and across other venues such as legal seminars.

A simple but meaningful step to promote inclusiveness and respect is to use personal pronouns more often – in court filings and in other modes of communication, such as email signatures, Zoom and LinkedIn profiles, during introductions at legal education seminars, and online professional profiles. During court proceedings, attorneys and judges can state their personal pronouns during introductions. **[5]** Courts can list judges' pronouns online or in courtroom signage. Judges and attorneys can use a person's name or gender-neutral words like "counsel" and "jurors," and eliminate the use of gender-specific terms and phrases like "ladies and gentlemen of the jury," "sir," and "ma'am." Trial court orders and appellate court decisions can use such techniques to refer to parties and witnesses.

Increased usage and visibility of personal pronouns will increase recognition and understanding and reduce any awkwardness, stigma, or uncertainty about personal pronouns. Indeed, using

someone's personal pronouns signals one's commitment to affirming and respecting everyone's individuality. "Being an effective ally means listening to the issues faced by marginalized groups, understanding how this may impact their well-being and professional advancement, and taking a proactive role in ensuring marginalized groups are supported throughout their careers, both personally and professionally."**[6]** Instead of being an exception, personal pronoun inclusion can become the norm.

Although SJC Rule 1:08 may not be well known because filers do not often consult it, Rule 1:08 is the basis for requirements in the Massachusetts rules of civil, criminal, and appellate procedure that govern the contents of every court filing.**[7]** These bodies of rules can be amended to incorporate the Rule 1:08(H) provision and thereby directly inform readers of the option for all filers to include their personal pronouns. Doing so would allow judges, opposing counsel, and court personnel to view a person's pronouns in advance of a hearing or communication, limiting the chances of misgendering them during the proceeding. Providing people the opportunity to self-identify their personal pronouns in court filings helps our courts be more inclusive by helping to minimize misgendering, transphobia, trans-exclusion, and negative LGBTQIA+ experiences in our courts and law offices.

Without more widespread use of personal pronouns, mistakes will likely occur. People frequently make assumptions about a person's gender based on their name or appearance and then apply those assumptions to the pronouns or form of address ("my brother" or "my sister") used to refer to that person. Some assumptions are incorrect and convey a potentially disrespectful message that people need to appear or have certain names to demonstrate their gender.**[8]** Judges**[9]** and clerks of court**[10]** are ethically bound to treat litigants respectfully, as are lawyers. **[11], [12]** Incorporating personal pronouns into our legal filings, court proceedings, and law-related activities facilitates and enables such respectful behavior.

Additional steps can include modifying the judiciary's case management systems (MassCourts and Forecourt) and court-issued forms to include fields for personal pronouns and for preferred honorifics such as "Mx" (pronounced Mix). Likewise, the Board of Bar Overseers' attorney records system, which the courts utilize to populate attorney profiles in their case management systems, can include an optional field for personal pronouns. Witness lists can include pronouns to inform other case participants and court personnel. Further, including an optional data field for pronunciation of names can be helpful and provide a more respectful environment.

Notwithstanding good intentions, inadvertent misgendering sometimes occurs. When it does, one of the most helpful things allies can do to normalize pronoun usage is to address mislabeling when they see it. Allies can do this in a variety of ways, with each having its own benefits and drawbacks. Two common ways to address mislabeling are "Calling Out" and "Calling In." "Calling Out" refers to speaking up in the moment when someone is misgendered by remarking something as simple as, "a quick reminder that [insert name] uses [insert pronouns]." This type of response shows others around you that you are actively being mindful, supportive, and inclusive of other people's identities. It gives the individual immediate feedback that they have misspoken and can help them be mindful for the future.

"Calling In" is used in situations when Calling Out may be too uncomfortable or perhaps inappropriate. This approach occurs one-on-one between the ally and the individual to have a conversation about the individual's misstep and ways to correct future communications. This

gentler approach can help reduce the embarrassment or even anger that a speaker may experience compared to the immediate reaction that can occur when Calling Out.

Conclusion

The Justices of the Massachusetts Supreme Judicial Court have created an opportunity for the Massachusetts judicial system and bar to practice inclusiveness and respect with just a few words. Whether you identify as he/him, she/her, they/them, or by other pronouns, please consider following the Justices' lead and incorporating SJC Rule 1:08(1)(H) into your filings as well as your daily communications.

Joseph Stanton (he/him) is Clerk of the Massachusetts Appeals Court. He is the proud parent of an amazing transgender child.

Yoshiko Taylor (they/them) is a member of the Appeals Court Clerk's Office and the Court's DEI committee.

[1] Human Rights Campaign, *Talking About Pronouns in the Workplace*, https://www.thehrcfoundation.org/professional-resources/talking-about-pronouns-in-the-workplace

[2] https://www.glsen.org/activity/pronouns-guide-glsen

[3] This article uses "personal pronouns" because the pronouns refer to a unique and individual person. https://pronouns.org/what-and-why. "Gender pronouns" is not used because the term does not necessarily reflect or indicate a person's gender, and "preferred pronouns" is not used because pronouns are part of a person's identity, not a preference. GLSEN, *Pronoun Guide*, https://www.glsen.org/activity/pronouns-guide-glsen. See also Human Rights Campaign, *Talking About Pronouns in the Workplace*, https://www.thehrcfoundation.org/professional-resources/talking-about-pronouns-in-the-workplace

[4] Compare SJC Standing Committee on Lawyer Well-Being: *Report Summarizing Affinity Bar Town Hall Meetings* (2021).

[5] The American Bar Association House of Delegates recently passed Resolution 401, which supports the adoption of a best practices bench card that guides judges in using LGBTQIA+ inclusive language and personal pronouns in the courtroom. The New York court system developed the original bench card, available at https://www.nycourts.gov/LegacyPDFS/IP/LGBTQ/LGBTQ%20Bench%20Card.pdf

[6] https://masslgbtqbar.org/articles/sjc-standing-committee-lawyer-wellbeing-report

[7] *See* Mass. R. Civ. P. 5(g) (information required "[o]n any pleading or other paper required or permitted by these rules to be filed with the court"); Mass. R. Civ. P. 11(a)(1) (signing of pleading); Mass. R. Civ. P. 11(b) (notice of appearance); Mass. R. Crim. P. 7(c)(1) (filing of appearance of counsel); Mass. R. Crim. P. 32(b) ("Service upon the attorney or upon a party shall be made in the manner provided for in civil actions"); Mass. R. Crim. P. 32(d) ("Papers shall be filed in the manner provided for in civil actions"); Mass. R. A. P. 13(d)(2)(C) & 13(e)(2)(E) (certificates of service); Mass. R. A. P. 16(12)(A) (brief's signature block); and Mass. R. A. P. 20(a)(6)(B)(v) & 20(b)(2)(B)(i) (content of briefs' covers and motions' signature blocks).

[8] https://pronouns.org/what-and-why.

[9] SJC Rule 3:09, Mass. Code of Judicial Conduct, Canon 2, Rule 2.3 *Bias, Prejudice, and Harassment*,
(B) and comments [2]-[4]. See also SJC Rule 3:09, Mass. Judicial Code of Conduct, Canon 3, Rule

3.1, Extrajudicial activities in general, Comment [3].
[10] SJC Rule 3:12, Mass. Code of Professional Responsibility for Clerks of Courts, Canon 8, Non-Discrimination.
[11] See SJC Rule 3:07, Mass. R. Prof. Conduct, Preamble (effective Oct. 1, 2022) ("[5] … A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.").
[12] See SJC Rule 3:07, Mass. R. Prof. Conduct, Rule 4.4, Respect for Rights of Third Persons, (a)(3) & Comment 1B.

