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Voice of the Judiciary

Interview with Massachusetts Commissioner of Probation Pamerson Ifill

Interviewed by Jade Brown

Boston Bar Journal *board member Jade Brown recently interviewed Pamerson Ifill, the new Massachusetts Commissioner of Probation, just as he began his five-year term of office after having served as deputy commissioner since 2019. This interview, which has been edited and condensed, and which is accompanied by video excerpts of the discussion, explores Ifill's approach to the work of probation and the goals for his tenure with a focus on innovation.*

Brown: You've been in the position for roughly four months now. What has it been like?

Commissioner: This has been a whirlwind. … I know the work of probation, that is the fun part. The difficult and challenging part is about communicating a vision and the mission of the organization and steering it in that direction.

Brown: What would you say the goal of the probation department is, or what should it be?

Commissioner: Our mission focuses on offender rehabilitation and taking care of victims and survivors, addressing issues of public safety, and advancing not just probation, but the broader mission of access to justice. We've evolved significantly over the last ten years and … we're focusing on reducing the number of violations. We're providing housing. We spend $15 million now a year — the Massachusetts Probation Service and the Massachusetts Trial Court — on short term housing for individuals on probation and parole.

We have eighteen community justice support centers that are focusing on rehabilitation and treatment, cognitive behavioral therapy, and motivational interviewing. There's a broad spectrum of services that we're engaging in, that traditionally in the past, weren't areas where we focused in probation.

Brown: How does the probation department's housing program work and how does that affect, for example, recidivism of folks who are under supervision?

Commissioner: Most of our housing is short term because we just don't have the budget or the capacity to provide long-term housing. But we know that stable housing is conducive to good probation practice and supervision.

Brown: In terms of the mission of the probation department as a whole, what role would you say individual probation officers play or can play in reaching this larger goal?

Commissioner: The heart of a probation officer is the ability to build a connection with the individual that we're supervising. Inherently, that ability to build that connection is just, you know, being empathetic and understanding at a human level. I think these are really important

skills. We're looking for probation officers with human services, mental health and treatment and educational backgrounds.

Brown: What improvements do you hope to make over your five-year tenure?

Commissioner: Right now, we're focusing on three big tenets. One, I'm going to get a group of experts internally and externally within the field that do this work to look at our policy protocol or practice and to do a comprehensive review and a rewrite of our policy and protocols. And we've been dealing with some written policies in Massachusetts that have been in place since the first probation officer was hired in 1878. I don't know that we've ever done a comprehensive review. So, we're doing that.

Two, community engagement. The trial court has been focusing on access and fairness surveys because we know that communities, especially communities of color, people from disadvantaged and marginalized backgrounds, have different experiences within the court system. We want to make sure that we're able to engage communities, we want to make sure that we look and reflect the communities that we serve.

When we talk about diversity and inclusion, we're really thinking about not only our hiring or promotion or training, but all of our practices. We have a standard condition of probation reporting that says you need to report to your probation officer. We're open 8:30AM to 4:30 PM or 9AM to 5PM. We bring people in from their work, from their homes, from their treatment, from all sorts of things during the day. That disrupts the natural flow of what life looks like. And we want to be engaging people after hours, on weekends and other nontraditional times.

The third one is very focused on employee health, wellness, and morale. We want to make sure that we support, engage, and build inclusive environments, and that our managers have the kinds of leadership skills and capacity to be able to work with diverse populations.

Brown: You started a very innovative system of sending out text messages to folks to remind them of their court dates. Do you envision similar innovations using technology as part of this process that you have outlined?

Commissioner: The text messaging system was launched during the height of the pandemic. And as we continue to build on that by sending somewhere between fifty to sixty thousand text messages monthly. We're seeing a 3% decline in failure to appear rates in the populations that we're targeting.

I'm hoping that we can do more check with kiosks where people aren't coming in and just simply waiting. I'm hoping that we can build apps where rather than having to come to a probation office to upload verification requirements, we can just scan your mail, and provide the verification documentation.

We have close to 4,700 people on [GPS] bracelets, and another close to 6,000 people on SCRAM [(Secure Continuous Remote Alcohol Monitoring)] devices for alcohol breath tests. I'm hoping that we can find equipment that is much more dignified than a big ankle bracelet.

Brown: One of the critiques of the probation system is that the system is predicated on the stick and not the carrot. What role do you think incentives should play in the probation system?

Commissioner: I have two responses to that. You know, the Council of State Governments and the Pew Trust came into Massachusetts in 2018 and 2019, and we are ranked number one or two in the country as the probation department that violates and sends the least amount of people to prison or jail in the country.

That said, the ratio of violations to arrests still in the Commonwealth is problematic…. About 67 to 68% of all of our violations are for technical offenses, not new offenses, versus about 31 to 32% [of cases] where somebody commits a new crime. I would like us to drive that technical violation down by using much more graduated approaches to how people are [deemed] noncompliant. If somebody's not showing up or missing treatment, we need to figure out other ways of incentivizing people to comply with their conditions.

In 2019, we had 30,961 violations of probation; in 2023, it was 17,261 violations. So, we've cut it by [roughly] than half. Wherever around the country, people see probation as a recidivism trap. Here in Massachusetts, we approach it very differently.

Brown: People are hopeful that you can make changes. How do you feel about that? Is that a lot of pressure?

Commissioner: You know, it's tough to be the first of any kind. I'm always conscious that … probation has been here since 1878. I know I stand on the shoulders of a lot of people. Some days, it is tough; [but] I know that there's a lot of people hoping that I'll be successful.
What I'm hoping to do is to get people to understand the broader narrative. I grew up as a person on the borderline of problems. I've been stabbed. I got shot one night, and these are things that I haven't talked to family members or even people about until recently. And that's just the nature of how trauma can be. So, I know that there are a lot of people like me in the system.
I want to be able to make sure that we provide opportunities and second chances for people who so many people have given up on. So, do I feel the pressure some days? Yeah, I do. But I know the work of probation; I fundamentally believe in the work of probation and [of] the Trial Courts.

Pamerson O. Ifill is an innovative and versatile criminal justice and diversity, equity, and inclusion (DEI) professional with more than 36 years of experience in transformational leadership, change management, and improving justice outcomes for court-involved individuals and families. On November 27, 2023, Ifill was appointed as Commissioner of the Massachusetts Probation Service (MPS), the nation's first probation department.

Jade Brown is an Associate Clinical Professor in the Civil Litigation & Justice Program (CLJP) at Boston University School of Law. Jade teaches the art of lawyering to BU Law students, who represent low-income clients while increasing access to justice. During the pandemic, she

started a nationally recognized eviction defense project at BU Law where students assist tenants with drafting responsive pleadings to eviction cases using the MADE (MA Defense for Eviction) online portal created by Quinten Steeinhuis. Jade also directs the Consumer Economic Justice Clinic at BU Law, where she supervises law students working on consumer law cases and causes. Previously, Jade was a staff attorney at Greater Boston Legal Services, where she practiced housing and consumer law.

Case Focus

"Emerging Adults" Can No Longer Be Sentenced to Life Without Parole: The Impact of *Commonwealth v. Mattis*

Stevie Leahy

"[M]aturity is a gradual endeavor, and while age eighteen is a milestone, society does not view it as the end of the metamorphosis toward adulthood."

- Wendlandt, J., concurring.

Building upon 8th Amendment protections established a decade earlier in *Commonwealth v. Diatchenko*, the Massachusetts Supreme Judicial Court ("SJC") made the Commonwealth the first state by court decision to categorically ban life without parole ("LWOP") sentences for individuals eighteen through-twenty years old. *Commonwealth v. Mattis*, 493 Mass. 216, 221-22 (2024). This ban includes mandatory and discretionary LWOP sentences and stands in stark contrast to the parallel federal precedent and most other states. The *Mattis* decision labels this category of eighteen through twenty -year-olds as "emerging adults." Prior to this landmark ruling, Massachusetts was in the minority of states that *required* LWOP for these emerging adults convicted of murder in the first degree. *Id.* at 234.

In the January 2024 decision, the SJC wrestled with the question of whether a bright line at 18 is the appropriate cut-off for the prohibition on an LWOP sentence. *Id.* at 224, n.16. Current neuroscience research supports that brain maturation continues through an individual's mid-twenties, and oral argument was heavily focused on where to draw the line. The 4-3 split decision, authored by Chief Justice Kimberly Budd, relied on Massachusetts precedent and "contemporary standards of decency" when it comes to the punishment and rehabilitation of those who commit crimes prior to the age of twenty-one. The decision also relied heavily on an updated scientific record, which was extensive. *See, e.g.*, *id.* at 218 n.3, 219, n.8.

The Origin Story: Two Co-Defendants Convicted, Two Drastically Different Sentences

The underlying case centered on defendants Sheldon Mattis and Nysani Watt. At the time of the crime, Mattis was 18 and 8 months and Watt was 17. They were jointly tried and convicted of murder in the first degree on the theories of deliberate premedication and extreme atrocity or cruelty. Watt, the individual who fired the weapon and killed the victim, received a life sentence with the possibility of parole after fifteen years. *Id.* at 218. Mattis was sentenced to mandatory LWOP. *Id.* On appeal, the SJC remanded Mattis's case for development of the record specifically as it pertained to brain development after the age of 17. *Id.* at 219.

In line with the most recent United States Supreme Court decision on under-18 LWOP sentencing, *Jones v. Mississippi*, the Commonwealth argued that such a sentence would be constitutional when imposed after an individualized hearing (often referred to as a *Miller* hearing based on earlier Supreme Court precedent). The SJC rejected this argument for discretionary LWOP for eighteen through twenty year olds.

After an extensive discussion of the federal framework, Chief Justice Budd's decision relied on Superior Court Judge Ullmann's four "core" findings of fact regarding emerging adults:

(1) they lack impulse control similar to sixteen- and seventeen-year-olds in emotionally arousing situations,
(2) they are more prone to risk-taking in pursuit of rewards than those under eighteen years and those over twenty-one years,
(3) they are more susceptible to peer influence than individuals over twenty-one years, and
(4) they have a greater capacity for change than older individuals due to the plasticity of their brains.

Id. at 225-29. Factors one, two, and four were found to be "well supported" by the extensive scientific record developed in the case. Factor three was found to be supported by experts, who all agreed that the most current research supports this conclusion. These factors provided the SJC "a scientifically informed view of emerging adults' culpability" and supported the majority's ruling that LWOP is unconstitutional when applied to emerging adults. *Id.* at 229.

The majority opinion referenced national and international movements to reinforce its decision. Chief Justice Budd looked to other states who are moving in the same direction when it comes to changing the bright line of eighteen years: California, Colorado, D.C., Illinois, Michigan, and Washington have all expanded protections for emerging adults, with age ranges extending to twenty-one and even up to age twenty-five in some circumstances. *Id.* at 232-34. Similarly, the United Kingdom has banned life without parole for any offender under twenty-one years of age at the time of the offense. The Supreme Court of Canada unanimously ruled that life without parole sentences were unconstitutional for all offenders, regardless of age.

Although research supports the idea that brain development continues through age twenty-five, when combined with contemporary standards of human decency, Justice Budd noted that there is no consensus within society to extend the prohibition that far. *Id.* at 235, n.30.

A Split Bench: Concurring and Dissenting Opinions

In the first concurring opinion, Justice Kafker agreed with the extension of the ban, writing to emphasize that "the letter and spirit of our trailblazing decision directs us to reach the same conclusion today that we reached a decade ago and extend those very same protections to the age group at issue—eighteen through twenty year olds." *Id.* at 237. In that decision a decade ago, *Diatchencko*, the SJC categorically ruled that LWOP sentences were unconstitutional and did not defer to the Legislature. Again here, where the SJC is responding to a United States Supreme Court decision, the SJC should likewise not defer. *Id.* at 242.

In the second concurrence Justice Wendlandt, joined by Justice Gaziano, dug into the issue of whether the Legislature should have made this decision. In plain English, easily digestible for a non-attorney, Justice Wendlandt summarizes the outcome of extending the ban based on updated neuroscientific research: "a child does not go to bed on the eve of her eighteenth birthday and awaken characterized by a lessened 'transient rashness, proclivity for risk, and inability to assess consequences.'" *Id*. 250. After a comprehensive review of statutes, the scientific record, the judges' collective experiences, and "common sense," Justice Wendlandt agreed with the extension of the LWOP ban up to age twenty-one as the constitutional duty of the SJC under Article 26 of the Massachusetts Declaration of Rights. *Id*.

In the first dissent, Justice Lowy, joined by Justices Cypher and Georges, wrote that great deference is owed to the Legislature's right to define the punishment for criminal behavior and define the line between juvenile and adult offenders. He argued that contemporary standards of decency do not clearly reflect that LWOP would be cruel and unusual for emerging adults (under either the 8th Amendment or Article 26). *Id.* at 255. Because the Legislature has drawn the bright line at eighteen, that is the line the Commonwealth should use. Therefore, the majority opinion "impermissibly engages in legislative line drawing, detached from our constitutional analysis." *Id.* at 270.

In the second dissent, Justice Cypher agreed with the principal arguments outlined in the first dissent, "namely, [that] it is the Legislature, not the judiciary, that prescribes punishment." *Id.* at 281. Justice Cypher wrote separately for four reasons: (1) extension of the prohibition is the job of the Legislature; (2) the majority's reliance on *Diatchenko* is mistaken; (3) drawing a judicial line at twenty is inherently capricious; and (4) arbitrary reliance on neuroscience raises troubling, if unintended, implications for other groups. *Id.* at 283-84. As to the third and fourth points, Justice Cypher raised critical questions for the future of LWOP in Massachusetts; as was discussed at oral argument, the research supports the argument that brain development continues up through age 25. *Id.* at 283. Will future judges "follow the science" (despite the perils described by Justice Cypher) and extend the prohibition further?

Future Implications of *Mattis* in the Commonwealth

The implications for this specific defendant, Mattis, are that the SJC has remanded his case to the Superior Court for resentencing consistent with the opinion. For other similarly-situated emerging adults, parole is not automatic—it will depend on when the individual was originally sentenced (pre- or post-2014). However, the majority decision means that all those emerging adults must be given at least an opportunity to obtain release by the Massachusetts parole board. This decision will impact approximately 200 individuals (200 men, three women) currently serving LWOP terms in Massachusetts prisons. These 200 people will be incentivized to make themselves appealing candidates for parole consideration.

The *Mattis* decision has already been cited in briefs outside of Massachusetts, and this is likely to be the first domino in a series of jurisdictions that follow in the footsteps of the SJC. Just as Justice Kafker referred to the earlier Massachusetts precedent in this area as "trailblazing," this decision is likely to be seen in the same light.

Stefanie (Stevie) Leahy is a professor in the Suffolk University School of Law Legal Practice Skills program. Prior to joining Suffolk, Professor Leahy was an Assistant Professor at Northeastern University School of Law. Professor Leahy also served as the Resident Fellow for the Center for Public Interest Advocacy and Collaboration, working on issues related to juvenile sentencing and the cradle to prison pipeline.

Heads Up

Youth Matters: Resentencing and Parole after *Commonwealth v. Mattis*

Afton M. Templin & Mara Voukydis

In January of this year, a 4-3 majority of the Supreme Judicial Court decided *Commonwealth v. Mattis*, 493 Mass. 216 (2024), extending the holding of *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) ("*Diatchenko I*"), which prohibited a sentence of life without parole on juveniles, to defendants who were eighteen, nineteen, or twenty years old[1] at the time of the offense. The SJC, "based on precedent and contemporary standards of decency in the Commonwealth and elsewhere,"[2] concluded that imposing such a sentence on these emerging adults violated Massachusetts Declaration of Rights Article 26. "When it comes to determining whether a punishment is constitutional under either the Eighth Amendment to the United States Constitution or art. 26 of the Massachusetts Declaration of Rights, youth matters."[3]

As a remedy, similarly to *Diatchenko I*, the SJC invalidated the portions of G.L. c. 265, § 2 (a) and G.L. c. 127, § 133A that deny parole to defendants ages eighteen to twenty. The SJC then "look[ed] to the next-most severe sentence under the sentencing scheme to determine the floor of parole eligibility."[4] The majority ended its opinion with the same cautionary language it used to conclude *Diatchenko I* a decade ago: "[b]y providing an opportunity for parole," the SJC was not suggesting that emerging adults "should be paroled once they have served a statutorily designated portion of their sentences."[5] Constitutional requirements command only that these individuals "be granted 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' before the Massachusetts parole board, who will 'evaluate the circumstances surrounding the commission of the crime, including the age of the offender, together with all relevant information pertaining to the offender's character and actions during the intervening years since conviction.'"[6]

As a result of the *Mattis* decision, approximately 200 individuals are now serving parole-eligible life sentences. Pursuant to *Diatchenko v. District Att'y for the Suffolk District*, 471 Mass. 12 (2015) ("*Diatchenko II*"), these individuals are eligible for the appointment of counsel. Shortly after the SJC decided *Mattis*, the Parole Advocacy Unit at the Committee for Public Counsel Services began assigning counsel to impacted individuals based on anticipated parole eligibility dates.

Once counsel has been assigned, the attorney and client will start the intensive process of preparing to show the Parole Board that the client is a strong candidate for release on parole by marshalling evidence to demonstrate that the client "will live and remain at liberty without violating the law" and that their release "is not incompatible with the welfare of society." G.L. c. 127, § 130. For individuals serving parole-eligible life sentences, their parole hearing is different in kind from other parole hearings. Referred to as "lifer hearings," these hearings are governed by different regulations, are held at the board's central office in Natick (instead of the prison or jail) and are open to the public. Lifer hearings require rigorous preparation. Counsel collects and reviews voluminous records, retains experts, and prepares the client to testify before and be questioned by board members.[7] The victims' families have a right to advance notice and to be present and provide testimony to the board if they so choose. The prosecuting district attorney's office may submit written and oral testimony in opposition. The board "weigh[s] multiple factors" and "consider[s] a wide variety of evidence" before reaching its decision.[8]

In emerging adult lifer cases, the task is made "far more complex" because the board must also consider "the unique characteristics" of emerging adults.[9] These unique characteristics, as explained by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), and embraced by the SJC in *Diatchenko I,* include "a lack of maturity and an underdeveloped sense of responsibility," being "more vulnerable to negative influences and outside pressures," and having a character that is less well-formed and "traits less fixed" than adults.[10] These characteristics may have been a contributing factor to the offense, which occurred many years before the parole hearing. The board must also consider whether the individual has been rehabilitated and matured out of characteristics that might have had a causal connection to the individual's criminal behavior many years ago.

While there is significant overlap in how someone will prepare for an emerging adult lifer parole hearing compared to a juvenile lifer hearing, *Mattis* differs from *Diatchenko I* and its progeny in ways that leave incarcerated individuals and advocates in familiar but still uncharted waters.

In *Mattis*, the SJC did not explicitly incorporate cases that flowed from *Diatchenko I*. Those cases established procedural protections for juvenile lifers in the parole process, some of which have since been codified in G.L. c. 127, § 133A. Such protections include funds for expert evaluations, the right to judicial review of parole decisions, and, as explained in *Commonwealth v. Okoro*, 471 Mass. 51, 62-63 (2015), the extension of procedural rights to juveniles serving a life sentence for second degree murder convictions. While it seems self-evident that those protections should be available to individuals engaging in the parole process as a result of *Mattis*, just as they were for those impacted by *Diatchenko I*, at this point the jurisprudence is unclear.

Even assuming, as advocates hope and expect, that the right to access funds for an expert does extend to emerging adults, it seems likely there will be reduced use of forensic psychology experts compared to post-*Diatchenko.* It may be that not every emerging adult parole case requires one. Since *Diatchenko I*, the board as a whole has become more fluent with adolescent neurological and psychosocial development, having conducted scores of release and review hearings for juvenile homicide offenders. In addition, at this time the board includes a number of members with backgrounds that enable them to bring an understanding of late adolescent brain development to the hearing. As a result, it may be that reliance upon forensic experts will be limited to those cases where there is a discerning need, dependent upon the facts of the case and the client's particular trajectory.

In addition to these differences, the January decision in *Mattis* created some uncertainty regarding the governing dates for calculating parole eligibility. Those calculations impact the scheduling of lifer parole hearings. In crafting the remedy in *Diatchenko I*, the SJC invalided portions of statutes that denied parole eligibility to juvenile homicide offenders and then looked to "the next-most severe sentence under the sentencing scheme" for murder.[11] When *Diatchenko I* was decided over ten years ago, the statutory landscape regarding sentences for murder was less complex. First degree murder was punished by life without parole. Second degree murder was punished by life with parole eligibility after fifteen years.[12] The *Diatchenko I* remedy was therefore straightforward: juvenile homicide offenders were eligible for parole after serving fifteen years.[13]

The *Mattis* court attempted to craft its remedy in the same manner, but what that "next-most severe sentence" may be is less readily apparent than it was in *Diatchenko I*. In 2012, before *Diatchenko I*, the Legislature amended G.L. c. 279, § 24, which governs indeterminate sentences to state prison, to provide judges with discretion to sentence an adult convicted of second degree murder to a minimum term of between fifteen to twenty-five years.[14] The minimum term set by the sentencing judge is used by the Parole Board to calculate parole eligibility and its concomitant initial parole hearing date. But because the offense in *Diatchenko I* occurred in 1981, well before the effective date of those 2012 amendments, the SJC in *Diatchenko I* did not have to consider the impact of the new range of minimum terms. In 2014, following *Diatchenko I*, the Legislature again amended G.L. c. 279, § 24, as well as other statutes governing parole eligibility for murder (G.L. c. 127, § 133A and G.L. c. 265, § 2). These amendments codified parole eligibility for juvenile homicide offenders and provided judges with discretion to sentence juvenile homicide offenders to a range of minimum terms of years based on the theory of murder.

So when the *Mattis* court quoted language from *Diatchenko I* regarding the "next most severe sentence" and applied the most recent (2014) version of G.L. c. 279, § 24, it created uncertainty regarding the calculation of parole eligibility.[15] On March 22, 2024, after the Commonwealth moved for modification of the decision, the SJC issued a revised opinion which resolved most, but not all, of the uncertainty. The court categorized the *Mattis* cohort into three groups based on the version of § 24 in effect at the time of the offense and whether § 24 set a fixed term or range of years for the minimum term. For those individuals eligible for a fixed term of years, the SJC ordered that their sentences "shall . . . so reflect" that fixed term, and further ordered that individuals "who ha[ve] served the requisite number of years" were immediately eligible to be seen for parole.[16] Individuals "whose parole eligibility date is discretionary may request a hearing to have the date set within the [applicable] ranges."[17]

Even for individuals convicted of an offense which occurred prior to the 2012 amendments to § 24, there is still some uncertainty as to whether the Parole Board has the authority to *sua sponte* consider an individual parole-eligible or whether the board is required to await updated documentation from the Superior Court. Accordingly, it may be necessary for counsel to file a motion to correct the sentence to obtain that updated documentation before moving forward with parole hearings. The SJC did not expressly remand to the Superior Court for resentencing; it remanded for the Superior Court "to take such further action as is necessary and appropriate." Meanwhile, for those individuals with "discretionary" parole dates imposed under the current version of § 24, it appears such motions, and a resentencing hearing, will be required.

Another area of uncertainty is to what extent *Commonwealth v. Costa*, 472 Mass. 139 (2015), will extend to emerging adults. In *Costa*, the trial court sentenced the juvenile homicide offender, before *Diatchenko I* was decided, to two consecutive life without parole sentences following convictions for first degree murder.[18] Following *Diatchenko I*, the juvenile defendant filed a Mass. R. Crim. P. 30(a) motion for resentencing. The motion judge concluded that the defendant's sentences should be converted to sentences of life with parole after fifteen years and that he was entitled to a resentencing hearing to determine if those sentences should still run consecutively or if they could be amended to run concurrently. After the SJC Single Justice reserved and reported the issue, the SJC held that on resentencing, the judge could amend the consecutive nature of the

original sentence.[19] For emerging adults sentenced to consecutive parole ineligible life sentences, their initial parole eligibility date could be dramatically impacted if *Costa* does apply.

These questions around resentencing generate uncertainty regarding the scheduling of these lifer parole hearings. Advocates and incarcerated individuals serving parole eligible life sentences can generally predict the approximate month and year of their initial parole eligibility based on when they were sentenced. Lifer hearings are typically calendared months in advance. Now, there are potentially as many as 130 individuals who may find themselves immediately eligible for parole. After *Diatchenko I,* the Parole Board did not prioritize hearings for individuals who were most "overdue" for their parole hearing. Instead, individuals were added to a list after they notified the board they were ready to proceed to a hearing, and hearings were scheduled based on the date of notification. It appears the board is likely to follow suit with the *Mattis* cohort. However, faced with hundreds of requests for hearings at the same time, it seems the board will need to take steps to prioritize individuals based on how long ago their hearing should have been. How the already-inundated Parole Board, whose responsibilities also include increasingly frequent executive clemency petitions and parole termination proceedings, will incorporate this additional deluge of hearings is yet to be seen.

That said, for many of these newly-parole-eligible emerging adults there may be compelling reasons not to rush forward to a parole hearing even if the opportunity presents itself. In most cases, it will take a significant amount of time before the client feels ready to appear before the board. It may be that for this reason the board will experience a scheduling bottleneck some months from now, once clients and attorneys believe they are ready to present their case.

The varied backgrounds of the board members put the current board in a good position to review these emerging adult parole candidates, and advocates are hopeful for thorough, fair reviews of each case and the positive outcomes seen following *Diatchenko I*.[20]

1. Indicative of the justices' differing viewpoints on the analytical framework, whether *Diatchenko I* controlled, and the ultimate holding, the majority, concurrences, and dissents refer to this cohort in various ways. See 493 Mass. at 217 n.1 (majority; emerging adults); 493 Mass. at 238 (Kafker, J., concurring; eighteen through twenty year olds); 493 Mass. at 251 (Wendlandt and Gaziano, concurring; young adults); 493 Mass. at 255 (Lowy, Cypher and Georges, dissenting; adults or individuals from eighteen to twenty one); 493 Mass. at 285 (Cypher, dissenting; "emerging adults" "as styled by the court and parties"). For this article, we follow the majority's lead and refer to individuals impacted by the *Mattis* decision as "emerging adults." However, advocates may prefer the term "late adolescents," reserving "emerging adult" for the broader cohort of individuals 25 and under.
2. *Mattis*, 493 Mass. at 217.
3. *Id.* (citations omitted).
4. *Id.* As discussed *infra*, the determination of initial parole eligibility dates for emerging adults under *Mattis* is not as clear as it was for juveniles under *Diatchenko I*.
5. *Mattis*, 493 Mass. at 430, quoting *Diatchenko I*, 466 Mass. at 674.
6. *Mattis*, 493 Mass. at 430, quoting *Diatchenko I*, 466 Mass. at 674.
7. See *Diatchenko II*, 471 Mass. at 20-23.
8. *Id.* at 23.

9. *Mattis*, 493 Mass. at 237; *Diatchenko II*, 471 Mass. at 23.
10. *Miller*, 567 U.S. at 479; *Diatchenko I*, 466 Mass. at 660.
11. *Diatchenko I,* 466 Mass. at 672-673.
12. G.L. c. 265, § 2.
13. *Diatchenko I*, 466 Mass. at 673-674.
14. *Commonwealth v. Brown*, 466 Mass. 676, 689 n.10 (2013). *See also* G.L. c. 127, § 133A; G.L. c. 279, § 24. Parole eligibility for juvenile homicide offenders convicted of second degree murder is established at fifteen years by G.L. c. 119, § 72B.
15. *Mattis*, 493 Mass. at 237.
16. *Id.*
17. *Id.*
18. *Costa,* 472 Mass. at 141.
19. *Id.* at 144
20. In his concurrence in *Mattis*, Justice Kafker noted that seventy-four percent of the *Diatchenko* cohort have been granted parole, demonstrating "reformative change after a lengthy period of incarceration." 493 Mass. at 250.

Afton M. Templin, Director of Juvenile Appeals at CPCS, oversees a panel of private attorneys representing juveniles on direct appeal and for motions for resentencing.

Mara Voukydis, Director of the Parole Advocacy Unit at CPCS, manages access to counsel for people across the Commonwealth seeking parole and medical parole release.

Viewpoint

The Impact of *Mattis* on Surviving Families of Homicide Victims

Liam Lowney

The Supreme Judicial Court's decision in *Commonwealth v. Mattis*, 493 Mass. 216 (2024), raised the minimum age at which a person may be sentenced to life without parole from eighteen to twenty-one years old. This decision is retroactive, meaning that individuals convicted and sentenced for first-degree murder committed years (even decades) ago will become eligible for parole—some immediately and others within a term of years. Such sweeping change has a significant impact on families of homicide victims throughout Massachusetts. Since *Mattis*, nearly 250 families have been notified that—despite what they had been told at sentencing—the person held responsible in court for the murder of their loved one will now have an opportunity to be free. Notwithstanding the rationale of the Court in reaching its decision, *Mattis* redefines justice for surviving families of homicide victims.

To understand the significance of the impact of *Mattis* on homicide survivors, it is important to understand their experience leading up to a criminal conviction and sentence. From the earliest moments after their loved one's murder, a surviving family's loss is inextricably linked to the criminal legal system. Families are first notified by law enforcement that their loved one was taken by violence. They are then asked to identify the body of their loved one at the medical examiner's office. Following this overwhelming and surreal experience, families often meet with police and prosecutors multiple times. Families attend pre-trial hearings, mental health competency or responsibility hearings, and even motion hearings where defense counsel seeks to expose their loved one's counseling or criminal records.

When first degree murder cases go to trial, surviving family members often attend. They see crime scene photos. They listen to the facts that are permitted to be shared with the jury about a defendant, alongside often personal information shared about their own family member. Their loved ones may be held up as heroes or vilified as part of the case. Either way, the ownership of how their loved one is defined, depicted, and remembered publicly is not theirs.