Case Focus

Commonwealth v. Rossetti: Searching for Clarity and Justice in Massachusetts' Sentencing Statutes

By Jared B. Cohen

As mandatory minimums and strict sentencing laws have increasingly come under public scrutiny—and compelling criticism—Massachusetts court decisions in this area have highlighted challenging constraints posed by statutes that are difficult to interpret logically and consistently. The cases also have generated important debates about the role of the courts vis-à-vis the Legislature, when laws are ambiguous or inconsistent in application, especially in matters of substantial social and moral concern. These dynamics were on full display in the SJC's recent decision in *Commonwealth v. Rossetti*, 489 Mass. 589 (2022).

Rossetti concerned G.L. c. 6, § 178H (a)(2), which provides, in relevant part, that a "second and subsequent conviction [for failure to register as a sex offender] shall be punished by imprisonment in the [S]tate prison for not less than five years." *Id*. After the defendant in *Rossetti* had pled guilty, the judge imposed a one-to-two-year sentence in state prison, which was stayed pending questions reported to the Appeals Court to determine whether such a sentence was lawful under the statute. *Rossetti*, 489 Mass. at 590-91. The SJC granted direct appellate review and found the sentence unlawful. *Id.* at 591, 605. Specifically, it held that "the five-year minimum term in § 178H (a)(2) . . . requires a judge who chooses to sentence a defendant to incarceration in State prison to impose an indeterminate sentence, the minimum term of which may not be less than five years." *Id.* at 605. The Court also, however, interpreted § 178H (a)(2) to permit a sentence of probation in lieu of incarceration. *Id.* at 599-604.

Significantly, the case provided a forum for the Justices to present competing visions of statutory interpretation and the Court's sentencing jurisprudence, as set forth in the majority, concurring, and dissenting opinions.

Majority Opinion

Justice Cypher's majority opinion explained that answering the reported questions required clarification of the Court's sentencing jurisprudence, and in particular, how to decipher whether a statute imposes a true "mandatory" minimum sentence, or merely a minimum term of imprisonment *if imprisonment is imposed at all* (rather than a probationary sentence without any prison confinement). *Id.* at 591. The opinion emphasized that to designate a true mandatory minimum, the Legislature must use "unambiguous" language such as the word "mandatory," or other equivalently clear terms or combinations of terms, or language expressly prohibiting suspended sentences, probation, parole, furlough, or reduction of a sentence for good conduct. *Id.* at 591 n.3, 597-603. By contrast, when a statute merely sets a minimum term of imprisonment, without such explicit textual indication of a "mandatory" sentence, it presumptively leaves judges discretion to impose a sentence of probation without imprisonment. *Id.* at 594-99. Observing that the Legislature has used inconsistent statutory language related to minimum and/or mandatory sentencing, the Court explained that the rule of lenity requires that any ambiguity in sentencing language must be resolved in favor of criminal defendants. *Id.* at 599-600, 603 (recognizing that some language which intuitively seems mandatory—such as "shall be [imprisoned] for not less than" X years—may be "insufficient to unambiguously convey the Legislature's intent to create a mandatory minimum sentence.").

Applying these guidelines and presumptions to the statute at issue in *Rossetti*, the Court concluded that the five-year minimum provision at issue required that any prison sentence imposed must be at least five years in length (precluding the trial court's proposed one-to-two-year state prison sentence), but did not prohibit probation in lieu of prison, or later reduction of time served for good behavior. *Id.* at 603-05. The Court reasoned that the Legislature's failure to specifically prohibit probation created an ambiguity, thus permitting the application of the rule of lenity and allowing for a sentence of probation. *Id*. at 603.

In reaching its conclusion that the statutory language forbids a state prison sentence of less than five years, *if prison is imposed at all*, the Court expressly overruled its precedent in *Commonwealth v. Hines*, 449 Mass. 183, (2007), which had held (or at least strongly implied) that in a statute featuring similar language ("shall ... be punished by imprisonment in the state prison for not less than five years"), the absence of the word "mandatory" left the judge discretion to impose a state prison sentence with a minimum term of less than five years.

Concurring Opinion

Chief Justice Budd's concurrence agreed with the majority "that the statutory language plainly requires that any State prison sentence imposed pursuant to this section must have a minimum term of incarceration of five years or greater" and that "to reach this commonsense conclusion, [*Hines*] must be overruled to the extent that it ignores the plain meaning of similar sentencing language in G. L. c. 265, § 18B." *Rossetti*, 489 Mass. at 616 (Budd, C.J., concurring). However, the Chief Justice criticized the majority's venturing beyond the reported questions "to conclude that § 178H(a)(2) allows a judge to impose a sentence of probation in lieu of a sentence of incarceration." *Id*. She emphasized that the majority decision disregarded the plain language of the statute that a convicted offender "shall be punished by imprisonment." *Id.* at 617, 620 ("[T]he court creates an interpretive presumption concerning the availability of probationary sentences that departs from the plain meaning of statutory language and is not grounded in legislative intent[,] . . . raising a serious question concerning the separation of powers."). Although Chief Justice Budd shared concerns "that mandatory minimum sentences risk unduly harsh penalties for any individual and contribute to the unjustly disproportionate rate of incarceration for Black and brown folks," she concluded that that did not justify the use of interpretive shortcuts around clear (if harsh) sentencing language, because the Court is "bound to interpret statutes to faithfully effectuate legislative intent, even where we consider the Legislature's policy choice unwise or unjust." *Id.* at 621 (citations omitted).

Dissenting Opinion

Justice Wendlandt issued a sharp dissent focused squarely on the consequences of the decision: "At a time when we are beginning to understand that statutes imposing mandatory minimum sentences are resulting in the disproportionate incarceration of Black and brown defendants in our Commonwealth, we ought not to further strip judges of discretion in sentencing. There can be no doubt that the court's decision to overrule [*Commonwealth v. Hines*, 449 Mass. 183 (2007)] does just that." *Rossetti*, 489 Mass. at 621 (Wendlandt, J., dissenting).

Leaving aside the substantive merits of the Court's rationale in *Hines*, Justice Wendlandt observed that the decision represented longstanding precedent that had provided judges with just and vital alternative choices to imposing mandatory minimum prison sentences. Citing stare decisis, the Legislature's failure to act to correct any "perceived misconstruction of its intent," and the Court's stated commitment to racial justice, Justice Wendlandt argued for adhering to

Hines and preserving its sentencing discretion for judges. *Id.* at 622-29. Here, a holding consistent with *Hines* would have allowed Mr. Rossetti to be sentenced to one to two years in state prison, which the sentencing judge apparently considered to be the fairest and most just disposition. Instead, Justice Wendlandt pointed out, the majority's decision required a sentence of either five or more years in prison, or probation without incarceration, but nothing in between. *Id.* at 628-29 ("The panoply of choices previously available under our sentencing jurisprudence is now much more constrained.").