A family's attendance at trial can have very real financial and emotional consequences. They must take time off from work or school and find childcare. They spend days and weeks in courthouse hallways and cafeterias, often in proximity to the defendant's friends and family. They must sit quietly in a courtroom and listen as defense counsel claims that the defendant is not responsible, that the action was the result of something the victim did, or that there was a mitigating or excusable reason for the murder. Family members will often be motivated to subject themselves to this process from a deep feeling of responsibility to their loved one and a very human desire to understand what happened and why. Sadly, whatever answer they receive will not be adequate to explain their loss.

After the trial, jury deliberation, and a verdict of guilty, family members may be asked to give an impact statement at sentencing. This statement is often the only opportunity a family is offered to stand in front of the court, and the defendant, and to speak about their loved one in their own voice.

Throughout this difficult (and lengthy) process—from investigation, to arrest, to prosecution, to sentencing—family members may be told that "justice" is the maximum sentence. Until *Mattis*, the maximum sentence was life without parole. With that sentence, family members' connection to the court, the criminal legal system, and the defendant could largely be severed. Family members could leave the criminal legal system behind and focus on learning to live as a new family, attempting to hold on to old memories, while creating new ones absent someone they loved.

Since *Mattis*, however, for at least 250 families in Massachusetts, justice now means something different. Whether the family agreed with the life-without-parole sentence or not, for the first time in years, maybe even decades, families are being told that the process is not over and that their loved one's murderer may be eligible for parole. This news can profoundly impact families' actual or perceived sense of safety. Some survivors may now be asked to participate in re-sentencing hearings at the trial court, and all impacted survivors will need to determine whether they will participate in the parole process and again face the defendant. For older cases, the responsibility to represent the family at parole hearings may have to pass from now-elderly or deceased parents of the victim to their other grown children, many of whom never expected to relive the loss of their sibling in such a public way. Many survivors may also struggle with the reasoning behind *Mattis*. The Court's focus on brain science and the ability of the defendant to make different decisions and regain liberty as an adult may be in direct conflict with the reality that their loved one, the homicide victim, will never get the same opportunity.

Given the experience of survivors throughout the criminal process and now post-*Mattis,* it is imperative that any procedures or policies established to implement *Mattis* be informed by survivors and their experiences. For example, any process or timeline to determine new sentences or parole eligibility must be established in accordance with the Massachusetts Victim Rights Law, G.L. c. 258B, which affords families the right to be informed, present, and heard in sentencing and parole proceedings, should they choose to do so.

Further, the *Mattis* decision may inspire legislative leaders to introduce more sweeping sentencing reform proposals for eighteen to twenty-one year olds. As lawmakers begin to consider such proposals—particularly any that would take effect retroactively—it is critical that survivors be provided opportunities to be heard in the policy-making process. Though the Court in *Mattis* was constrained from weighing the full scope of the public policy implications in its decision, it is incumbent upon the legislature to do just that.

Violent crime and the criminal legal system inherently undermine survivors' sense of control over the most tragic moments in their lives, and changes to a sentence years, even decades, later only further undermine survivors' sense of justice. Though each survivor's journey through the criminal legal system is unique, what is consistent for nearly 250 Massachusetts families in the wake of *Mattis*, is that now, their journey is no longer complete.

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victim rights and services, partnerships with agencies and individuals, and a commitment to providing funding and services for underserved and marginalized communities.

Heads Up

Potential Impacts of Rescheduling on the Cannabis Industry in Massachusetts

Michael P. Ross

When April 20, 2024, or "4/20," the unofficial holiday within the cannabis world, came and went without movement on the long anticipated federal rescheduling of cannabis from a Schedule I to a Schedule III substance, some industry watchers were skeptical that the reclassification would happen. Just ten days later, however, news broke that the federal government was in fact proceeding with the plan. For those attorneys who practice within this space, the consequences of this historic shift, particularly within the context of other steps towards the legitimization of the cannabis industry both at a federal level and in Massachusetts, are very significant.

The brief history of rescheduling starts with the Controlled Substances Act, passed in 1970, which created five schedules or classifications of various substances, and placed cannabis on Schedule I, along with heroin, LSD, and other drugs with "no currently accepted medical use treatment" value. In October 2022, the Biden administration announced its intention to reschedule cannabis to Schedule III, a classification of drugs that have an "accepted medical use in treatment" and are available with a prescription.

To be clear, reclassifying cannabis does not legalize recreational cannabis nationwide, but instead places cannabis with other Schedule III drugs, including ketamine, anabolic steroids, and some acetaminophen-codeine combinations. The immediate effects, particularly relevant to the legal community, will be the resulting changes for cannabis operators. The most significant issue will be the end of the application of IRS Rule 280E. As a Schedule I drug, Rule 280E limits cannabis companies from writing-off legitimate business expenses as other businesses are entitled to do. With the exception of cost of goods sold (the cannabis itself), all other expenses—rent, employees, operational costs—were not allowed to be counted as an expense, and therefore, were essentially counted as revenue, and taxed accordingly. Moving cannabis from Schedule I to Schedule III will end this requirement, and essentially bring overnight liquidity to these businesses.

Notably, prior to the federal rescheduling announcement, some businesses had already challenged 280E's legality. Earlier this year, the cannabis companies Trulieve and TerrAscend collected refunds of over $150 million when they stopped paying 280E taxes. Other companies are following their lead. Undoubtedly, the lawsuit against the Department of Justice on behalf of four Massachusetts state-licensed companies, alleging that the Controlled Substance Act is unconstitutional, at least partially motivated these businesses in their decision to cease making payments.

In addition to 280E no longer applying, there are other benefits that are expected from rescheduling, including removing barriers to obtaining federal trademarks. Due to cannabis' prior illegal status under federal law, federal trademarking had been difficult for cannabis companies and their products. Once the reclassification is official, the U.S. Patent and Trademark Office ("USPTO") should be open to these brands. Rescheduling should also mitigate the attempted workarounds currently used by some companies such as registering trademarks for certain hemp products under the federally legal Farm Bill for products that contain less than 0.3 percent THC (and are not listed as a Schedule I substance). Many of these products share the

same marks and brand names as their cannabis counterparts. It is worth noting that the current hemp market has created havoc within the industry, often forming new synthetically manipulated and intoxicating products that are illegal, and claiming regulatory ambiguity within the federal and state laws, even when, as here in Massachusetts, the regulations clearly prohibit foods containing CBD or any THC or synthetically derived THC products.

Another key area likely to change is bankruptcy proceedings. Here again, legal restructuring options such as bankruptcy, were not available to federally non-legal companies. While there are state law protections available for state legal cannabis entities, federal protection is not. Other alternatives to bankruptcy would be contractual arrangements, or receiverships – but here too, with receiverships, given the regulatory nature of cannabis at the state level, receivers must be licensed by the state authority to step into this role. Once rescheduling is complete, cannabis companies should have access to federal bankruptcy protection.

As referenced, rescheduling is not the only potential major regulatory change for the cannabis industry. The SAFER Banking Act, currently making its way through Congress, would open up banking and other business services to state-legal operators who are currently not able to participate in these markets. While there are some state-chartered, credit-union facilities, and smaller banks participating in the industry, most of the larger banks are not. SAFER would allow nearly all financial institutions and services to participate in the industry, which would lower associated costs, and allow cannabis companies to keep more of their money.

At the state level, we are already seeing reforms that are helpful to the cannabis industry. In Massachusetts, we have witnessed the reform of the Host Community Agreement process, the statutorily required agreement between an operator and the host community that establishes the mutual responsibilities between the parties. The "reform" which came as a result of the passing of the Acts of 2022, Chapter 180, "An Act Relative to Equity in Cannabis Industry," as well as the regulatory regime promulgated by the Cannabis Control Commission, puts guardrails on just how far a municipality can go in extracting fees from an operator. While the statutory revisions only go so far, cannabis operators in Massachusetts also scored a win through a settlement agreement in a lawsuit that was pending before the Superior Court. In 2022, Caroline's Cannabis, LLC filed suit against the Town of Uxbridge, seeking a refund for fees that it paid to the town that were not "reasonably related" to its operation as a marijuana retailer. Uxbridge agreed to pay the operator $1.2 million, opening the door for other operators to follow suit (both figuratively and literally).

This industry moves quickly, and a nimble practitioner will need to keep up to speed with these changes in order to serve as an effective advocate for clients.

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Heads Up

The Bar Exam: Past, Present, and NextGen

Marilyn J. Wellington

The practice of law is always evolving, and the evaluation of candidates for admission to the bar is evolving with it. The bar exam is an essential tool for ensuring that candidates seeking legal licensure have the appropriate level of knowledge and skills necessary to perform the activities typically required of an entry-level lawyer. The next evolution of the bar exam launches in July 2026 with the NextGen bar exam, ensuring that our profession's most effective tool for assessing readiness to practice retains its relevance to legal practice in a rapidly changing legal landscape.

The bar exam has been an essential tool used by jurisdictions to assess candidates' practice readiness since the beginning of standard legal licensure practices and continues to be a key part of the bar admission process in virtually every U.S. jurisdiction. Massachusetts led this effort, administering the first written bar exam in the country in 1855 and making it a requirement for attorney licensure beginning in 1876. The 1972 introduction by the National Conference of Bar Examiners ("NCBE") of the Multistate Bar Exam ("MBE"), the 200-question multiple-choice exam still used today in 54 jurisdictions, MBE Bar Exam | Multi State Bar Exam | NCBE (ncbex.org), provided a consistent tool to be used alongside a written exam specific to the laws and procedures of each jurisdiction.

The Uniform Bar Exam (the "UBE") was launched in 2010 and is currently administered in 41 jurisdictions, including Massachusetts. The UBE provides candidates with a portable score that can be used to seek admission in any of the 41 jurisdictions administering the exam. These broad changes to the bar exam, as well as more focused changes to knowledge areas tested, describe an exam that has evolved over time.

To ensure that newly licensed lawyers are familiar with local law in the licensure jurisdiction, many UBE jurisdictions require an additional step to licensure. In Massachusetts, which first administered the UBE in July 2018, "petitioners for admission must successfully complete an online multiple-choice test, based on substantive materials provided online, on key distinctions and essential highlights of Massachusetts law and procedure." Additional Pre- or Post-Admission Requirements and Continuing Legal Education – NCBE Comprehensive Guide to Bar Admission Requirements (ncbex.org).

In 2018, the NCBE Board of Trustees established a Testing Task Force "to undertake a comprehensive three-year study to ensure that the bar examination continues to test the knowledge, skills, and abilities needed for competent entry-level legal practice in a changing profession." Research, leading to the development of the NextGen exam, was conducted in three phases, beginning with a series of listening sessions with key stakeholders, followed by a comprehensive nationwide practice analysis, and concluding with expert analysis and evaluation of the data compiled in the first two phases and the development of final recommendations. *See* Final Report – NextGen Bar Exam (ncbex.org). Stakeholders participating in listening sessions provided feedback and input on the content, format, timing, and delivery method of the bar exam. *See* Phase 1 Report – NextGen Bar Exam (ncbex.org). The listening sessions were followed by a practice analysis, conducted in the second phase of this study, with these phases of

research providing the basis for establishing the foundational knowledge and skills to be tested on the next evolution of the bar exam.

For the practice analysis conducted by the Testing Task Force, 14,846 lawyers from all 56 US jurisdictions and more than 35 areas of practice participated in a survey to provide empirical data on the job activities of newly licensed lawyers and the knowledge and skills needed to conduct these job activities. Of those surveyed, 21% were newly licensed lawyers, defined as lawyers in practice for three or fewer years, and the remaining 79% were lawyers with direct experience working with or supervising newly licensed lawyers. *See* Phase 2 Report – NextGen Bar Exam (ncbex.org). Analysis and evaluation of the data and commentary retrieved through this research resulted in recommendations as to the structure, format, and content of the bar exam of the future. In the development of the new exam, the Testing Task Force directed that all decisions be guided by the prevailing views expressed by stakeholders that:

- The bar exam should test fewer subjects and should test less broadly and deeply within the subjects covered.
- Greater emphasis should be placed on assessment of lawyering skills.
- The exam content and delivery should remain affordable.
- Fairness and accessibility for all candidates should continue to be ensured.
- Score portability as provided by the UBE should be maintained.

See Final Report – NextGen Bar Exam (ncbex.org)

Based on this extensive research and maintaining fidelity to these guiding principles, NCBE began the development of the NextGen exam in 2021, with the first jurisdiction administration of the exam scheduled for July 2026.

The NextGen exam features an integrated format, testing knowledge and skills together in questions and question sets that replicate the actual practice of law for entry-level practitioners, defined as those within three years of initial licensure. These questions and questions sets are built on the types of realistic practice scenarios that new attorneys are likely to encounter, and each includes several foundational knowledge areas coupled with essential lawyering skills. Each question, whether multiple-choice or constructed response (writing task, short essay, or short answer), requires candidates to employ knowledge of the law and lawyering skills to demonstrate their ability to assess and respond to a situation that they may see in practice. Readers can view sample NextGen questions at NextGen Bar Exam Sample Questions – NextGen Bar Exam (ncbex.org).

The current UBE and the NextGen exam share similarities in content relative to doctrinal knowledge: the topics tested on the NextGen exam will include those currently tested on the MBE component of the UBE (civil procedure, contract law, evidence, torts, constitutional law, and criminal law), plus family law and business associations. Additionally, the NextGen exam will test foundational lawyering skills including legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management. By design, the NextGen exam will require candidates to demonstrate more legal skill and rely less on memorization.

Throughout the development of the NextGen exam, and consistent with best practices in high-stakes examinations, NCBE is conducting research testing in three phases: Pilot Testing, Field Testing, and Prototype Testing. Each phase of this research provides qualitative and quantitative data and information to help ensure the next generation of the bar exam tests what it is meant to test and does so in a way that is fair, equitable, and accessible to all candidates. NCBE has conducted the first two phases of research testing, with more than 6,000 law students, including students from six Massachusetts law schools, and newly licensed lawyers nationwide participating to date in research testing. The wealth of data and information collected through research testing informs NCBE's development of the NextGen exam.

Development of a new bar exam is not an easy task, and the participation of hundreds of practicing attorneys, law faculty, justices and judges, and admissions boards and staff has been essential to this endeavor.

Marilyn Wellington was appointed Executive Director of the Massachusetts Board of Bar Examiners by the Massachusetts Supreme Judicial Court in September of 2010 and served in that position until her appointment as Chief Strategy and Operations Officer for NCBE in June of 2022. As Chief Strategy and Operations Officer she oversees NCBE operations, including the development and implementation of the NextGen bar exam, and guides organizational strategic initiatives and priorities.

Legal Analysis

The Improving Law of Judicial Gag Orders

Jeffrey J. Pyle

"The Supreme Court has roundly rejected prior restraint" on speech.[1] Orders that prohibit protected expression in advance have always been considered "the most serious and least tolerable" infringement of First Amendment rights.[2] Most famously, in the Pentagon Papers case, the Supreme Court refused to enjoin the media from publishing a classified U.S. Department of Defense study on the history of the Vietnam conflict despite the government's plea that an injunction was needed to protect national security.[3]

Except, the law sometimes *requires* courts to issue prior restraints. The Supreme Court has held that judges have an affirmative duty to restrain the speech of trial participants to protect the administration of justice against prejudicial outside interference like witness intimidation, jury interference, and threats to court staff. Such orders restraining speech must be sufficiently broad and enforceable to ensure that cases are fairly tried on the merits. At the same time, they can be imposed only when absolutely necessary, and they must be narrowly tailored to give breathing space for free speech on public issues – including harsh and vituperative criticism of judges, prosecutors, and other litigants.[4]

In short, there is not much room for error here. When a court orders a trial participant not to say something, it must navigate between the Scylla of maladministration of justice and the Charybdis of unconstitutional prior restraint.