Concluding Observations

Although the three opinions in *Rossetti* offer differing perspectives on the Court's sentencing jurisprudence and application of statutory construction principles, they all shared concerns about the inequity of mandatory minimum sentences. *Id.* at 621-22, 627-29, n.15, n.25. The three opinions may be read as different responses to two related challenges that the Court has wrestled with in recent years: (1) that minimum and/or mandatory sentence laws can be unduly harsh and contribute unjustly to racial disparities in incarceration; and (2) the incongruous ways in which the Legislature has written such laws. As the Court has pointed out with some frequency, only the Legislature has the ability to address these flaws and ambiguities directly. *See, e.g., id*., 489 Mass. at 597-600 n. 11 and 17 (noting that "if the Legislature disagrees with [the Court's] interpretation, it is free to amend or enact new statutes clarifying" its intent in sentence provisions); *id.*, 489 Mass. at 622-23, 627-29 (Wendlandt, J., dissenting) (observing that legislative "inaction" has left it up to the Court to try to reconcile discordant statutory sentencing provisions); *Commonwealth v. Montarvo*, 486 Mass. 535, 542-43 (2020) (remarking that the Legislature has declined the Court's invitations to amend and clarify statutes which created seemingly "anomalous" results by "offering a sentencing judge . . . a Hobson's choice between probation and a mandatory term of twenty years in prison") (citing *Commonwealth v. Zapata*, 455 Mass. 530, 535-36 (2009)). But the Legislature has not done so, and without legislative action to amend, clarify, and potentially make uniform sentencing statutes, the Court will likely continue to struggle with these issues. And the resulting jurisprudence, emerging through a process of jousting between the differing perspectives illustrated in *Rossetti*, may continue to prove challenging for lower courts and litigants to understand and apply.

*Jared B. Cohen is a Massachusetts Assistant Attorney General. His previous article on this topic—"*Careful Scrutiny: The SJC and Mandatory Sentencing Laws*," 65.3 Boston Bar Journal (Summer 2021)—was cited by the Court's majority opinion in Rossetti. This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.*

Point/Counterpoint

Why the Government Gets the Last Word

By Hon. Richard E. Welch III (ret.)

Appeals Court Justice Peter J. Rubin wrote both the decision and a concurrence in the case of *Commonwealth v. Nova*, 101 Mass. App. Ct. 1 (2022). In his concurrence, Justice Rubin suggested revisiting Mass. R. Crim. P. 24, which requires the defendant to argue first and the prosecutor to argue last. Justice Rubin recommended allowing the defendant "to respond to the government's closing" either by adopting the federal approach allowing the prosecutor to argue first, the defense second, with an opportunity for the prosecutor to rebut the defense closing, *see* Fed. R. Crim. P. 29.1 or, alternatively, "retaining our current rule and simply allowing rebuttal."

The *Massachusetts Lawyers Weekly* editorial board was quick to praise Justice Rubin's concurrence and likewise expressed hope that Mass. R. Crim. P. 24 be revisited. At best, Justice Rubin's concurrence and the small groundswell it produced are the proverbial tempest in a teapot. At worse, they represent an ill-considered invitation to change to a balanced, well-tested, and just legal system.

Massachusetts is hardly alone in its order of closing arguments. For example, Pennsylvania, New Hampshire, Texas, and New Jersey mandate that the defense closes first, followed by the prosecutor. This is a system that has worked for over two hundred years. *See* John B. Mitchell, *Why Should the Prosecutor Get the Last Word?,* 27 Am.J.Crim.L. 139, 141, n.5 (2000) (order of closing arguments dates from before 1823).

The prosecution gets the "last word" for two very commonsense reasons. First, the prosecution bears the burden of proof beyond a reasonable doubt, the heaviest and most difficult burden recognized in the law. *See Commonwealth v. Russell*, 470 Mass. 464, 477 (2015) (the burden is "the highest degree of certainty possible in matters relating to human affairs"). The defendant has nothing to prove at a trial and the burden of proof never shifts. Thus, only the prosecution has to persuade the jury that the evidence meets the high burden. Second, the prosecution properly has the right to rebut any improper defense argument by going last, as it has no right to appeal any possible error—unlike the defendant, who has a plenary right to appeal and to file unlimited motions for new trial. To argue that the defense may be surprised by the prosecutor's argument fails to recognize the realities of a criminal trial. By the time all the testimony and exhibits are in evidence, competent defense counsel should be able to anticipate what aspects and elements the prosecutor will emphasize in a closing. Any errors in the prosecution's closing are addressed by the judge (often the most credible and authoritative voice to a jury) after argument.

Although Justice Rubin argues that defense counsel should have the ability to respond to improper prosecutorial argument, the defense in *Nova* did not even object to most of the prosecutor's errors. The advantage of our current system is that the defendant can always raise even unpreserved errors on appeal, whereas improper arguments by a defendant would never be subject to review. While Justice Rubin's judicial service has seen many cases where the government's closing has generated an appealable issue, *Nova*, 101 Mass. App. Ct. at 12 (Rubin, J. concurring) those cases, indeed, demonstrate that the defendant's rights are being protected by that very review. To permit the defendant's final word to go unrebutted would create a system in which an inappropriate closing statement by a defendant would be, *de facto*, unreviewable.

Any zealous advocate finds it frustrating not to get the last word in an argument. But, after all, someone must argue last and, with the possible exception of Vermont, every state and federal court in the nation gives the "last word" to the prosecution.

While at least ten states follow the federal practice of allowing the defense to argue second, including California, North Carolina, Florida, Virginia, Minnesota, Georgia, and Colorado, they also provide that the prosecution gets the last word with a rebuttal. So, this may be a distinction without a difference. In either system, the prosecution gets the "last word."

Although defense counsel occasionally assert that they should get the last word, such a tactical advantage is based on the view that every advantage should be given to the defendant "even at the expense of the truth." Mitchell, *supra,* at 141. This argument is premised on the belief that a criminal trial is not a "truth system" but "screening system which protects the defendant against overreaching governmental power." *Id*. at 142-43. But one hopes that this is entirely a false premise. Of course, any defendant is entitled to valuable constitutional protections such as the Fourth and Fifth Amendments, which force the government to independently and fairly gather and present evidence. And the government always should shoulder the heavy burden of proof which encompasses "the highest degree of certainty." *Russell,* 470 Mass. at 477.

Nevertheless, a criminal trial remains a search for the truth. *See id.*, at 479, n. 10. That, after all, is the reason for discovery and cross-examination. The term "verdict", loosely translated from Latin, means to speak the truth. Because the prosecution shoulders the heavy burden of proof beyond a reasonable doubt, the present order of closing argument is fair and just. While we should be open to improvements to the Massachusetts criminal justice system, permitting defendants to have the last word is not one of them.

The Honorable Richard E. Welch, III is a retired Associate Justice of the Superior Court of Massachusetts. He is also an Adjunct Professor at New England Law | Boston and serves as a Senior Advisor to the District Attorney of Essex County Paul F. Tucker. The opinion and the views expressed in this piece are solely those of the author.

Point/Counterpoint

Defendants Must Be Able to Actually Defend

By Madison Bader

In his concurrence in *Commonwealth v. Nova*, 101 Mass. App. Ct. 1 (2022), Appeals Court Justice Peter J. Rubin suggests revisiting Mass. R. Crim. P. 24. While current Massachusetts practice is for the defendant to argue first and for the government to have the last word, the time has indeed come to revisit this long-standing practice. Allowing criminal defendants the last word, even if it is as short as a simple rebuttal, will help criminal defendants achieve the justice they deserve.