However, there is some helpful new caselaw on this issue, courtesy of Donald Trump. Over the last several months, courts have issued groundbreaking gag orders against the indicted former president and presumptive Republican nominee. These courts did so after he repeatedly published online posts that caused some of his followers to harass, threaten, and abuse the judges, prosecutors, witnesses – and even a law clerk – involved in cases against him.

Those courts' decisions to gag the former president were understandable, and mostly justified. Some of Trump's posts included ominous and even threatening language. For example, attacking Manhattan District Attorney Alvin Bragg (who filed the first indictment against Trump), Trump wrote, "OUR COUNTRY IS BEING DESTROYED, AS THEY TELL US TO BE PEACEFUL!" – a statement prosecutors argued was a signal to his followers not to be peaceful. In another post, Trump predicted "death & destruction" would come from Bragg's "false charge" that Trump falsified business records. DA Bragg's office said it had "received hundreds of threats in the wake of, and connected to, [Trump's] public attacks."

The Trump cases present extremes on all sides of the gag order issue. The public has an unusually high interest in what Trump has to say. At the same time, his speech has an unusually strong tendency to harm the trial process. This article will summarize the emerging, and generally improving, caselaw on this issue.

What's the Standard?

The standard for imposing a gag order likely depends on which trial participant is being gagged.

Courts impose gag orders on trial counsel based on a relatively relaxed standard of "substantial likelihood of causing material prejudice" to the proceeding. That was the language of the disciplinary rule upheld in *Gentile v. State Bar of Nevada*.[5] The Supreme Court justified this standard based partly on the role of lawyers as "officers of the court," which "subjects them to fiduciary obligations to the court and the parties." The standard is replicated in Mass. R. Prof. C. 3.6(a).

A litigant, of course, has no such fiduciary obligation. In its decision largely upholding U.S. District Court Judge Tanya Chutkan's gag order against Trump in the January 6 criminal prosecution, the U.S. Court of Appeals for the District of Columbia Circuit assumed without deciding that "the most demanding scrutiny" applies to a speech-restricting order against a criminal defendant. To the court, this meant that "only a significant and imminent threat to the administration of criminal justice will support restricting Mr. Trump's speech." Further, such a prior restraint "can be imposed only if narrowly tailored to redress sufficiently serious threats to the criminal justice process and if no less restrictive alternatives are available."[6]

Similarly, the Supreme Judicial Court of Massachusetts held years ago that an order restraining the speech of a litigant "must be justified by a compelling State interest to protect against a serious threat of harm," and must be narrowly tailored to prevent that harm. "It is apparent that any order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available."[7]

What Justifies a Gag Order?

The most common reasons that courts cite to support gag orders are preventing prejudicial outside influence on the jury and on witness testimony. In the prosecution of Whitey Bulger, for example, Judge Denise Casper of the District of Massachusetts issued an order requiring trial counsel to refrain from making extrajudicial statements during the trial in accordance with D.Mass. L.R. 83.2.1(e). That rule stated that no lawyer shall make a statement to the media except to "quote from or refer without comment to public records of the court in the case." Judge Casper held that there is "a compelling interest in avoiding any risk of the jurors' exposure to the extrajudicial statements of counsel about this case," as well as in "insulating witnesses, many of whom have not yet testified," from having their testimony affected by extrajudicial statements. These broad restrictions, she held, served the compelling interest of "protecting the integrity and fairness of trial proceedings."[8]

On the other hand, protecting judges, the government, and high-level prosecutors from criticism is not a compelling governmental interest.[9] In the January 6 case against Trump, Judge Chutkan's order prohibited parties from making *any* public statements that "target" prosecutors or their staff, including Special Counsel Jack Smith. The D.C. Circuit Court of Appeals overturned this portion of the gag order, largely based on the public interest in the handling of prosecutions. As the court explained:

> Prosecutors are vested with immense authority and discretion, including the power to take steps that can result in persons' loss of liberty. The public has a weighty interest in ensuring that such power is exercised responsibly. And criminal defendants facing potential curtailments of liberty have especially strong interests in commenting, within reasonable bounds, on prosecutors' use of their power.[10]

For these reasons, the appellate court overturned Judge Chutkan's order to the extent it "restricted speech about the Special Counsel himself." It held that the special counsel was "no more entitled to protection from lawful public criticism than is the institution he represents." On the other hand, given Trump's documented history of inciting harassment, the court held it was permissible to protect lower-level staff from such comments.[11]

What are Some Reasonable, Less-Restrictive Alternatives?

Before issuing a gag order, courts must consider less-speech-restrictive alternatives. These can include an admonition encouraging trial participants to self-regulate. Shortly after the indictment of Trump in relation to the events of January 6, Judge Chutkan cautioned all parties "to take special care in your public statements about this case," because even "arguably ambiguous statements from parties or their counsel, if they could reasonably be interpreted to intimidate witnesses or to prejudice potential jurors, can threaten the process." The D.C. Circuit Court of Appeals held that this warning helped show that Judge Chutkan considered, and even tried, less restrictive alternatives to suppressing speech.

The Supreme Court has identified several other potential, less-speech-restrictive alternatives, most of which have to do with protecting juries from outside influence. They include questioning prospective jurors, instructing seated jurors to ignore extrajudicial statements, moving the trial to a different location, and postponing the trial. These are the workaday tools of the trade for trial judges seeking to protect the sanctity of the jury. However, as certain courts in the Trump cases have held, where a trial participant's statements are likely to put witnesses or participants in fear of their safety, such alternatives are not an effective substitute for a gag order.

Does Intent Matter?

The standards discussed above look at the likely *effect* of the speech on the administration of justice, not on whether the speaker *intends* to prejudice the proceeding. However, in other contexts, the law frequently restricts speech based on whether the speaker intended to achieve a particular unlawful outcome. For example, state law allows Massachusetts courts to issue harassment prevention orders when a person commits three or more "acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property ...." G.L. c. 258E, § 1. Should judicial gag orders likewise focus on the intent of the speaker?

As noted above, Judge Chutkan was concerned about how Trump's public statements attacking court personnel and prosecutors led to online harassment. Accordingly, she issued an order prohibiting Trump and others involved in the case from "making any public statements, or directing others to make any public statements, that target . . . the Special Counsel prosecuting this

case or his staff . . . any of this court's staff or other supporting personnel. . . ."[12] The D.C. Circuit Court of Appeals held this portion of the order too restrictive, because "targeting" a public official with criticism about their conduct in office can amount to core free speech. Accordingly, the court sought to balance the competing interests by adding a *mens rea* requirement as to statements about line prosecutors, court staff, and their families.

Specifically, the court held that it was appropriate to restrict Trump's speech "concerning counsel and staff members, or their family members, to the extent it is made with either the intent to materially interfere with their work or the knowledge that such interference is highly likely to result." *Mens rea* requirements, the court explained, "lessen the hazard of self-censorship" and allow "breathing room" for speech, while covering the speech most likely to harm the courts' institutional interests. On the other hand, the court noted that such requirements make the imposition of sanctions for violation of the gag order more difficult. New York Supreme Court Judge Juan Merchan later included the similar intent language in a gag order on Trump in the prosecution for falsification of business records.[13]

Conclusion

The decision of the D.C. Circuit Court of Appeals in the January 6 prosecution skillfully navigates the difficult competing interests in gag order cases. It provides strong protection against witness intimidation and harassment, while allowing for ample speech criticizing the government and the court. The decision shows the way toward a more sophisticated and balanced approach to this important issue.

1. Walter Sobchak, *The Big Lebowski* (1998).
2. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
3. *New York Times Co. v. United States*, 403 U.S. 713 (1971).
4. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–612 (1973).
5. 501 U.S. 1030 (1991).
6. *United States v. Trump*, 88 F.4th 990, 1014 (D.C. Cir. 2023), *reh'g denied*, No. 23-3190, 2024 WL 252746 (D.C. Cir. Jan. 23, 2024).
7. *Care & Prot. of Edith*, 421 Mass. 703, 705 (1996).
8. *United States v. Bulger*, No. 99-cr-10371-DJC, 2013 WL 3338749, at *7 (D. Mass. July 1, 2013).
9. See also *Care & Prot. of Edith*, 421 Mass. at 705-706 (holding there was no compelling interest in preventing father from directly or indirectly revealing the names of children subject to care and protection proceeding).
10. *United States v. Trump*, 88 F.4th 990, 1025 (D.C. Cir. 2023), *reh'g denied*, No. 23-3190, 2024 WL 252746 (D.C. Cir. Jan. 23, 2024).
11. Similarly, in the civil fraud case against the Trump Organization, Judge Arthur Engoron prohibited Trump from making any statements attacking court staff (not including the judge himself). The order came after Trump started attacking the judge's law clerk, Allison Greenfield, whom he falsely called "Chuck Schumer's girlfriend."
12. *United States v. Trump*, No. 23-cr-257 (TSC), 2023 WL 6818589, at *2 (D.D.C. Oct. 17, 2023).
13. *People v. Trump*, No. 71 543-23 (N.Y. Sup. Ct., March 26, 2024). As of this writing, Trump faces a motion for sanctions based on his alleged violation of Judge Merchan's gag order some ten times over.

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Case Focus

SJC Holds Broker-Dealers Serving Massachusetts Customers to a Fiduciary Standard

Marley Ann Brumme

In *Robinhood Financial LLC v. Galvin*, 492 Mass. 696 (2023), the SJC approved a 2020 regulation promulgated by the Secretary of the Commonwealth ("Secretary") requiring broker-dealers that provide investment recommendations to retail customers to adhere to fiduciary duties of care and loyalty. This so-called "Fiduciary Rule" raises the standard of conduct applicable to broker-dealers serving Massachusetts customers—even if the broker-dealer is located outside Massachusetts or the recommendation is made outside Massachusetts (*i.e.*, online)—to a fiduciary standard like that applies to investment advisers.

Regulatory Framework

Historically, retail customers have relied on two primary sources of investment advice: (i) investment advisers and (ii) broker-dealers. Investment advisers traditionally provide ongoing portfolio monitoring and management, and generally have full discretion over investment decisions. Because investment advisers provide ongoing services, they are compensated through a fee-based structure—*i.e.*, they charge a periodic fee, usually calculated as a percentage of the amount of the customer's assets under management. In contrast, the primary responsibilities of broker-dealers are to execute trades and sell/distribute securities. Many brokerage firms also offer transaction-specific investment recommendations incidental to their brokerage services. In other words, before buying or selling a security, a customer can receive a recommendation about that transaction. Broker-dealers are generally compensated via a commission per transaction, with no additional fee for any incidental investment advice provided.

In recognition of the different models of advice, federal and Massachusetts law have traditionally imposed different standards of conduct on investment advisers and broker-dealers. Investment advisers generally must comply with a traditional fiduciary duty standard, owing duties of care and loyalty to their clients. In contrast, broker-dealers historically have been held only to a "suitability" standard when providing investment recommendations, which requires them to have a reasonable basis to believe that the recommended investment is suitable for the customer based on information obtained from the customer.

Following the 2007–2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which charged the U.S. Securities and Exchange Commission ("SEC") with studying whether the standard of conduct for broker-dealers should be changed, considering the various costs and benefits of doing so. Following its study, in 2019 the SEC adopted Regulation Best Interest ("Reg BI"), which raised the standard of conduct for broker-dealers to a "best interest" standard—deliberately stopping short of imposing a general fiduciary standard on broker-dealers.

During the rulemaking process for Reg BI, the Secretary was a vocal proponent of the adoption of a universal fiduciary standard. Among other things, relying on a 2008 study by the RAND Corporation, the Secretary asserted that retail investors were fundamentally confused about the differences between investment advisers and broker-dealers. The Secretary noted that investors

were harmed because they (i) mistakenly believed that broker-dealers are required to (and do) act in the customer's best interest and (ii) do not read or understand the types of disclosures that Reg BI proposed to address such confusion by explaining that a broker-dealer may have certain conflicts of interest.

After the SEC instead adopted the best interest standard in Reg BI, the Secretary, under his authority to promulgate regulations implementing the Massachusetts Uniform Securities Act, G.L. c. 110A ("MUSA"), issued the Massachusetts Fiduciary Rule, which deems it an "unethical or dishonest conduct or practice[]" under MUSA for a broker-dealer to "fail[ ] to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening or transferring of assets to any type of account, or the purchase, sale, or exchange of any security." 950 CMR § 12.207(1)(a).

Case Background

Robinhood Financial LLC ("Robinhood") is a web- and app-based investment platform that offers commission-free trading of stocks, exchange-traded funds, and other financial instruments. In 2020, the Secretary brought an administrative proceeding alleging that Robinhood violated the Fiduciary Rule. In particular, the Secretary alleged that Robinhood took advantage of unsophisticated retail investors by encouraging frequent, risky, and unsuitable trading in a manner tantamount to making investment recommendations without first assessing whether those recommendations were in the investors' best interest.

Robinhood sued in the Superior Court, challenging the validity of the Secretary's Fiduciary Rule. Robinhood alleged that (i) the Secretary exceeded his authority in enacting the Fiduciary Rule, (ii) the Fiduciary Rule impermissibly sought to override the common law standard of conduct for broker-dealers set forth in *Patsos v. First Albany Corp.*, 433 Mass. 323 (2001), and (iii) the Fiduciary Rule was preempted by Reg BI. On cross-motions for judgment on the pleadings, the Superior Court held that the Secretary had exceeded his authority under MUSA to promulgate the Fiduciary Rule, and impermissibly overrode the common law.[1]

The SJC's Opinion

On direct appellate review, and considering the issues de novo, the SJC reversed and held that the Secretary acted within his statutory authority in adopting the Fiduciary Rule. Beginning with the proposition that agency rules are presumptively valid, the Court first analyzed the authority granted to the Secretary by the Legislature in MUSA. The Court noted that MUSA grants the Secretary "extensive investigative and enforcement powers," as well as the power to make rules—including rules that "defin[e] any term" whether or not used in MUSA—that "are necessary to carry out the provisions of" MUSA. This rulemaking authority gives the Secretary discretion to promulgate "regulations 'necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of' MUSA."

Against this backdrop, the Court held that the Secretary had not acted ultra vires in adopting the Fiduciary Rule. After describing the investigation conducted by the Secretary prior to adoption

of the rule, the Court noted that the Secretary thereafter "determined that the fiduciary duty rule was necessary to fulfill MUSA's broad investor protection purpose, consistent with the Secretary's obligation to police 'unethical or dishonest conduct or practices.'" Because "unethical or dishonest conduct or practices" are not defined in MUSA and the MUSA gives the Secretary the authority to "defin[e] any term" in MUSA, the Court held that the Fiduciary Rule fell within the Secretary's "broad-ranging," "extensive," and "flexib[le]" authority.

The Court also rejected Robinhood's other theories of invalidity. First, the Court held that the Fiduciary Rule could exist alongside the common law (and, indeed, was "of equal status" with the common law). Illustrating that the two can coexist, the Court held that an investor injured by the conduct of a broker-dealer may have a claim under *Patsos*, but that the Fiduciary Rule gives the Secretary a distinct regulatory enforcement tool to protect investors. Second, the Court held that the Fiduciary Rule was not preempted by Reg BI. Beginning with the presumption against preemption and the "long history" of concurrent regulation of broker-dealers by both state and federal law, the Court noted that the SEC (i) was aware when it adopted Reg BI that certain states already imposed a fiduciary standard on broker-dealers, but (ii) specifically declined to express any intent to preempt such laws. Accordingly, the Court held that Reg BI sets a floor for the standard of conduct for broker-dealers, but permits states to impose a higher standard for the purposes of enhanced investor protection.

Implications

With the SJC's blessing of the Fiduciary Rule, Massachusetts is now one of several states that impose a fiduciary standard on broker-dealers when they provide investment advice or recommendations to retail customers. Notably, these standards vary from state to state. Broker-dealers operating nationally will thus need to ensure that their sales and other practices comply with the small patchwork of legal requirements created by the coexistence of Reg BI and state standards like the Fiduciary Rule. While the full effect of the Fiduciary Rule on broker-dealers is yet to be seen, compliance is likely to be costly. Whatever the final effect on broker-dealers, however, Massachusetts consumers are officially owed fiduciary duties when receiving investment advice or recommendations—no matter whether they come from an investment adviser or a broker-dealer.

1. The Superior Court did not consider Robinhood's preemption argument.

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Legal Analysis

Easements Taken by Eminent Domain Still Subject to General Rules of Construction

Shamus J. Hyland

Introduction

The Massachusetts Supreme Judicial Court ("SJC") in *Smiley First LLC v. Department of Transportation*, 492 Mass. 103 (2023) recently clarified how to determine the scope of easement interests taken by public entities via eminent domain. The Court concluded that, while the intent of the parties to a taking should be disregarded when determining the extent of an easement interest, "the ordinary rules of interpretation for easements otherwise apply." *Id.* at 104-05. Therefore, easements taken by eminent domain are still amenable to classic property law rules of construction including that doubts about the scope of an easement should be resolved in favor of "freedom of land from servitude." *Id.* at 109. As a result, if a condemnor later enlarges the scope of a taken easement, the burdened property owner may be owed compensation. *Smiley* also underscores the importance of careful drafting in takings and easement interests, as the principles of statutory interpretation apply when interpreting the text of the taking order.

Case Background

Smiley centered on an easement interest taken by eminent domain in 1991 by the Massachusetts Department of Transportation's ("MassDOT") predecessor in interest, the Massachusetts Department of Public Works ("DPW"). The purpose of the easement was "the relocation of the facilities of the Consolidated Rail Corporation [(Conrail)]," which were to be displaced by construction related to the "Big Dig." *Id*. at 104. The easement was "for railroad purposes only." *Id*. The taking order also contained a license for Conrail to use the easement for ancillary "railroad purposes." *Id*. Pursuant to the easement, Conrail relocated its main rail line to a single track that crosses what is now the property of Smiley First LLC ("Smiley"). *Id*.

In 2017, MassDOT announced that it was sponsoring an MBTA project to construct a 6,000 sq. ft. building and test track for newly purchased Red Line subway cars. MassDOT authorized the project in reliance on the 1991 taking, citing the language of "railroad purposes" in the original instrument. Smiley, the owner of the burdened land, objected to the easement's scope and challenged MassDOT's newly contemplated use in the Land Court. In response, MassDOT recorded a 2018 confirmatory order of taking of the 1991 easement and "publicly declared that the entirety of the burdened land on Smiley's property was subject to the MBTA's exclusive use for any railroad purpose, including the Red Line test track project." *Id*. at 106-07.

Eventually, the dispute made its way to Superior Court, where Smiley sought a declaratory judgment concerning the parties' respective rights under the 1991 easement as of January 11, 2018 (the day before the 2018 taking), and damages. The Superior Court granted summary judgment in favor of MassDOT, taking a capacious view of "railroad purposes" language in the 1991 easement. The Superior Court also found Smiley's reliance on general easement principles unavailing "because they derive from cases that concern transfers or prescriptive rights involving *private parties*." *Id.* at 108 (citations omitted) (emphasis in original).

The SJC disagreed. Easements taken by eminent domain, the court concluded, "must be construed in light of the language of the order of taking and the circumstances surrounding the taking," but "the intents of the owner and government entity taking the easement are not relevant." *Id.* at 109 (citing *Mugar v. Massachusetts Bay Transp. Auth.*, 28 Mass. App. Ct. 443, 445 (1990)). The SJC explained that the intentions of the parties to a taking are irrelevant because: (1) the taking for a public purpose is effective without the consent of the owner; and (2) the intent of the government is "largely beyond the scope of judicial scrutiny." *Id*. at 108.

At the same time, the Court noted that while a party's intent is irrelevant, traditional legal principles governing easements still apply, even in the eminent domain context. In particular:

- "Restrictions on land are disfavored;"
- "[D]oubts concerning the rights of use of easement are to be resolved in favor of freedom of land from servitude;" and
- "[T]he servient owner retains the use of his [or her] land for all purposes except such as are inconsistent with the right granted to the dominant owner or acquired by that owner."

The SJC held that the lower court erred in suggesting these principles are relevant only as to easements between private parties. *Id.*

The upshot is that a court should disregard the intents of the parties to an easement taking but must otherwise apply all traditional principles of construction to determine the easement's scope.

As applied in *Smiley*, the express language of the 1991 taking limited the easement. Its purpose "was to facilitate the laying out of the State highway for the Central Artery/Tunnel Project by relocat[ing] portions of railroad rights of way." *Id*. at 110. The taking specifically mentioned the relocation of Conrail facilities. Notwithstanding the language regarding "railroad purposes," the license did not open up the land for any railroad-related usage decades later. In concert with the language of the taking order, the license was "to partially replace and restore the [c]urrent [Conrail] Rail Facilities and Conrail Land affected or eliminated by the Haul Road." *Id*. The Court held that once Conrail relocated its single track to the burdened property, "the scope of the easement … was fixed and limited to the right of way occupied by Conrail's track and the vertical dimension above it." *Id.* at 111.

MassDOT's argument before the SJC relied on *Leroy v. Worcester Street Railway Co.*, 287 Mass. 1, 10-15 (1934), which held that an easement taken for one public purpose may be used for a "public use of a like kind." *Smiley First*, 492 Mass. at 114-15. In *Leroy*, a permanent easement taken for a steam railway could be used for a motor bus in the same easement corridor because "the essential purpose was to . . . transport members of the public." *Leroy*, 287 Mass. at 12. The SJC disagreed with MassDOT, contrasting the 1991 taking's provision to relocate Conrail operations, which ended up on a single track, with the MBTA's proposal to construct a test track, a new building, and an additional track. Set against the default principle that easements should be narrowly construed, the court found the new test track project too far removed from

the original purpose and scope of the 1991 taking. The new use amounted to a new compensable taking. *Smiley First*, 492 Mass. at 115-16.

Some Practical Considerations

The *Smiley* decision is significant for government or quasi-government agencies with eminent domain power. Practitioners should be aware that, in the takings context, basic easement construction principles still apply. When drafting easement interests, stakeholders should consider how to frame the taking to accomplish public purposes but avoid circumscribing the easement to prevent future uses. As the SJC found in *Smiley* "in exercising the power of eminent domain in 1991, DPW had the power to choose how it wished to articulate the scope of the easement. If it had intended to establish a perpetual right to occupy all of the burdened property, then it could have done so unequivocally, but it did not." *Id*. at 116. The same reasoning applies when the contemplated use is diminished relative to the scope of the original taking. *See Mugar*, 28 Mass. App. Ct. at 447.

When pursuing new projects in reliance upon existing property interests, government actors should scrutinize the text of older taking orders. Broad language adverting to public purposes may suffice to vest the interest but may not be enough to avoid compensating a burdened owner for what could be ruled an augmented use. Depending on the entity's needs, budget, and overall project goals, operative language should be tailored to specific ends, or else remain broad enough to cover future uses "of a like kind."

For All 'Intents' and 'Purposes'

Smiley also raised interesting questions about "purpose" and "intent." In the eminent domain context, "[j]udicial review is limited to the questions whether a taking was made for a legitimate public purpose, . . . and whether the deprived landowner received just compensation." *Mugar*, 28 Mass. App. Ct. at 446 (citations omitted). On the one hand, *Smiley* affirmed that "principles of interpretation designed to give effect to the express or implied *intent* of parties contracting for or acquiring an interest in land . . . are, *in general*, inapplicable to eminent domain proceedings." *Smiley*, 492 Mass. at 109 (citations omitted) (emphasis added). On the other hand, a central consideration for courts interpreting the scope of an easement taken by eminent domain is the "*purpose* of the taking" because the dominant estate's interest is limited "to the extent reasonably necessary for the purpose of the taking." *Id*. at 105 (citation omitted) (emphasis added).

In practice, what does it mean to disregard the parties' "intent" and only examine the taking's "purpose"? Is it possible to conceptualize a taking's "purpose" apart from the condemnor's "intent"? An eminent domain easement must be construed not only "in light of the language of the order of taking" but also by "the circumstances surrounding the taking." *Id*. at 108. What counts as a relevant circumstance? And what if the "circumstances" conflict with the text of the taking order? As *Smiley* shows, even enumerated purposes in the text can be vague enough to sow doubt about the extent of a property interest.

One source of conceptual tension: courts are required to read taking orders like statutes. "An order of taking in writing, duly recorded, in conformity with the statute authorizing the order of

taking, is to be treated as if it were a statute." *General Hosp. Corp. v. Massachusetts Bay Transp. Auth.*, 423 Mass. 759, 764 n.3 (1996) (citing *Boston v. Talbot*, 206 Mass. 82, 90 (1910)). In Massachusetts, "the primary goal in interpreting a statute is to effectuate the intent of the Legislature." *Casseus v. Eastern Bus Co.*, 478 Mass. 786, 795 (2018). If construing a taking order is a species of statutory interpretation, then the aim (in theory) should be to effectuate background "intent." But *Smiley* reaffirms that intent is "not relevant." Thus, a court must determine the scope of a taken easement in light of its abstract "purpose," but disregard the intent of the entity that issued the taking order. Further, if the analogy to statutory interpretation holds, then defining the compass of an easement is attended by the challenges confronting statutory interpretation in general.[1]

Another possible source of confusion is that the "purpose" of a taking or connected takings may be broader than the specific "purpose" served by an easement ancillary to the overall project. One approach would gloss "purpose" as the abstract general purpose of the "enactment"—here, the taking order—and eschew trickier nuances of "intent" as they apply to a particular condemnation. In *Smiley*, the SJC adverted to the "overarching governing purpose" of relocating Conrail's right of way, which prevailed over MassDOT's later (and broader) reading of the "railroad purposes only" provision. *Smiley,* 492 Mass. at 114.

As in statutory interpretation, the text of a taking order is paramount. But divining the "purpose served by the taking" or the "overarching governing purpose" may well require reconstructing the "intent" of the condemnor. What was the condemnor trying to accomplish with this particular property interest? How did the easement fit into the larger plan? Answering such questions may be at odds with the principle that the intent of a governmental entity is "largely beyond judicial scrutiny." But, as the SJC pointed out long ago, allowing parties to inquire into the motive of the government entity exercising eminent domain "would be seriously to hamper public officers in the performance of duties necessary to the public welfare," could lead to additional unnecessary litigation, and would undermine the ordinary presumption that government officials act in good faith. *Despatchers' Cafe, Inc. v. Somerville Hous. Auth.*, 332 Mass. 259, 263 (1955). The Court allowed that there could be a rare future case in which the government acted in bad faith in exercise the eminent domain power, and that a landowner could challenge the taking on that ground. *Id.* at 263-64. But scrutinizing intent is rare, and the bar to prove bad faith is high. As the SJC has explained, "[w]e should not easily attribute improper motives to a town and to its citizens voting at town meeting" in effecting a taking, "if there were valid reasons that would have supported the town's action." *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 399 Mass. 771, 777 (1986).[2]

In view of the conceptual blurring between purpose and intent, litigants may continue to test boundaries and challenge the "impelling motives" of a taking where the overall "purpose" is sufficiently vague. "Overarching governing purpose" may be a focus of litigation where the text of a taking order is vague or ambiguous. As a matter of good practice, taking entities should remain transparent about their aims and draft clear taking orders mindful of the usual rules governing construction of easements.

1. For some history and analysis of the problems surrounding statutory interpretation and legislative intent, see generally, John F. Manning, Without the Pretense of Legislative Intent, 130 Harv. L. Rev. 2397 (2017).

2. *See also Boston v. Talbot*, 206 Mass. 82, 90 (1910) ("The 'sense of the commission,' the belief of the commission, and the 'conclusion' of the commission in reference to the taking, are to be determined from their final act of taking. The offers, in these particulars, seem to be attempts to show the views and opinions of individual members of the commission, which could not be put in evidence.").

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Case Focus

The Juvenile Justice System: The Impact of Rehabilitation on Juvenile Custody

Brooke Hartley

The overriding purpose of the juvenile justice system is rehabilitation not punishment. The juvenile justice system recognizes the inherent differences between juvenile and adult offenders. At its core, the system is built upon the principle that children who commit crimes have diminished culpability and a greater capacity for change than adults. *See* *Miller v. Alabama*, 567 U.S. 460, 479 (2012). The Supreme Judicial Court and the Massachusetts Appeals Court have recently clarified how this principle shapes the law regarding the custody of juveniles. The Courts have reaffirmed that rehabilitation should be the guiding principle of the juvenile justice system in the context of juvenile custody determinations, except in the case of juveniles charged with murder.

Juveniles can be divided into three different categories depending on the gravity of the crime with which the juvenile is charged: (1) juveniles under the jurisdiction of the Juvenile Court and committed to the custody of the Department of Youth Services ("DYS"); (2) juveniles indicted as youthful offenders who may receive an adult sentence or who may be held in DYS custody; and (3) juveniles charged with murder who are treated as adults. This article addresses changes and clarifications in the law regarding the custody status of the first and third categories of juveniles.

The first category of juveniles, juveniles under the jurisdiction of the Juvenile Court and committed to the custody of the DYS, are entitled to rehabilitative services rather than punishment. In *Commonwealth v. Noah N.*, 489 Mass. 498 (2022), the Supreme Judicial Court addressed the custody status of these juveniles. In relevant part, G.L. c. 119, § 58, expressly states that a juvenile's commitment to the custody of DYS will end when the juvenile reaches the age of eighteen. Under certain circumstances, however, the Juvenile Court has continuing jurisdiction after the juvenile turns eighteen. General Laws c. 119, § 72(a) provides that "[t]he divisions of the juvenile court department shall continue to have jurisdiction over children who attain their eighteenth birthday pending final adjudication of their cases." Practically speaking, this provision leads many juveniles to resolve their cases immediately before turning eighteen. Unless final adjudication of the case is pending, the juvenile will receive rehabilitative services through DYS only until his or her eighteenth birthday, when the Juvenile Court loses jurisdiction and the case is disposed.