In his concurrence, Justice Rubin recognized what criminal defense counsel have long argued—the unfairness of defense counsel's inability to respond to unanticipated (and, many times, improper) arguments by the government. *Id*. at 13. Given that a defendant's liberty is at stake, justice demands that a defendant be given the opportunity to, at the very least, respond to the government's closing argument.

Some may argue giving defense counsel the last word could give them a "tactical advantage." In reality, however, it merely attempts to even a playing field that largely favors the prosecution, which already holds substantial discretion at every phase of a criminal trial from the powers to accuse, to request bail and detain, to offer pleas, and more. Allowing defense counsel the opportunity to, at least, rebut the government's closing argument will in no way diminish the government's far-ranging authority. Further, claiming that giving defendants the last word would come "at the expense of truth" is precisely backward; *not* allowing a defendant to respond to the government's argument undermines the effort to give the defendant every opportunity to present their case.

Having the last word at trial is clearly of the utmost importance. Closing argument is a "vital part of the adversarial process that forms the basis of our justice system," and "can be a critical part of winning a case." *State v. Jones*, 355 N.C. 117, 135 (2002). It is the "last clear chance" for the defense to persuade the trier of fact of the defendant's innocence or lesser culpability. *Herring v. New York*, 422 U.S. 853, 862 (1975). Denying defense counsel the opportunity to at least rebut the government's closing statement prevents defense counsel from responding to assertions made against their client at this critical moment. Further, while it has been suggested that any errors in the prosecutor's closing statement can be addressed by the judge (either after argument or in their charge), such instructions are oftentimes inadequate. Most of the time, the proverbial cat is out of the bag and the jury is left with the last words of the prosecutor, with no response from defense counsel. A defendant's "plenary right of appeal" and ability "to file unlimited motions" are in no way comparable to having the ability to correct prosecutorial errors and misstatements at the time they occur, and before the case is submitted to the jury.

A further argument advanced by those supporting the current order is that because the system has worked well for 200 years, it should not be tampered with. But this is an argument against progress in the criminal justice system, and could be said about many of our procedural protections. Had that rationale prevailed, we would have no *Miranda* warnings, no right to counsel for all criminal defendants, no evolution of search and seizure law, no establishment of the federal defender service and, most recently, no recognition of the role of implicit bias. In short, simply because this is the way that things have always been done, does not mean it cannot be changed—especially where the change seeks to protect the rights of criminal defendants, who are literally fighting for their

lives.

Under the Sixth Amendment, defendants have a right to present a defense. They are also entitled to give a closing argument. *Herring*, 422 U.S. at 858. The trial judge cannot deny the defendant this right, no matter how strong the prosecution's case may be. *Id*.; *see also State v. Eury*, 317 N.C. 511 (1986) (the right to make a closing argument is a substantial legal right of which the defendant cannot be deprived by the exercise of a trial judge's discretion).

Closing arguments are the last thing a jury hears from counsel, and if the *very* last thing a jury hears is unrebutted, incorrect, or mistaken facts by the prosecution, this will clearly influence the jury's decision. The intentionally high burden is on the government to prove a defendant's guilt beyond a reasonable doubt. Affording a defendant the opportunity to have the final word, at the very least, in rebuttal to the government's case, holds the government to its burden, and is one more way to ensure that a defendant's constitutional rights to a fair trial are protected. Justice Rubin's suggestion of permitting rebuttal furthers this vital goal.

Madison F. Bader is a trial attorney at Todd & Weld LLP in Boston, Massachusetts. Attorney Bader started her career as an Assistant District Attorney prior to moving into private practice doing criminal defense. Attorney Bader represents clients in all aspects of criminal defense and civil litigation matters, in both state and federal courts in Massachusetts and Rhode Island.

Law Student Viewpoint

The Massachusetts Origins of "A Government of Laws and Not of Men": The Separation of Powers Debate, Article 30, and K.J. v. Superintendent of Bridgewater State Hospital

By Liam Edward Cronan

The Supreme Judicial Court's majority and dissenting opinions in *K.J. v. Superintendent of Bridgewater State Hospital*, 488 Mass. 362 (2021) highlight a tension in interpreting Article 30 of the Massachusetts Constitution and underscore the jurisprudential value of separation of powers more broadly. In *K.J.*, the Supreme Judicial Court ("SJC") held that the "commissioner's certification" provision under G.L. c. 123 § 18(a) which allowed the commissioner of the Department of Correction to decide that a prisoner committed to a Department of Mental Health facility by a judge should instead be held at the more secure setting of Bridgewater State Hospital, violated the principle of separation of powers in Article 30. *Id.* at 376. (Gaziano, J. dissenting). The majority so held, notwithstanding the fact that "this arrangement, [was] adopted by the Legislature more than fifty years ago as part of a comprehensive reform of the Commonwealth's mental health system." *Id.* Cases like *K.J.* reveal that Article 30 stands among the most legally and historically significant aspects of the Massachusetts Constitution. As a prime example recognizing the importance of the separation of powers, Justice Antonin Scalia's dissent in *Morrison v. Olson,* 487 U.S. 654 (1988) notes that "it is the proud boast of our democracy that we have 'a government of laws and not of men,'" yet he states "not many know" its origins. *Id.* at 697 (quoting Mass. Const. art. 30). Those familiar with Massachusetts law are not so unaware: this oft-cited quote from Article 30, drafted by John Adams, represents a legal concept with an immense historical foundation that still generates vigorous debate among justices on the SJC.

Article 30

Article 30 states "[i]n the government of the commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Mass. Const. art. 30. As the SJC has emphasized, "Massachusetts is one of only a few [s]tates to articulate an explicit separation of powers," an articulation that is "more explicit than the [f]ederal Constitution" and compels "scrupulous observance." *See Commonwealth v. Cole*, 468 Mass. 294, 301 (2014). Such limitations remain a time-honored feature of Massachusetts law. *See Walton Lunch Co. v. Kearney*, 236 Mass. 310, 315 (1920).

More recently, applications of Article 30 continue to reflect the important relationship between the executive and judicial branches, especially in criminal matters. *See, e.g.*, *Commonwealth v. Rosa*, 491 Mass. 369, 370, 376 (2023) (overruling trial court order that required the prosecution to seek court approval before refiling charges as a violation of Article 30, holding that it "constituted an unwarranted intrusion upon the powers granted exclusively to the executive branch under art. 30"); *Commonwealth v. Rossetti*, 489 Mass. 589, 609 (2022) (holding that the court's interpretation of statute mandating imprisonment in State prison for not more than five years where a sex offender convicted of a second offense for failing to register as a sex offender, nonetheless permitted a term of probation, was not a violation of Article 30); *see also, e.g.*, *Commonwealth v. Newton N.*, 478 Mass. 747, 755-56 (2018). Perhaps most notable among recent decisions is the dispute between the majority and the dissent in *K.J.* concerning the

meaning, application, and standard governing Article 30 challenges. 488 Mass. at 366, 376. This article does not endeavor to question the validity of the majority or dissent; rather, it highlights the important effects, history, and current relevance of Article 30.

K.J. v. Superintendent

Section 18(a), the statute at issue in *K.J.*, permitted the Commissioner of the Department of Correction to determine whether a prisoner committed to a Department of Mental Health ("DMH") facility by a judge should instead be held in a more secure setting to assure the prisoner's "retention in custody." *Id.* at 362-63. After a hearing on a petition to recommit K.J., a pretrial detainee charged with, among other things, armed assault with intent to murder, the trial judge determined that K.J. was mentally ill and posed a likelihood of serious harm if not confined. *Id.* at 363-64. The court also found that K.J. did not require strict custody and issued an order committing him to a DMH facility. *Id.* at 363. Despite this order, the Commissioner used § 18(a)'s certification provision to hold K.J. in custody at Bridgewater. *Id.* K.J. filed a petition to the SJC, seeking release from Bridgewater and enforcement of the trial court's order. A single justice reported the case to the full court. *Id.* at 365.

In evaluating whether §18(a) violated Article 30, the majority examined Article 30 and the tension between the necessity of maintaining "scrupulous observance" to the principle of separation of powers while at the same time exhibiting flexibility in "not requir[ing] three 'watertight compartments' within the government." *Id.* at 363-64, 369. The majority held that, because this "flexibility reaches its breaking point" when the legislative branch enacts a statute that would permit the executive branch to "essentially overrule a court order," § 18(a) violates Article 30. *Id.* at 366-69. The SJC thus declared that aspect of § 18(a) unconstitutional.

Conversely, the dissent reasoned that, because the "constitutionality of a statute should be sustained in absence of evidence clearly to the contrary" and because Article 30 does not require the three branches to be "watertight compartments," it was permissible that § 18(a) "anticipates leaving room for possible further action by the executive branch in a traditional area of executive concern." *Id.* at 376. The dissent further maintained that the majority changed the "critical inquiry" in Article 30 challenges from asking whether the legislative provision "allows one branch to interfere with the functions of another" to a broader inquiry concerning "whether an executive action can in any way be read as conflicting with a judicial order." *Id.* at 377. Adopting a narrower approach, the dissent concluded that, because it is possible to read §18(a) to avoid unconstitutionality, the majority erred. *Id.* at 378.

Rossetti, similarly, reveals the ongoing debate among the justices regarding the meaning and application of Article 30. Although the Chief Justice concurred in the majority's holding that the minimum mandatory statute requiring imprisonment for five years precluded the trial court from ordering a shorter term of imprisonment, the Chief Justice stated that the majority's holding that a term of probation was permissible "may violate Article 30." *Id.* at 621.

The Relevance of Article 30's Long History

John Adams, the principal drafter of the Massachusetts Constitution, derived the language and the purpose behind Article 30 from at least centuries of jurisprudence and political theory. Even a rudimentary understanding of these historical underpinnings reveals the broader purpose of this provision and provides context to modern interpretations of Article 30, including a means of understanding the tension between the majority and dissenting opinions in *K.J.* For Adams, a

government "of laws and not of men" —the stated purpose of the explicit separation of powers in Article 30—was the very definition of a republic. *See* John Adams, Novanglus Letter No. VII, in *The Revolutionary Writings of John Adams* (C. Bradley Thompson ed., 2000). The most cited "origin" of this phrase is Montesquieu's *Spirit of the Laws*. Baron de Montesquieu, *The Spirit of the Laws* 153-54 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748). While Adams's letters before 1780 attest to his having read Montesquieu, the roots of this branch of constitutional law—and Adams' understanding of it—extend far deeper. *See, e.g.*, John Adams, *To John Penn, 27 March 1776*, Founders Online, Nat'l Archives.

The earliest traces of the legal concepts found within Article 30 draws inspiration from works of ancient philosophy and history. Adams relied on, among others, the writings of Aristotle, Cicero, and Livy in formulating a grounded understanding of the republican system of government—a system devoid of "arbitrary government" and instead one governed by laws with "regard [for] the common interest" and by checks and balances among ruling branches. 1 Livy, *History of Rome* 127 (George Baker, trans., Derby & Jackson 1858); Aristotle, *Politics* 114 (Benjamin Jowett trans., Cosimo Books 2008). It is here where Adams' classical education comes through most clearly. *See e.g.*, 1 John Adams, *A Defence of the Constitutions of the Government of the United States*, ii-iii, xix-xxiii (1794) (referencing among others Tacitus and Cicero).

Article 30 likewise follows from the English republican political theorists from the age of the English Civil War and Restoration. In 1656, James Harrington, an English political philosopher and a name Adams invoked when he first expounded his idea behind Article 30, defined a "commonwealth" as "an empire of laws and not of men." James Harrington, *The Oceana and Other Works* 593-96 (1656) (referencing Aristotle); John Adams, *To the Inhabitants of the Colony of Massachusetts-Bay, 27 February 1775*, Founders Online, Nat'l Archives. In 1683, Algernon Sidney, another English political philosopher, similarly maintained that, in a republic, "[j]ustice . . . ought to be deducted" rather than derived "from the depraved will of man." Algernon Sidney, Discourses Concerning Government ch. 3, sec. 11 (1683); John Adams, *To William Hooper, 27 March 1776*, Founders Online, Nat'l Archives.

Lastly, Article 30 reflects a largely overlooked influence from the Dutch Republic, one of Europe's few contemporary republics in the late eighteenth century and one with which Adams was notably familiar. *See* David McCullough, *John Adams* 376-77 (2001). In the 1770s, Adams successfully obtained loans from Amsterdam bankers to fund the American Revolution and later opined that "in freedom and . . . liberty of conscience" the Dutch Republic "resemble[d the United States] more than any other." John Adams, *Memorial to Their High Mightinesses, The States-General of The United Provinces of the Low Countries*, in 7 The Works of John Adams 396, 399, 400 (Charles Francis Adams ed., 1852) (1781). Adams also cited the gradual decline of the Dutch Republic into a hereditary monarchy in the very same sources in which he theorized about a "government of laws and not men" as a warning of which to take heed. *See, e.g.*, John Adams, *Thoughts on Government, April 1776*, Founders Online, Nat'l Archives.

Conclusion

Ultimately, Adams' ideal of "a government of laws and not men" reveals an intellectual history relevant to ongoing discussions over the purpose, meaning, and application of Article 30. Courts and litigants alike have considered Article 30 in the realm of criminal law and in many instances that a party may view as implicating traditional principles of "divided" government. *See generally* James Madison, *The Federalist No. 48*, *51* (1787) (separation of powers as a protection

against one branch encroaching upon another, which is "essential to a free government").

Today the application of Article 30 remains a recurring motif in the Appeals Court and the SJC dockets. In addition to cases involving substantive criminal law noted above, they involve matters such as: (1) interpretations of the Massachusetts Rules of Criminal Procedure, *Commonwealth v. Moore*, 93 Mass.App.Ct. 73, 74-75 (2018) (affirming a judge's discretion on matters of interpreting the Massachusetts Rules of Criminal Procedure under Article 30); (2) emergency orders under the Civil Defense Act, *Desrosiers v. Governor*, 486 Mass. 369, 382 (2020) (concluding that authority granted to the governor to issue emergency orders under the Civil Defense Act does not violate Article 30); (3) the Whistleblower Act and sex offender registry, *Edwards v. Commonwealth*, 488 Mass. 555, 567 (2021) (Whistleblower Act may be invoked by the Chair of Sex Offender Registry Board when Chair dismissed by the governor without violating separation of powers under Article 30); and (4) policy issues, *Moran v. Benson*, 100 Mass.App.Ct. 744, 749 (2022) (Article 30 prohibits a court from imposing its own policy preferences even where a possibly meritorious claim will go unredressed by operation of a statute of repose). In short, the vigorous debate in *K.J.* is just one of the most recent concerning those few powerful words and, by implication, their storied history.