In *Noah N.*, 489 Mass. at 499, the juvenile filed a tender of plea form approximately one month before his eighteenth birthday. A week later, the Commonwealth moved to continue sentencing until after the juvenile's eighteenth birthday, contending that there was not sufficient time for rehabilitation. Such a continuance would have prevented the case from reaching final adjudication before the juvenile's eighteenth birthday and thus allowed the Juvenile Court jurisdiction over the juvenile for another year, until his nineteenth birthday. The Supreme Judicial Court addressed whether a Juvenile Court judge can allow such a continuance for the express purpose of extending the juvenile's DYS commitment. The Court concluded that such a continuance may be allowed only if, after an evidentiary hearing, the Commonwealth can prove by clear and convincing evidence that continued commitment is necessary to ensure rehabilitation of the juvenile. *Id.*, 489 Mass. at 499. In so holding, the Court considered the statutory requirements of G.L. c. 119, § 58

and Mass. R. Crim. P. 10(a) (1), as well as the overriding purpose of the juvenile justice system—rehabilitation. *Id*. at 502.

More recently, the Appeals Court provided specific guidance on how judges should determine whether continued commitment is necessary to ensure rehabilitation of juveniles in the first category. In *Commonwealth v. Steve S.*, 103 Mass. App. Ct. 691 (2024), the Appeals Court applied the *Noah N*. framework to a case with a similarly situated juvenile that was pending on direct appeal when *Noah N*. was decided. In *Steve S.*, the Court provided further guidance as to how the Commonwealth may meet its burden to prove by clear and convincing evidence that continued commitment is necessary to ensure rehabilitation of the juvenile. Despite not having the benefit of the *Noah N*. decision, the Juvenile Court judge satisfied the requirements of *Noah N*. by holding an evidentiary hearing and making detailed findings as to whether a continuance past the juvenile's eighteenth birthday was necessary to ensure his rehabilitation. *Steve S*., 103 Mass. App. Ct. at 699-700. Significantly, although *Noah N*. placed the burden on the Commonwealth, it did not prohibit the Commonwealth from meeting its burden by using trial evidence. *Id*. at 699. Moreover, *Noah N*. did not require the Commonwealth to introduce any such evidence twice. *Id*. Where the Commonwealth's motion to continue was filed after a bench trial, the Appeals Court concluded that the evidence presented at trial was sufficient to meet the Commonwealth's burden. *Id*. Accordingly, the Commonwealth met its burden without presenting any evidence at the hearing. *Id*. Had the Commonwealth's motion been filed pretrial or in anticipation of a plea, as in *Noah N*., the Commonwealth would need to present sufficient evidence at the hearing to satisfy its burden.

The Appeals Court also concluded that the Commonwealth met the "clear and convincing" standard required by *Noah N*. even though the Juvenile Court judge did not articulate what standard was applied when assessing the juvenile's need for rehabilitation. *Id*. at 700. "[T]he standard was easily met" where the juvenile did not contend that any of the judge's findings made in connection with the motion were erroneous, nor did he challenge the subsidiary findings underlying his adjudication of delinquency. *Id*. Despite not having the benefit of the *Noah N*. decision, the Appeals Court concluded that "the central purpose, thrust, and procedural safeguards of Noah N. were clearly satisfied" in *Steve S*. *Id*. at 698.

In *Steve S*., the juvenile also argued that *Noah N*. is in tension with *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The juvenile contended that the *Noah N*. framework improperly permits a judge to extend a commitment period based on a need for rehabilitation when such a determination should be made only by a jury. The Appeals Court did not address the merits of this argument, recognizing that it has "no power to alter, overrule or decline to follow the holding of cases the Supreme Judicial Court has decided." *Steve S*., 103 Mass. App. Ct. at 701, quoting *Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485 (2003). The Supreme Judicial Court denied further appellate review.

Unlike the juveniles in *Noah N*. and *Steve S*., the third category of juveniles, those charged with murder, are the exception to the rule because of the seriousness of the crime. The legislature has expressed a clear intent through the provisions of G. L. c. 119, that juveniles charged with murder are to be treated as adults and thus "are not entitled to the benefit of [the] juvenile justice system."

Commonwealth v. Soto, 476 Mass. 436, 439 (2017). The legislature's intent to treat such individuals as adults is grounded in public safety policy. *See Nicholas-Taylor v. Commonwealth*, 490 Mass., 552 at 557 (2022). Accordingly, G.L. c. 119, § 68, requires that a juvenile offender charged with murder and held pending trial be committed to the custody of the sheriff, rather than DYS.

In *Nicholas-Taylor*, the Supreme Judicial Court considered the pretrial custody status of juveniles charged with murder and concluded that judges have no discretion to allow such persons the benefits of the juvenile justice system. *Id.*, 490 Mass. at 553. There, the juvenile was charged with murder and armed assault with intent to rob. The juvenile argued that the judge had discretion to craft a bail order releasing the juvenile on personal recognizance on the murder charge and ordering the defendant held without bail on the nonmurder charge so that he could continue to be held in DYS custody after his eighteenth birthday. *Id.* at 552-553. The Court concluded that while the judge has discretion to release the juvenile defendant on bail or even personal recognizance, if the juvenile is not released, he must be committed to the custody of the sheriff because of the murder charge. *Id*. at 557. There is no justification for treating juveniles who have been charged with murder and a nonmurder offense properly joined different than juveniles charged solely with murder. *Id*.

These recent decisions reflect the Supreme Judicial Court's continuing desire to support "the correction and redemption to society of delinquent children." *Commonwealth v. Humberto H*. 466 Mass. 562 (2013). Where the juvenile is charged with murder, however, the law remains clear: he or she is less deserving of "aid, encouragement and guidance" and therefore not entitled to the benefits of the juvenile justice system. *See* G.L. c. 119, § 53.

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The Profession

GenAI is Not a Legal Tool. Or is it?

Dyane O'Leary

Artificial intelligence, or AI, has held a spot in legal workflows for years (e.g., natural language searching). But when ChatGPT exploded on the scene as the fastest growing consumer app ever, it sparked fresh enthusiasm and interest about this new "Generative AI" or "GenAI"—along with skepticism and distrust from a historically conservative profession.

On the one hand, the technology is mind-blowing. It strikes at the heart of something many lawyers consider their most precious commodity: words. The machine learning that fuels large language models on which tools like ChatGPT are based is a super-charged distant cousin of the basic predictive text and autocomplete we enjoy on smartphones. A common refrain is that these tools simply "predict the next word." True, but oversimplified. Based on more training language than we can imagine (in some cases, the entire internet), these systems make billions of mathematical language connections, mimicking human patterns, context, syntax, and creativity.
On the other hand, GenAI is just that: a tool. Some lawyers use contract analytics software, others don't. Some use knowledge management tools, others Ctrl-F their way through old files. The ins and outs of work product and the business administration of law are nuanced. The end goal is competent client representation, and lawyers enjoy endless choices among process paths.

So how do we navigate this new GenAI era? Sensationalized stories of AI making up cases (known as hallucinations) are serious, but they are a sliver of a complicated and evolving picture. It is easy to dismiss the chatter as hype; it is much harder to separate fact from fiction and stay "abreast" of the "benefits and risks associated with relevant technology" per Comment 8 of Mass. R. Prof. Conduct 1.1. At this early stage in the arc of new technology, here are some baseline "Need to Knows":

- **Not All GenAI Tools Are the Same**: "ChatGPT" is misused as a generic term for every GenAI platform. In a year's time, the market has flooded with competition for the next best language model tool, whether free, paid, or an enterprise version designed for an organization or business. The differences between these tools are real, from how many characters are accepted in a prompt (the instructions a user provides to the AI) to whether a user can upload their own document(s) against which the tool works its magic. Behind these generic models, a laundry list of "GenAI for lawyers" offerings emerge. *See, e.g.*, AI Tools for Lawyers: Improving Efficiency & Productivity in Law Firms, www.clio.com; https://theresanaiforthat.com/. Compared to public models, most of these tools—especially those from reputable legal research and law practice management providers—tout two notes that should be music to lawyers' ears: (a) greater security for work product and client information; and (b) greater protection against hallucinations. This is because the models work with source-specific guardrails around them, such as a trusted legal database of primary law or a set of deposition transcripts. And they purport to do so with the same level of security lawyers have relied on for decades to, for example, protect online search term queries. They combine the word-prediction power of GenAI with familiar and reliable sources of legal information. So what tools should you use? That depends on why and how you are

using it. One size does not fit all. Appreciate and research the differences. Choose wisely.

- **The Art of Prompting:** Speaking of use, 'garbage in' will result in 'garbage out'. Prompting is an interactive back-and-forth akin to directing a junior colleague—not a one-stop quick natural language search extracting a phrase on Google or a research database. Effective prompting is rarely a one-and-done task. Tools are growing more powerful but for now, prompting still matters, especially with non-legal tools. The instructions combine to direct the vast spinning wheel of the model where to land. Here are some tips:

    - Persona Priming: Offer context & background *"You are a lawyer interested in a simple and accessible writing tone for someone without a legal background."*

    - Prompt the Task: Give specific instructions. "*Draft a description of what reasonable accommodations mean in the context of the ADA*."

    - Specify Format & Adjust/Polish: Adjust outputs. "*Turn that summary of ADA law into a bullet point list with ten different one-sentence ideas*."

- **Finding Best Use Cases**: Legal work ranges from the more mundane (organize, summarize, edit) to substantive (analyze, compare, argue). GenAI will not fit every step. Builders do not use a wrench to hammer a nail. It could work in a pinch but it is not the best tool to use. So why is it a surprise when a model trained on internet language, from Reddit comments to random websites, cannot provide a correct legal citation and perfect cover email for a nuanced query? That's not its best use. GenAI is great at summarization and extraction. New whitepaper on a hot issue? Digest it in seconds. Struggling to get past the blank page for marketing content? Prompt a first draft. Preparing a witness for trial? Ask GenAI for a moot cross-examination outline. Creating a novel policy-driven argument in an appellate brief? GenAI may not be your best bet. Consider GenAI a productivity tool in more legal-adjacent aspects of work.

- **The Ethics of GenAI Use:** This topic alone deserves a deep dive. *See* Andrew M. Perlman, The Legal Ethics of Generative AI, Suffolk U. L. Rev. (forthcoming 2024) (Feb. 22, 2024 draft). State bars such as Florida and California published early advisory opinions. *See* FL. Eth. Op. 24-1 (Fla. State Bar Ass'n. Jan 19, 2024); State Bar Standing Comm. On Pro. Responsibility and Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, State Bar of Cal. 1, 1 (Nov. 16, 2023). There is a growing list of judicial admonishments of lawyers who included fictitious case citations in filings, starting with the Southern District of New York in June 2023 and then in our own backyard from Massachusetts Judge Brian Davis in February 2024. *See Mata v. Avianca*, No. 22-cv-1461, (S.D.N.Y. June 22, 2023); *Smith v. Farwell*, No. 2282-cv-01197 (Mass. Super. Ct. Feb. 12, 2024). Though plenty of gray area remains, some themes are emerging:

- Rule 1.1 Competence & Rule 1.3 Diligence: These rules capture the duty to "trust but verify" outputs. Blind acceptance is at best risky. Consider a sliding scale. The more important and nuanced the use, the more verification is needed with primary sources. The more basic the use, as with a quick summary, for example, the less verification might be needed. Reviewing GenAI outputs requires what these rules have always required: careful discretion.

- Rule 1.6 Confidentiality: Lawyers have long been advised to use "reasonable efforts" to ensure ethical use of third-party software providers for storing or transmitting client information and work product over the internet. *See, e.g.*, ABA Standing Comm. on Ethics & Prof. Resp., Formal Op. 477R (2017) and Formal Op. 498 (2021); *see also* Mass. R. Prof. Conduct 5.3 Cmt. 3. Absent informed consent, prompting a public tool like ChatGPT with client information or uploading work product would likely not be permissible, since even with opt-out choices in the terms of service, many companies offering free versions retain the right to review and use inputs to train underlying language models. But paid enterprise versions or law-specific tools from reputable providers may offer the same data protection procedures lawyers have relied on to use common internet tools like Westlaw, Microsoft OneDrive, and Zoom. The tool-specific details matter.

- Rule 3.3 Candor Toward the Tribunal: Several courts and judges instituted orders requiring lawyers to disclose use of AI in filings. *See* Ropes & Gray, Artificial Intelligence Court Order Tracker. This wave seems to have crested for now, but lawyers should know of the possibility of these orders—especially in federal court—and ensure compliance.

- Rule 5.3 Nonlawyer Assistance: Supervision extends to human assistants with whom a lawyer works and non-human technology assistance. Beyond diligence in selecting vendors and monitoring compliance, lawyers must give paralegals, support staff, and other specialists training and direction about policies or prohibitions. Law students joining the bar are the ChatGPT generation. They will depend on guidance to transition personal habits into new professional environments.

Plenty of other questions remain—chief among them involves Rule 1.4 Client Communication. Most guidance stops short of mandating disclosure to a client of use of GenAI. Lawyers likely do not disclose particulars of tools such as calendaring systems or trial presentation technologies. But guidance suggests a balance based on the risks and intended manner and scope of the use. The question may not be whether you must inform clients but whether you should. And what about fees? No lawyer wants to field a call from a client confused about an expensive "prompting" time entry. Lawyers can charge for time spent using GenAI tools under Rule 1.5 but of course should not overbill when significant time was saved.

So is GenAI a legal tool? In the right hands with the right approach under the right ethical boundaries, sure—it is "superhuman legal support." *Smith v. Farwell*, *supra*. But it can also be a distracting toy. Unless it is for personal experimentation, use of GenAI for the sake of using GenAI

is a waste of time. Legal tools are a means to an end: competent client representation. As lawyers, we will still have our place. Technology will too. The key is how we will work together.

Professor Dyane O'Leary directs the Legal Innovation & Technology Institute at Suffolk University Law School and is the author of Legal Innovation & Technology: A Practical Skills Guide for the Modern Lawyer. *Nothing in this article is offered as legal advice or ethics guidance and lawyers should consult updated jurisdiction-specific materials.*

Case Focus

Openshaw v. Openshaw: Savings Can be Considered as a Part of a Recipient Spouse's Need for Calculating Alimony

Rachael Soun

In *Openshaw v. Openshaw,* 493 Mass. 599 (2024), the Supreme Judicial Court ("SJC") for the first time faced the question of whether a Probate & Family Court judge may consider a divorcing couple's custom of saving money when determining the amount of alimony to be awarded. In this hotly anticipated decision, the SJC held that a judge may consider savings as a part of an alimony recipient's need if the record supports an ongoing practice of saving during the marriage and there is sufficient income post-divorce to support both parties.

Background

The parties had been married for nearly thirty years. They had six children and enjoyed an upper middle-class lifestyle. During the two full years preceding their separation, the parties reported over $1.3 million in annual income. The record reflected that the parties were able to regularly contribute portions of their income to investments and savings because of their modest spending compared to their earnings. Each month, the parties transferred any remaining funds after expenses to their investment and retirement accounts. They also consistently donated approximately ten percent of their income to their church in accordance with the tenets of their faith. At the time of their divorce, the parties' marital estate amounted to at least $4.5 million, a large portion of which was in the form of checking, savings, investments, and retirement accounts.