Liam Cronan is a third-year JD/MA in History candidate at Boston University. After graduation, he will clerk for the Vermont Supreme Court and then the U.S. District Court for the District of Massachusetts.

Heads Up

Sports Wagering Arrives in Massachusetts: Early Action Is Brisk With More Work Ahead For Regulators

By Keith Carroll

Sports betting arrived in Massachusetts to great fanfare and over $590 million dollars wagered in the first three months. There are also early signs that Massachusetts regulators and gambling industry businesses have their work cut out for them to oversee and manage the action.

January 31, 2023, the date in-person wagers were first taken in Massachusetts, and March 10, 2023, the date online mobile betting went live in the Commonwealth, were a long time coming for local sports bettors. Indeed, ever since the Supreme Court's May 2018 decision in *Murphy v. National Collegiate Athletic Association* declared the Professional and Amateur Sports Protection Act of 1992 ("PASPA") unconstitutional, and lifted the statute's nationwide ban on sports betting outside of Nevada and a few isolated jurisdictional exceptions, legalized sports betting in Massachusetts was inevitable.

Congress enacted PASPA in an era when the harm associated with sports gambling was viewed as a national menace. The lifetime ban given to Pete Rose by Major League Baseball in 1989 for placing wagers on Cincinnati Reds games while he was their manager was a fresh stain on the integrity of sports competition. And any perceived positive business prospects associated with sports gambling were marginalized in the PASPA legislative debate. At the time, even the professional sports leagues and NCAA were unified in their support for PASPA, recognizing that a nationwide ban on sports betting did much to foster the integrity of professional and college sports competition.

But times, or at least the perceived risks posed by gambling to fair competition, have certainly changed. Technology has played a part in the changing landscape, bringing an increased ability to monitor wager patterns and anomalies and thereby guard against corruption. At the same time, the proliferation of online sports betting applications and broadened smartphone accessibility brought the ability to wager on games from Las Vegas sports book windows to your living room couch. The old barriers to placing a sports bet—having to travel to Las Vegas or seek out a local bookie to place an illegal bet—no longer exist. Once PASPA was declared unconstitutional, states were on the clock to authorize and regulate sports betting in their respective jurisdictions. Growing consumer demand for the ability to place sports bets was widespread, and the sports world pivoted to take advantage of the inevitable revenue opportunities nationwide gaming offered to their businesses.

Unlike many states, Massachusetts did not immediately jump on the sports wagering bandwagon. Elected officials took a cautious approach, while neighboring states Rhode Island, New Hampshire, and Connecticut passed sports gambling legislation (including the allowance of online sports betting) in 2018, 2019, and 2021, respectively. The easy ability of Massachusetts residents to cross a state line to place an online bet on their phones, the promise of a burgeoning gaming industry in Massachusetts with the launch of gambling venues like Encore Boston Harbor, MGM Springfield, and Plainridge Park Casino, and the siren song of increased tax revenue for the Commonwealth all added to the growing momentum to allow sports wagering in Massachusetts.

The vote to approve a compromise bill to legalize sports betting, H.5164, finally came about during the legislative equivalent of overtime on August 1, 2022. Nine days later, Former Governor Charlie Baker, now President of the NCAA, signed into law the Massachusetts Sports Wagering Act ("MSWA"), and Massachusetts joined 32 other states and the District of Columbia in authorizing sports betting.

The MSWA delegated to the Massachusetts Gaming Commission the power and duty to implement, administer, and enforce sports wagering rules in Massachusetts. This is and will continue to be a daunting mandate. Before the first wager was even made, the Commission put in place a regulatory framework that, among many other guidelines and restrictions, limits who can place a bet (you must be at least 21 years old), prohibits bets involving in-state college teams unless they are playing in a tournament, and set licensing, technology and advertising standards for the licensees. For example, there are three categories of sports wagering licenses available from the Commission: Category 1 for licensed casinos, Category 2 for racetracks and/or simulcast centers, and Category 3 for online operators. To date, just three Category 1 licenses have been issued to Encore Boston Harbor, MGM Springfield, and Plainridge Park Casino, all of which are now accepting in-person wagers at their casinos. The Commission has also issued two types of Category 3 licenses—"tethered" licenses for online betting associated with one of the casinos, and "untethered" licenses for purely online betting applications. The current tethered licenses are MGM's BetMGM, Encore's Caesars Sportsbook and WynnBet, and Plainridge Park's Fanatics and Penn Sports Interactive/Barstool Sportsbook. The current untethered licensees are BallyBet, Betr, Betway, DraftKings, and FanDuel Sportsbook. Bally Bet, Betr, Betway, and Fanatics are approved but not yet in operation.

Two-plus months into the new normal of sports betting in the Commonwealth has demonstrated that both the Commission and its business licensees are taking their responsibilities to manage the high volume of sports betting seriously. For instance, there were early foot-faults, with four self-reported instances of non-compliance with the betting ban on college sports involving in-state college teams. The Commission has also held or announced several public adjudicatory hearings involving licensees Encore, MGM, Plainridge Park, and Penn Sports/Barstool and announced investigations into a mobile launch promotion offered by Barstool Sportsbook and advertising practices by FanDuel.**[1]** At the same time, the Commission highlighted its vigilance in attempting to prevent problem gambling and addiction by announcing the MSWA-created Voluntary Self-Exclusion ("VSE") program for sports wagering. The VSE program allows anyone—but targets people with gambling addiction problems—to add their name to a non-public "self-excluded persons" list that will be shared with the licensees who are required to ban those listed from placing sports bets. The Commission also recently recognized March 2023 as Problem Gambling Awareness Month and reported that it is "broadening [its] research focus and associated policy, strategy, and practice supports" for sports betting. *See* Commission Press Release, "Massachusetts Gaming Commission Recognizes March 2023 as Problem Gambling Awareness Month" (March 2, 2023).

But there is more work ahead. Attorney General Andrea Campbell is pressing the Commission to raise the bar on what is acceptable promotional advertising. Lawmakers on Beacon Hill have similarly expressed concerns about the advertising practices of licensees in their efforts to attract Massachusetts sports bettors. With any new commercial endeavor, the regulatory framework tends to lag behind the businesses operating in the market, particularly with regard to what is deemed an acceptable business practice. That holds true with the sports-driven non-fungible

token ("NFT") market and crypto assets, a popular venture among sports celebrities. Both of these investment products became very popular over the past several years, and they have since been subjected to increased scrutiny by federal regulators over what is perceived to be excessive promotional activities and sales practices. You can expect the same regulatory pattern to repeat itself with sports wagering in Massachusetts. The high volume of sports betting in the first two months signals that Massachusetts will be a fertile market for the gaming industry, which means the Commission and the industry operators will have plenty of opportunities to further define and refine how sports betting will operate in Massachusetts. Game on.

Keith Carroll is a trial lawyer and co-chair of Holland & Knight LLP's Sports Law Practice. He advises clients concerning business disputes, investigations, and other sensitive and high-profile matters.

[1] As of the publication date, no disciplinary decisions or sanctions have been issued.

Case Focus

Commonwealth v. Ronchi: Oral Disclosures of Infidelity Can No Longer Mitigate First-Degree Murder

By Margo Lindauer

The unanimous *Ronchi* decision issued by the Massachusetts Supreme Judicial Court on Valentine's Day of this year rejected the notion, most recently articulated in the *Commonwealth v. Schnopps*, 383 Mass. 178 (1981), that women could be responsible for their own murders. In *Ronchi*, the SJC asserted in no uncertain terms that a person can no longer avoid a murder conviction by saying he killed his spouse because she told him she had been unfaithful during their relationship. *Commonwealth v. Ronchi*, 491 Mass. 284, 295 (2023). The holding overturned previous case law which allowed for a defense wherein an oral assertion of infidelity constituted sufficient provocation to kill. *Id.*

In May of 2009, Peter Ronchi murdered his then 9-month pregnant girlfriend, Yuliya Galperina and their unborn fetus (a male), after she shared that she had been unfaithful in the relationship and that the child she was carrying was not biologically connected to Ronchi. *Ronchi*, 491 Mass. at 285. The facts in the case are undisputed—Mr. Ronchi stabbed Ms. Galperina multiple times in their shared apartment in Salem, Massachusetts. *Id.* The couple had allegedly been arguing for months about parenting and child-rearing prior to the murder. *Id.* at 288-289. Posthumously, it was confirmed that Mr. Ronchi was in fact the biological father of the fetus. *Id.* at 286.

The issue before the court was whether the intentionality behind the killings was mitigated by Mr. Ronchi's rage after hearing about Ms. Galperina's alleged infidelity. The previous case law derived from old English law of property and crimes of passion. *Ronchi*, 491 Mass. at 292-293 (*citing State v. Shane*, 63 Ohio St. 3rd 630, 627, 590 N.E. 2d 272 (1992)). February's SJC decision asserted the court's rejection of the patriarchal and misogynistic undertones of ownership of women in cisgender heterosexual intimate relationships. *Id.* at 295. No longer can heat of the moment passion due to rage and jealousy upon hearing of infidelity be grounds for fatal harm. "Going forward, we no longer will recognize that an oral discovery of infidelity satisfies the objective element of something that would provoke a reasonable person to kill his or her spouse." *Id.*

The SJC also rejected Mr. Ronchi's argument on appeal that he should not have been charged with first degree murder of the unborn fetus because the fetus itself was not stabbed. *Ronchi*, 491 Mass. at 296. The SJC reasoned that decision left intact two separate first degree murder charges against Peter Ronchi instead of one, asserting that because the unborn fetus was viable at the time of death, a singular first-degree murder conviction did not encompass the totality of the crime committed. *Id.* at 296, 298. Where the fetus was viable, the basis for personhood in this context supported the second conviction.

Reaction

The unanimous opinion drew understandable relief from domestic violence advocates across the state. The very notion that jealousy stemming from oral revelations could suffice as a valid defense for murder contradicts our societal goal of freedom from violence and parity in romantic relationships, including partnership in all forms. Massachusetts law as it stood prior to the *Ronchi* judgment imbued an antiquated understanding of ownership in intimate relationships.

Implications for Massachusetts

While the Court rejected the notion that oral disclosures of infidelity present reasonable grounds to produce an ire so intense that killing an intimate partner would be justified, underlying questions remain about the concept of violence itself and when, or if, violence is ever justified when there is no immediate threat or question of justified self-defense or physical self-preservation.

For Massachusetts specifically, the *Ronchi* decision codifies an important change. Under no circumstances does jealousy or rage learned from an oral utterance permit a partner to kill a partner. Questions remain. Who constitutes a partner? Is dating or having a child in common the sole requirement? Will the same pre-*Ronchi* arguments prevail? Does this ruling only apply in cases where a person is killed? What about generalized acts of violence and harm, particularly when the theory of assault or battery requires proof of specific intent? Will future rulings reject the notion of jealousy from oral revelations of infidelity as a mitigating factor? Equally, if not more important, the Court affirmatively only spoke to oral revelations of infidelity as lacking a sufficient basis for homicide. The Court did not take its ruling a step farther, as urged by Justice Elspeth B. Cypher in her concurrence, to reject the very notion of infidelity generally (however learned or observed) as sufficient provocation to kill.

Justice Cypher cited to a 2022 study of maternal mortality which revealed that women are more likely to be killed during pregnancy or early post-partum than to die from the three major causes of maternal deaths—high blood pressure disorders, sepsis, or hemorrhage. The instant case further reflects the efficacy of "lethality assessments." Yuliya Galperina and her relationship to Ronchi embodied at least two known lethality factors that made her death more likely—pregnancy and having a child not biologically related to Ronchi. Justice Cypher's elevation of the important reality that women face a higher risk of violence when pregnant is worthy of further attention.

Margo Lindauer is the former Head of Clinical Programs and Domestic Violence Institute at Northeastern University School of Law. She is currently on leave from her position to start her own consulting practice and podcast. JustUsPodcast.com investigates social justice issues impacting women at a Big Age.

Legal Analysis

Recent Developments in the "Related Subjects" Requirement for Ballot Questions

By Meredith G. Fierro

When Massachusetts voters went to the polls this past November, their ballots included initiative petitions regarding alcohol licensing and dental insurance. But before those petitions made it to the ballot, each had to survive a legal challenge at the Supreme Judicial Court. The focus of those respective legal challenges was the Attorney General's threshold conclusion that each petition contained only "related subjects" under Article 48 of the Massachusetts Constitution. Yet while these two petitions were found to be properly certified as containing only "related subjects," the Court struck down two other petitions (regarding ride-share companies) on the basis that they did not contain "related subjects."

These recent rulings provide new and valuable insight into the Court's interpretation of Article 48's related subjects requirement. Legal challenges to the Attorney General's ballot question certifications have become more common in recent years, making it essential for both proponents and opponents of potential ballot questions to understand the nuances of the Court's "related subjects" jurisprudence.

Background

Under Article 48, every proposed initiative petition must comply with the following requirements before it can be certified by the Attorney General: (1) the measure must be in "proper form;" (2) it may not be substantially the same as any measure submitted in the past two statewide general elections held in even-numbered years; (3) it must not contain subjects specifically excluded from the initiative process; and (4) it must contain only subjects "which are related or . . . mutually dependent." Litigation involving the first two prongs is relatively rare, as is litigation over whether a particular measure involves a subject "excluded from the popular initiative" (given that the list of excluded topics is established in Article 48 itself). Consequently, much of the recent litigation over the constitutionality of proposed initiative petitions has been based on the "related or . . . mutually dependent" prong of Article 48, focusing primarily on the "related" (rather than the "mutually dependent") language.

Over the past two decades, the Supreme Judicial Court has articulated the "relatedness" test in various ways, characterizing it as a search within a given initiative petition for a "general subject," for a "common purpose," for a "uniform statement of public policy," or for a proposal sufficiently coherent to be voted on with a simple "yes" or "no" vote. *See*, *e.g.*, *Oberlies v. Attorney Gen.*, 479 Mass. 823, 830 (2018), *Carney v. Attorney Gen.*, 447 Mass. 218, 226-31 (2006) ("*Carney I*"); *Mass. Teachers Ass'n v. Sec. of the Commonwealth*, 384 Mass. 209, 219 (1981). Of course, "[a]t some high level of abstraction, any two laws may be said to share a 'common purpose.'" *Carney I*, 447 Mass. at 226. The Court has thus cautioned that "relatedness cannot be defined so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another, which might confuse or mislead voters, or which could place them in the untenable position of casting a single vote on two or more dissimilar subjects." *Abdow v. Attorney Gen.*, 468 Mass. 478, 499 (2014). This determination is somewhat subjective, and the Court has emphasized that it is "not susceptible to bright-line analysis." *Carney I*, 447 Mass. at 226. As a result, it can be difficult for practitioners to predict how the Court might view the internal relatedness of a given petition.