Following a trial in which custody, alimony, child support and division of assets were all contested, the trial judge entered a judgment of divorce nisi which, in relevant part, required the husband to pay to the wife the sum of $5,020 per week in alimony. That amount represented what the court found to be the wife's expenses and was inclusive of $1,000 per week in savings and $730.64 per week in charitable giving. The trial judge also divided the marital estate with the wife retaining fifty-five percent of the assets and the husband retaining the remainder, along with $343,280 of liabilities which were mostly comprised of the family's 2020 and 2021 tax liabilities. The husband appealed those portions of the judgment.

The *Openshaw* Decision

In determining whether a spouse's need for alimony purposes can include savings, the SJC reviewed G.L. c. 208, § 53(a) ("the alimony statute"). The alimony statute enumerates certain factors that a judge must consider when fashioning an order for alimony. One of those factors is the parties' "marital lifestyle." In reviewing the alimony statute's construction as well as case law and dictionary definitions of "lifestyle," the SJC concluded: "the plain meaning of the alimony statute's directive that the judge must consider the 'marital lifestyle' and the 'ability of each party to maintain the marital lifestyle' requires consideration of saving where the evidentiary record shows it was a regular practice during the marriage." *Openshaw*, 493 Mass. at 605.

The SJC determined that in the same way a divorcing couple's recent lavish spending on vacations or other luxuries would be considered in determining a recipient spouse's need for alimony, so too would a couple's customary allocation of income to savings. *Id.* at 605-07. "Saving" should, therefore, not be considered any differently than "consumption" if it constituted

a part of the parties' practice while they were still married. *Id.* The SJC went on to cite cases from Utah and California that likewise considered the practice of saving in an alimony recipient's need in holding that to do otherwise would be to penalize those who make wise financial decisions during their marriage. *Id.* at 608-09.

The SJC considered the husband's position that the parties' historical practice of saving was recognized in the assets that the wife was to retain after their divorce and that it could also be considered in the award of alimony. The SJC cited to a New Jersey case in concluding that where post-divorce income is sufficient for each party to continue living the marital lifestyle, the alimony awarded should include the parties' historical savings: "it is not equitable to require the wife to rely solely on the assets she received through equitable distribution to support the standard of living while the husband is not confronted with the same burden." *Id.* at 609, quoting, *Lombardi v. Lombardi,* 477 N.J. Super, 26, 40 (App. Civ. 2016). Interestingly, the SJC noted that it joins "the vast majority of jurisdictions" in that conclusion and cited many of those decisions in footnote 20. *Openshaw,* 493 Mass. at 609, n.20.

The SJC also considered the husband's position that the trial court erred by crediting the wife's expenses as reflected on her trial financial statement rather than the calculations and analyses he presented at trial. The SJC concluded that the trial court did not abuse its discretion in its calculation of the wife's need and that the judgment, findings, and rationale reflected that the trial court considered all the mandatory factors of the alimony statute.

The husband raised a secondary issue relating to the allocation of liabilities in the divorce judgment. The liabilities were largely comprised of the husband's tax debts accrued during years in which the parties filed separate tax returns. The assignment of that debt resulted in the husband getting far less of the marital estate than the forty-five percent that the trial court stated it intended him to receive. The SJC found the liabilities to be marital and remanded the matter to the trial court for further proceedings solely with respect to the assignment of liabilities.

Conclusion

The *Openshaw* decision allows for savings to be considered a part of an alimony recipient's needs if: (1) there is a clear record and pattern of saving by the parties during their marriage; and (2) there is sufficient income post-divorce to allow both parties to maintain the standard of living enjoyed during the marriage. Although the tension between "need" versus "ability to pay" is nothing new with regards to alimony in Massachusetts, the now clear precedent of including savings in a recipient's "need" will certainly change the way that courts and litigants will approach alimony cases for high wage earners going forward.

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Legal Analysis

One Less Arrow in Defense Counsel's Quiver: Personal Jurisdiction in the First Circuit After *Ford Motor Company*

Devin K. Bolger & Trevor J. Brown

Did the United States Supreme Court upend specific jurisdiction in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021)? Not quite. But the Court did rule for the first time that due process does not require a causal link between the defendant's activities in the forum and the alleged injury to the plaintiff. This case calls into question decades of precedent in the U.S. Court of Appeals for the First Circuit suggesting otherwise. Since *Ford*, however, First Circuit district courts have continued to cite older cases, sometimes for propositions that now appear tenuous. The First Circuit, moreover, has yet to clarify what *Ford* means for its earlier cases. Until it does, defense counsel should tread carefully when citing pre-*Ford* cases in personal jurisdiction motion practice.

Personal Jurisdiction Before *Ford*

The constitutional analysis for specific personal jurisdiction has three well-established prongs: relatedness; purposeful availment; and reasonableness.[1] The relatedness prong focuses on the nexus between the defendant's activities in the forum and the plaintiff's cause of action. As courts often put it, claims must "arise out of or relate to" the defendant's conduct in the forum. *See, e.g.*, *Sawtelle v. Farrell*, 70 F.3d 1381, 1388-89 (1st Cir. 1995).

For many years, First Circuit precedent suggested that, in personal injury cases, causation was a *per se* element of relatedness.[2] In a seminal case, *Nowak v. Tak How Investments Ltd.*, the court explained that relatedness "ensures that the element of causation remains in the forefront of the due process investigation." 94 F.3d 708, 714 (1st Cir. 1996) (citation omitted). This emphasis on causation, the court observed, was widely shared among federal courts. But courts differed on "the proper causative threshold, gravitating, in most cases, towards one of two causation tests: 'but for' or proximate cause." *Id.* The court ultimately decided that "the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability." *Id.* at 715. The court in *Nowak* recognized a "narrow exception to the proximate cause test" when a foreign corporation targets residents of a given forum to further a business relationship there, and those "efforts lead to a tortious result." *Id.* at 716. The court described this exception as "a small overlay of 'but for' on 'proximate cause.'" *Id.* Later cases reaffirmed that "due process demands something like a 'proximate cause' nexus." *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (quoting *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d 59, 63 (1st Cir. 2002)). These cases left little room for doubt that *some* causation was required, even if the standard was flexible in some circumstances.

This flexibility left ample room for advocacy. For example, imagine you represent a global automobile manufacturer in a pre-*Ford* products liability case. The plaintiff sued in the federal district where she lives and was injured by the vehicle your client designed, manufactured, and sold. Your client advertises and sells many vehicles—including the allegedly defective model involved in the accident—in that same district. But your client is neither incorporated nor headquartered there, and the vehicle that injured the plaintiff was designed, manufactured, and

purchased in a different district. On these facts, you might have a specific personal jurisdiction defense: the complaint does not draw a sufficient causal link between your client's general business activities in the forum and the plaintiff's injury. Plaintiff's counsel might counter that "but for" your client's presence in the forum, and the assumed brand awareness arising from that presence, the subject vehicle likely would not have ended up there. No matter. You have at your disposal First Circuit cases suggesting that due process demands a much stronger causal link—something approaching proximate cause—between your client's forum activities and the alleged injuries. *See, e.g.*, *Harlow*, 432 F.3d at 61 ("A broad 'but-for' argument is generally insufficient. . . . [D]ue process demands something like a 'proximate cause' nexus."); *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) ("We have likewise suggested an analogy between the relatedness requirement and the binary concept of causation in tort law under which both elements—cause in fact . . . and legal cause—must be satisfied to find causation sufficient to support specific jurisdiction."); *see also Cambridge Literary Props., Ltd.*, 295 F.3d at 65 (noting that "but for" events can be "very remote," and assuming that due process requires "something like" proximate case); *Massachusetts Sch. of Law v. American Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998) ("[O]ur relatedness analysis thus focuses on causation."). With these cases, you might have had a shot at dismissal on personal jurisdiction grounds. But probably not after *Ford*.

The Supreme Court's Decision in *Ford*

Ford involved the same basic scenario presented above: a global automotive company sought dismissal, on personal jurisdiction grounds, of products liability claims involving vehicles purchased outside the forums where the plaintiffs lived and were injured. The defendant conceded purposeful availment, but maintained that, because the vehicles were designed, manufactured, and purchased outside the forums, the plaintiffs could not satisfy the relatedness prong. *Ford Motor Co.*, 141 S. Ct. at 1026. Parsing the oft-repeated formulation of that inquiry—that the injuries must "arise out of or relate to" the forum conduct—the Court observed that, while the first half of the phrase required causation, the latter half "contemplates that some relationships will support jurisdiction without a causal showing." *Id*. Accordingly, the Court rejected the defendant's argument for an "exclusively causal test of connection." *Id.* at 1026, 1029. The Court cautioned, "the phrase 'relate to' incorporates real limits." *Id.* at 1026. But as a concurring opinion pointed out, *see id.* at 1033-34 (Alito, J., concurring), the Court declined to articulate those limits, suggesting only that a "strong relationship among the defendant, the forum, and the litigation" would suffice. *Id.* at 1026 (quotations omitted).

Compare *Ford* with First Circuit precedent. *Nowak* recognized a "narrow exception to the proximate cause test," but one that still required a causal showing, i.e., "a small overlay of 'but for' on 'proximate cause.'" *Nowak*, 94 F.3d at 716. And *Harlow* reaffirmed that "due process demands something like a 'proximate cause' nexus." *See Harlow*, 432 F.3d at 61. But *Ford* held that "some relationships will support jurisdiction without a causal showing." *Ford Motor Co.*, 141 S. Ct. at 1026. It is hard to see how *Nowak* or *Harlow* would support jurisdiction in that circumstance.

First Circuit Personal Jurisdiction Decisions After *Ford*

Since *Ford*, First Circuit courts have dismissed claims on grounds that resemble the sort of "exclusively causal test of connection" that *Ford* rejected. In *Ching-Yi Lin v. TipRanks, Ltd.*, 19 F.4th 28 (1st Cir. 2021), the First Circuit affirmed the dismissal of a defamation claim because the plaintiff failed to allege that the defendant's in-state conduct was the "cause in fact" and "legal cause" of her injuries. *Id.* at 35-36, 41. Likewise, in *Vargas-Santos v. Sam's West, Inc.*, No. 20-1641 (GAG), 2021 U.S. Dist. LEXIS 196736 (D.P.R. Oct. 12, 2021), the U.S. District Court for the District of Puerto Rico dismissed employment claims because, while the alleged facts satisfied a "but for" standard of relatedness, they fell short of "something more akin to proximate cause," which the court said was "required" in the First Circuit. *Id.* at *10. Both cases relied on pre-*Ford* cases without citing *Ford*, much less discussing it.[3]

Two district courts have commented, in passing, that *Ford* aligns with First Circuit precedent. In one case, the U.S. District Court for the District of Massachusetts cited *Nowak* and *Harlow* to suggest that "*Ford Motor Co.* is consistent with First Circuit precedent, which recognizes that while its presence or absence is important, causation is not a per se requirement of specific jurisdiction." *See Adams v. Gissell*, No. 20-11366-PBS, 2021 U.S. Dist. LEXIS 126712, at *21 n.13 (D. Mass. May 24, 2021). But neither *Nowak* nor *Harlow* said exactly that. *Nowak* allowed a "slight loosening" of the proximate cause standard in a specific factual circumstance, but the relationship found in that case to satisfy relatedness was still causal in nature—i.e., a "small overlay of 'but for' on 'proximate cause.'" *Nowak*, 94 F.3d at 715-17. Along similar lines, *Harlow* reaffirmed that "causation is central to the relatedness inquiry" and nowhere suggested that a non-causal relationship would satisfy First Circuit precedent. *Harlow*, 432 F.3d at 61. The same is true of *Nandjou v. Marriott International, Inc.*, 985 F.3d 135 (1st. Cir. 2021), a decision that preceded *Ford* by two months, and which the U.S. District Court for the District of New Hampshire cited to support its observation that First Circuit "precedent is consistent with [*Ford*]." *See O'Neil v. Somatics, LLC*, No. 20-CV-175-PB, 2021 U.S. Dist. LEXIS 183730, at *10 (D.N.H. Sept. 24, 2021). *Nandjou* went no further than *Nowak*, recognizing only that, in some circumstances, strict adherence to proximate cause is inappropriate. *Nandjou*, 985 F.3d at 149-50.[4]

Nowak and its progeny are best understood not as rejecting "causation-only," as *Ford* did, but as recognizing that sometimes the proper causative threshold lies closer to "but for" than proximate cause. *See Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 142 (D.N.H. 1996). The same cannot be said of *Ford*, which made clear that relatedness can mean a causal relation, but it can also mean an "affiliation," "relationship," or "connection." *Ford Motor Co.*, 141 S. Ct. at 1035 (Alito J., concurring).

The First Circuit recently acknowledged as much, but still did not reconcile *Ford* with circuit precedent. In *Cappello v. Rest. Depot, LLC*, 89 F.4th 238 (1st Cir. 2023), a New Hampshire resident ate a contaminated salad in New Jersey and then sued, in his home state, companies involved in the distribution and sale of the salad. *Id.* at 241. In some respects, the facts in *Cappello* paralleled *Ford*: both companies did business in the forum, but the particular instrumentality of harm was sold elsewhere. Seizing on *Ford*, the plaintiff argued that his claims were related to the defendants' business contacts in New Hampshire because the product that allegedly caused him harm was of the type that the defendant sold in the forum state. *Id.* at 245. The First Circuit disagreed. Acknowledging *Ford*'s rejection of "causation only," the court nonetheless found that the business contacts at issue concerning produce were inherently different in nature and scale than

those at issue in *Ford*, which involved the nationwide manufacture and retail sale of automobiles. *Id.* at 245-47. The plaintiff thus did not satisfy *Ford*'s broader relatedness standard. In so ruling, the *Cappello* court did not discuss whether or how its earlier precedent aligns with the new, broader standard established by *Ford*.

Accordingly, even after *Cappello* it remains true that "the First Circuit has yet to address what *Ford Motor Co.* means for the test articulated in *Harlow*." *Levesque v. Iberdrola, S.A.*, No. 2:19-cv-00389-JDL, 2021 U.S. Dist. LEXIS 147847, at *22 n.5 (D. Me. Aug. 6, 2021). For now, it is safe to assume that *Ford* means *something* for the tests articulated in First Circuit precedent.

Practical Impact for First Circuit Practitioners

Until the First Circuit provides further guidance, counsel should be wary of relying on cases like *Nowak* and *Harlow*. Those cases could easily be used to craft a "causation-only" argument that *Ford* expressly rejected. Indeed, the Court in *Ford* observed that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." 141 S. Ct. at 1026. Accordingly, when challenging personal jurisdiction, defense counsel should avoid forming arguments that suggest causation is necessarily required to establish relatedness. That is no longer the law of the land, even if no First Circuit case has said as much.

1. *See Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 27 (1st Cir. 2008); *see also* U.S. Const. amend. XIV (due process).