The 2022 Challenges

In the first of the three 2022 challenges, several registered voters opposed the Attorney General's certification of a proposed petition to amend existing law involving retail sales of alcohol. *Colpack v. Attorney Gen.*, 489 Mass. 810 (2022). The Supreme Judicial Court held that while the initiative petition contained "a variety of provisions affecting the licensing of retail sales of alcohol for off-premises consumption, the formula for assessing fines for violations of the licensing laws, and the conduct of a transaction for the sale of alcohol," it nonetheless satisfied the related subjects requirement because its provisions formed part of an "integrated scheme" that furthered a common public policy goal. Drawing a distinction with prior cases, including *Gray v. Attorney General*, 474 Mass. 638 (2016), the Court found that the petition did "not yoke together substantively distinct subjects unrelated to a consistent public policy," but instead centered on a "common purpose": "loosening some of the current restrictions on the number and allocation of licenses for the retail sale of beer and wine for off-premises consumption, while taking steps to mitigate the potential negative effects of this expansion." *Id.* at 818. The Court rejected the opponents' argument that the petition "impermissibly combine[d] multiple contradictory positions," reasoning that the various subjects were "operationally related" because they "arguably serve[d] to moderate the effects" of increasing the number of off-premises licenses and range of potential purchasers. *Id.* at 818-19. While the initiative petition made it to the ballot, it was ultimately rejected by voters.

The initiative petition in *Clark v. Attorney General*, 489 Mass. 840 (2022) involved a proposal to amend existing laws governing dental insurance benefits. The Supreme Judicial Court rejected the claims of two registered voters that the initiative petition impermissibly combined policies on two unrelated subjects: first, creating mandatory "medical loss ratios" (essentially, establishing required minimum expenditures by insurers on dental claims), and second, promoting insurer transparency. *Id.* at 845-46. The Court instead determined that the various provisions furthered a cognizable "common purpose," which it identified as "enabling the [insurance] commissioner to implement and monitor compliance with the new [medical loss ratio] scheme." The Court concluded that the insurer transparency provisions contributed to this common purpose because they anticipated and mitigated a potential consequence of the new minimum expenditure requirement. *Id.* at 847. After this petition was placed on the ballot, voters approved it by a wide margin.

Finally, in *Koussa v. Attorney General*, 489 Mass. 823 (2022), the Supreme Judicial Court struck down on relatedness grounds two similar initiative petitions regarding ride-share companies. Both petitions sought to define and regulate the contract-based relationship between ride-share companies and app-based drivers. Specifically, the petitions proposed to: (1) deem app-based drivers to be independent contractors (as opposed to employees or agents) for all purposes under Massachusetts law; (2) require ride-share companies to provide a set of benefits and protections to workers (including minimum earnings, paid sick leave, paid family and medical leave, and on-the-job injury insurance); (3) prohibit ride-share companies from discriminating against app-based drivers; and (4) prohibit ride-share companies from deactivating workers' access to a ride-share platform for reasons not specified in their contracts (and provide a right to appeal a deactivation). One of the two petitions also required ride-share companies to mandate paid driver safety training. The Attorney General certified both petitions as containing only related subjects.

In rejecting the petitions as failing Article 48's related subjects requirement, the Court focused on what it characterized as "vaguely worded provisions placed in a separate section near the end

of the laws" that classified app-based drivers as independent contractors for purposes of third-party lawsuits. The Court concluded that including these provisions presented voters with a "substantively distinct policy decision" that went "well beyond the contract-based relationship between [ride-share] companies and app-based drivers, and the compensation and benefits associated therewith." *Id.* at 829-30. The Court acknowledged that the Attorney General and the proponents both disputed the opponents' claim that the challenged provisions would affect private tort litigation, but nevertheless interpreted the provisions in favor of the opponents, concluding that "any residual doubts about the meaning of an obscurely drafted petition must be resolved against the proponents." *Id.* at 834.

The Attorney General and the proponents also argued that any effect on private tort litigation was a "downstream consequence" of the permissible common purpose of defining the contract-based relationship between app-based drivers and ride-share companies, a rationale that had allowed previous petitions (including those in *Abdow* and *Albano v. Attorney General*, 437 Mass. 156 (2002)) to survive relatedness challenges. The Court distinguished these cases, however, reasoning that "[a]n express instruction or directive in an initiative petition is different from a consequential effect." *Id.* at 824.

Lessons and Future Implications

With *Colpack* and *Clark*, the Supreme Judicial Court reaffirmed its view that the Article 48 "related subjects" requirement is satisfied where an initiative petition proposes an integrated scheme to accomplish a unified public policy goal. *See Weiner v. Attorney Gen.*, 484 Mass. 687, 693 (2020) (upholding certification of initiative petition that "proposed [a] scheme to lift restrictions on off-premises licenses for the retail sale of alcoholic beverages").**[1]** In future cases, counsel for proponents of an initiative petition would be wise to scrutinize their petition prior to filing to ensure that each individual provision contributes to a common "integrated scheme."

In *Koussa,* however, the Supreme Judicial Court appeared to inject two new factors into the relatedness inquiry—namely, the clarity of a petition's provisions and the placement of those provisions within the petition itself. Emphasizing the importance of preventing voter confusion, the Court held that for purposes of the related subjects inquiry, any ambiguity in a petition would be "resolved against the petition's proponents," *id.* at 520. While this standard appears to have general applicability, it could potentially be limited to instances where the Court believes the intent of the drafters was obfuscation. The Court's contention that certain provisions were "bur[ied]" at the end of the petitions with "alluring provisions" in front also signals that it may more closely review a petition's organization to evaluate the "risk[] that voters will be confused and misled." *Id*. Both of these factors could serve as additional avenues for challenging an initiative petition in the future.

Because ballot question challenges generally arise only every two years, the number of ballot question decisions is relatively small. The Supreme Judicial Court's decision in *Koussa* therefore has outsized importance. Going forward, counsel for proponents and opponents should carefully consider the issues of clarity and placement of a petition's provisions when crafting, defending, or challenging future initiative petitions.

Meredith G. Fierro is an associate at CEK Boston, P.C., where she focuses her practice on government and administrative law, white-collar criminal defense, and appellate litigation. She was involved in representing the proponents of the ride-share petition at the Attorney General certification stage prior to the challenge in Koussa.

[1] *See also Oberlies*, 479 Mass. at 830 (2018) (upholding certification of initiative petition that proposed a scheme to establish and enforce nurse-to-patient ratios in facilities in the Commonwealth); *Hensley v. Attorney Gen.*, 474 Mass. 651, 654 (2016) (upholding certification of initiative petition that "la[id] out a detailed plan to legalize marijuana (with limits) for adult use and to create a system that would license and regulate the businesses involved in the cultivation, testing, manufacture, distribution, and sale of marijuana and that would tax the retail sale of marijuana to consumers.").