2. *See Massachusetts Sch. of Law v. American Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998) ("[In] a tort claim, we customarily look to whether the plaintiff has established cause in fact (i.e., the injury would not have occurred 'but for' the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action)." (cleaned up)); *Old United Cas. Co. v. Flowers Boatworks*, No. 2:15-CV-43-DBH, 2016 U.S. Dist. LEXIS 58430, at *9-10 (D. Me. May 3, 2016) ("The claims . . . constitute a conventional products liability case, and I treat the claims as tort claims. . . . For tort claims, I must probe the causal nexus between the defendant's contacts and the plaintiff's cause of action." (cleaned up)).

3. Two other recent decisions from the U.S. District Court for the District of Massachusetts cited pre-*Ford* cases to suggest that causation is central to relatedness, but neither case turned on the relatedness element. *See Sheldon v. DT Swiss AG*, No. 1:22-cv-11198-IT, 2023 U.S. Dist. LEXIS 169108, at *32 (D. Mass. Sept. 22, 2023); *SV Athena, LLC v. B&G Mgmt. Servs.*, 671 F. Supp. 3d 77, 83 (D. Mass. 2023).

4. In another case, the U.S. District Court for the District of Massachusetts recognized that "[i]n *Ford*, the Supreme Court held that a causal showing is not necessary" for relatedness. *See Alves v. Goodyear Tire & Rubber Co.*, No. 22-11820-WGY, 2023 U.S. Dist. LEXIS 127323, at *16 n.2 (D. Mass. July 24, 2023). But the Court found no occasion to comment further on the effect of *Ford* on earlier circuit precedent, reasoning that *Ford* was inapplicable to the internet-based contract and economic injuries at issue. *Id.*

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Voice of the Judiciary

Federal Judicial Roundtable: Getting to Know Judges Kelley, Guzman, and Joun

Interviewed by Elizabeth Gardon

The Boston Bar Journal *held a roundtable discussion with three recent additions to the U.S. District Court in Massachusetts: Judges Margaret R. Guzman, Angel Kelley, and Myong J. Joun, moderated by Elizabeth Gardon, Associate, Todd & Weld. The first part of the discussion was published in the Winter 2024 Edition. In this second part of the discussion, which has been edited and condensed, the judges discuss how they navigated their practice as lawyers from diverse backgrounds and what others may consider in their own practice when engaging in the legal community. Some of their tips based on their own experiences include:*

- *Introduce yourself to all members of the legal community including court staff, not just attorneys.*
- *Take the initiative to speak with people you admire and seek mentorship. Experienced attorneys and judges will confirm that mentorship is a two-way street.*
- *Be an advocate for yourself and others in a manner that works for you.*
- *Apply for judicial vacancies even if your experiences are not within the traditional judicial profile.*

Gardon: The diversity within the Massachusetts legal community is growing. For example, the Massachusetts Supreme Judicial Court Standing Committee on Lawyer Well-Being issued a census report and summary of completed surveys of lawyers in Massachusetts, between November 11, 2020 and November 11, 2021. The report found that diverse lawyers, such as those identifying as female, Asian, Black or African American, Hispanic or Latinx, multiracial, or those not identifying as heterosexual, were underrepresented as compared to the general Massachusetts population. The report also found that lawyers between the ages of 22 and 44 represented more diverse identities than lawyers aged 45 years and older. Can each of you tell us about your experience as a person of color in the legal profession?

Judge Guzman: I stood out more as a female. For many years, at trials among the judge, prosecutor, defense attorney, probation officer, and court officers, I was very often the only woman in the room. That stands out more for me when I reflect on my experience in Worcester. The Hispanic part of my heritage didn't play as much of a role as it has played for others' lives and careers. Since I started in the late 1980s, the Worcester bar has changed significantly because of the encouraged internal growth. They made a concerted effort over a long time to recruit interns who came from diverse backgrounds. They did so by reaching out to affinity bar associations wherever they could. The change was assisted by a couple of people in leadership of the local bar association—from both the civil and criminal practices. It was a concerted effort. And those efforts have resulted in a more pronounced diverse community of women and men in the Worcester courts. Longstanding members of the Worcester legal community and the new generation of lawyers are working together to make sure that Worcester is seen as an interesting place to work, with a good environment to create growth and opportunity. Part of the proof of that is that many law clerks and interns are not only coming from Boston to work in Worcester law firms, but also many are putting down roots and making the move permanent.

Judge Joun: Earlier in my career, I didn't know many other Asian lawyers in courtrooms. There was one Asian Assistant U.S. Attorney in this court around 1999-2000, but other than him, I didn't see anyone else. I remember going to various state courts, and on at least a couple of occasions, the court officer would not allow me inside the bar because they thought I was not an attorney. I was once mistaken for an interpreter. Later there was one other attorney, Attorney Steven Kim, who left the District Attorney's office and started practicing in Boston, so we used to see one another, but then I would at times be mistaken for him. So those things would happen because there were so few of us. But in my last year in the Boston Municipal Court, I was presiding in East Boston and both the prosecutor and the defense attorney were also Asian. So, things have gotten better.

Judge Kelley: Listening to Margaret made me think about my early days as an attorney. I was proud of my accomplishment of graduating from law school, being a young attorney. However, there were some things that I couldn't escape, which was one being young, two being a woman, and three being a person of color. Often times people interacted with me based on just those three categories. And it was exhausting! It still can be exhausting to deal with that on a daily basis feeling that people are underestimating you or outright disrespecting you. I can think of the times when I was practicing in New York where I felt bullied in a deposition, with comments like "Young Lady, I've been doing this for 50 years." Being a New Yorker, my inclination was never to back down from a challenge and go toe to toe, "Well, let's get the judge on the phone," that was something that we would do in New York: call the judge, right from the deposition room, which I'm glad lawyers don't do too much of here. But then I realized that wasn't how I wanted to spend my career, and I really had to get out of my own way and not let my pride get in the way. So, I accepted the baggage people brought to the table, this baggage of underestimating me or marginalizing me, or wanting to disrespect me. And I decided to use that to my advantage. I can remember clearly, being told, "Angel, here's a case for trial, go to the Bronx and try the case," and when I got to the Bronx, one of the clerks said, "You're really going try this case against this attorney? He's an institution here in this courthouse." I decided it was okay if the lawyers and staff underestimated me because I knew that meant they would underprepare, and I knew that I was going to be prepared for trial. Then the hammer would come out during trial because my preparation would win the case. I had to let my ego get out of the way to find a comfortable place that was more peaceful for me: one that wasn't just full of anger or disappointment at the bar. I had to figure out how to navigate it. For me it was, put your head down, do the hard work, and think about the bigger goal here, which is to win the case. That's how I navigated those obstacles.

Gardon: I really appreciate all three of you for being open about your experience, especially early in your careers. I hope that it continues to improve for those practicing now. The efforts for inclusivity and the support of lawyers of all identities are more prevalent in our practice, I believe, now with affinity bar associations and other efforts, such as diversity, equity, and inclusion offices and committees at law schools, law firms, and other workplaces. When Judge Kelley presided over my swearing-in ceremony at the U.S. District Court for the District of Massachusetts, the court played the Massachusetts Trial Court Up-Stander video, a video of state court judges and staff speaking out against disrespectful actions and behavior in the courts. This was my first time watching it. I was pleasantly surprised to see such a recognition of the need for that call to action in our profession, though I hope that this type of effort continues to expand in

the legal practice. Do you have any suggestions for attorneys from diverse backgrounds, especially newer attorneys, about handling any obstacles related to their identity that they may encounter in their practice or in the legal community?

Judge Guzman: I had a similar experience to Judge Joun. Not only once, but many times I was ordered to interpret Spanish. A judge would say, "You, I need you to interpret for that fella, who's standing there." Rather than fight it, I approached the defendant and confessed that I didn't speak Spanish and the person would say, "I know, I know." There was not much you could do. Those were the old days. There are people who will be your allies, and you just have to reach out to them. If you see a lawyer who's done something fabulous, go up to them and introduce yourself. And then say, "I'd like to second seat you, or I'd like to observe a trial and then talk to you about it," something like that. You have to be proactive**.** You cannot let other people's treatment of you be how you define the way you behave in court. If you want to be a lawyer, you need to be confident enough to get up and say something good on behalf of your criminal defendant who's accused of something terrible. In that same way, you should advocate for yourself. That means if someone wants to be a trial lawyer, or pick up cases, or learn how to do that, reach out to someone who has done it. I don't know any lawyer or judge from my generation that would ever turn down an opportunity to speak with a young lawyer about our personal experiences—without having to be an official mentor—just a telephone conversation or certainly in chambers. The new lawyer has to take the initiative to reach out, find people they admire, and ask that person to have a conversation with them.

Judge Joun: I agree with Judge Guzman that if an incident happens you shouldn't let it go, but how you handle it really depends on who you are and what's comfortable for you. I didn't experience it so much as a personal affront, but it was more embarrassment in front of my clients. When I was treated that way, I decided I was going to visit courthouses more often, get to know the clerks and the court officers by name, so that they were familiar with me so that it didn't happen in the future. If they called me Attorney Kim the first time, they wouldn't do it again once they knew me. I wasn't trying to be confrontational. I would simply say, "Hi! I'm Attorney Joun." But if it was more intentional, then I would just have a conversation with the person quietly without embarrassing them. You can do that in a professional, respectful way. There are different tactics, but it has to be something that's truly you. I think you can do it in a way that can be educational and at same time fix the immediate problem.

Judge Kelley: In addition to being an advocate for yourself, which sometimes can be exhausting to always having to be the one to speak up. Be an advocate for others. Through that process, hopefully, you're building a tent with more allies who will then speak up for others, which is part of the premise of the Up-Stander Video. On a larger level, I think that the bar associations have a lot of power to communicate that they want to cultivate an environment that is more receptive and accepting of attorneys of diverse backgrounds and experiences. Then, seek out individuals who may be able to assist in finding a creative platform or to be a megaphone for some of these goals. I definitely believe that it's important to stand up and speak out because as long as we keep a lid on it, as long as we accept it and keep things quiet, things will stay the same; no one wants to work in an environment like that on a daily basis. I think sometimes people don't even know what they're doing. It's an educational process for them as well. I think that we can bring the legal community around to accepting and being more respectful to the bar. There are things

that can be done on a small scale and a larger scale. Fortunately for me, when I was in the state court, we had state court leadership that was receptive to a number of projects, such as the Up-stander Video, the Lawyer Well-Being Committee Report, or the commissioning of the racial diversity inequities study that Justice Gants commissioned through Harvard. In fact, making the Up-Stander Video took several years to complete. We started it at the beginning of the pandemic when Justice Gants was still with us, and Justice Carey was chief of the trial court. By the time that the video was released, Chief Justice Gants had passed, and Chief Justice Carey had stepped down, and we had to add the new chiefs. It was a very, very interesting project to do, because while it was widely well-received, some people didn't want to be a part of it initially. But then, as it was nearing completion, a few people said, "No, no, actually I want to be part of it now." It grew in length to include the latecomers and original naysayers. It was something that I'm very proud of, and I'm glad that you remember it. I try to show it as often as possible. I hope the federal court will create something similar.

Judge Guzman: We brought a lot of that good work with us from the state court. What I did as soon as I was able to, was fill my chambers with not just my law clerks, but interns as well. I have college interns and high school interns. Every semester we take students from local public schools. They're in the courtroom. They put on presentations. They meet with probation. It's taking some of the stigma out of federal court for them; it becomes a place that they see themselves in. It's been a wonderful experience to be able to bring the people from this community into this courthouse.

Judge Kelley: Outside our walls, certain communities referred to the federal courthouse as "the House of Pain." Hopefully, we get back to being a house of justice and not a house of pain.

Gardon: That is valuable insight, and I know I will remember this advice as I navigate my career. As a general matter, do you have any practice tips for attorneys appearing before you in court?

Judge Guzman: Be ready. Know your case.

Judge Joun: Know the rules, be prepared, and be civil.

Judge Kelley: I don't really have any practice tips, but I would ask the following: if something takes place in my courtroom, whether it's something I, my staff, a lawyer, probation or anyone, said or did, even if I wasn't present for it and it was inappropriate or insensitive, to bring it to my attention, because I don't want that going forward. And hopefully, I can help to make certain that my staff doesn't do it, and maybe have a conversation with the lawyers, so they're not repeating that someplace else. And so always find a way to speak to me about that. Talk to my clerk to bring something to my attention, and don't be hesitant about that at all. I simply want us all to be better at our jobs. So, I don't have a practice tip, but that's what I would ask.

Gardon: Any closing remarks?

Judge Kelley: I am living my dream, not because I didn't make mistakes, I surely did. I am living my dream, because I continued to apply to get to this very position, even when I was told

"no" on more than one occasion. My path to the federal court bench was not a straight path, nor a pre-ordained journey, but I still reached my goal. I am thankful to the Biden-Harris administration for having faith and confidence in me. I encourage everyone to pursue your dreams and don't be deterred by a little rejection.

Judge Guzman: I would just say, if you want to see the inside of a courtroom, walk into a courtroom and introduce yourself – either to the local Assistant U.S. Attorney or the Federal Public Defender, or ask to meet the judge. There is not a thing wrong with that – even if you are just visiting and don't plan to practice there. If you're in Worcester, stop by the federal court. Everyone knows that my chambers is open to visitors. And I would say, the same is very true in Boston and Springfield. So that's just from the federal court. I mean, I don't know a state court judge that wouldn't love to sit down and talk with a student or a young attorney. I don't know any that would turn down an opportunity to have that conversation.

Judge Joun: I know there are scores of vacancies that are coming up in the next year or two in the state courts. For those attorneys that are interested in possibly applying, they should really give it some serious thought even if they don't have the traditional resume. Echoing what Judge Guzman said, as an attorney, I didn't think you had access to judges to talk to or think about issues with them. Having been on this side now, I know many judges are open to conversations. Whether it's a bench bar, formal sort of event, or just an attorney calling and say, "Hey, can I talk to you about this?" I don't think there are many judges who will say they don't want to talk to you about your interest in applying. I think we're more accessible than attorneys think, and I would encourage them to think about doing that.

Gardon: Thank you all for your participation.

Hon. Angel Kelley was appointed to the U.S. District Court for the District of Massachusetts in September 2021. She previously served twelve years as a state court judge in both the District Court and the Superior Court. She was a trial attorney before joining the bench, in New York and Massachusetts, in both state and federal courts, with experience in both civil litigation and criminal work as a federal prosecutor and defense attorney.

Hon. Margaret R. Guzman was appointed to the U.S. District Court for the District of Massachusetts in July 2023. She previously served for fourteen years as a judge in the Massachusetts District Court. Prior to judicial service, she was a sole practitioner in Worcester from 2005 to 2009; and from 1992 to 2005, she served as a public defender for the Massachusetts Committee for Public Counsel Services.

Hon. Myong J. Joun was appointed to the U.S. District Court for the District of Massachusetts in July 2023. From 2014 to 2023 he served as an Associate Justice of the Boston Municipal Court. Before the bench, he was in private practice for fifteen years focusing on criminal defense and civil rights litigation in state and federal courts.

Elizabeth L. Gardon is an associate at Todd & Weld, where she concentrates her practice on complex civil litigation matters. Gardon previously served as a law clerk to a state trial court judge in New York.