

MASSACHUSETTS LAW REVIEW

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Exterior of the Dedham District Courthouse.*

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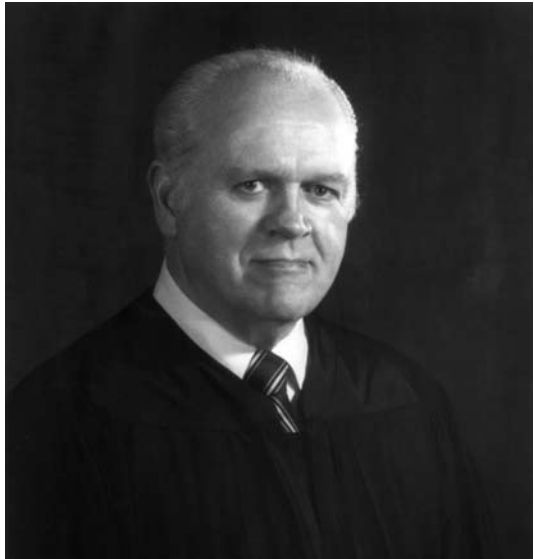
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In Memoriam

Chief Justice Edward F. Hennessey (April 19, 1919 – March 8, 2007)



The Honorable Edward F. Hennessey died on March 8, 2007, at the age of 87. He had a distinguished career as a soldier in World War II, a prosecutor, a defender, a trial lawyer who was active in the organized bar, a law teacher and scholar, an author of Massachusetts Practice volumes on automobile law, and a judge who was appointed by three different governors: as a justice of the superior court by Governor John Volpe; as an associate justice of the Supreme Judicial Court by Governor Frank Sargent; and as chief justice of that court (a position he held for thirteen years) by Governor Michael Dukakis. He also served as president of the National Conference of Chief Justices and as president of the National Conference of State Courts. In his tenure as a justice of the Supreme Judicial Court, he wrote more than 700 majority opinions and more than 60 concurring and dissenting opinions. He had a well-earned reputation as “a lawyer’s lawyer and a judge’s judge.”

Chief Justice Hennessey’s scholarship frequently enlightened the pages of the *Massachusetts Law Review*. He served as editor-in-chief of the *Massachusetts Law Quarterly* (the *Review*’s previous name) from 1961 to 1964 (Volumes 46, No. 1 through 49, No. 1), wrote articles¹ and published thirteen Annual Reports on the State of the Massachusetts Judiciary beginning in 1977 and concluding in 1989²

1. *Eg.*, Edward F. Hennessey, *Torts: Indemnity and Contribution*, 47 MASS. L. Q. 421 (1962).

2. *See generally* 74 MASS. L. REV. 3 (1989); 73 MASS. L. REV. 3 (1988); 72 MASS. L. REV. 3 (1987); 71 MASS. L. REV. 4 (1986); 70 MASS. L. REV. 3 (1985); 69 MASS. L. REV. 2 (1984); 68 MASS. L. REV. 3 (1983); 67 MASS. L. REV. 8 (1982); 66 MASS. L. REV. 64 (1981); 65 MASS. L. REV. 104 (1980); 64 MASS. L. REV. 3 (1979); 63 MASS. L. REV. 101 (1978); 62 MASS. L. Q. 7 (1977).

3. *See* Special Issue: A Tribute to Edward F. Hennessey, 74 MASS. L. REV. No. 3

The *Review* dedicated an issue to him upon his retirement, which reflects the enormous esteem he was held in by the bench and bar.³ A collection of his writings, *The Hennessey Papers*,⁴ is available for \$35 from MCLE and belongs in every lawyer’s library.

For those who knew him, the impressive *curriculum vitae* only hinted at his integrity, his genuine humility, his unfailing courtesy, and the depth and warmth of his personality.⁵ He frequently sat on law school moot court competitions; he always left an indelible impression on the students who appeared before him; and afterwards, faculty inevitably had to caution them not to think that during their legal careers all judges would be such a pleasure to argue before. In a time when partisan ideological battles seem to predominate in every judicial appointment or election, it is refreshing to recall his pragmatic approach to justice, epitomized in the observation: “When justice requires, I’m a liberal. When justice requires, I’m a conservative.”

In remarks delivered on April 22, 1982, at a memorial service for the Honorable Paul G. Kirk, Chief Justice Hennessey described the attributes of an excellent judge and the influence such a judge can have on those who follow him onto the bench.

The administration of justice is a fine art, and the lawyers and many others are its generators, but the efforts of all can reach no higher than the personality of the judge permits. Perfection, if the judge seeks it, requires knowledge of the law and faithful application of the law; diligence and efficiency; unfailing courtesy without sacrifice of firmness and decisiveness; evenhandedness, while retaining a jealous regard for the individuality of every person; restraint, eternal restraint, particularly as to both the quality and the quantity of speech; courage and strength in the face of criticism. Above all, integrity in all its nuances. In a sense, the system is self-perpetuating, because the judge who reaches for these goals has, by his example, a part in the decisions which inspire some men and women of excellence and ideals to become judges, and they inspire others in their turn to the next generation and the next and the next.⁶

Ed Hennessey was – and will perpetually be – an inspiration to us all.

– Board of Editors

(September, 1989).

4. EDWARD F. HENNESSEY, *THE HENNESSEY PAPERS* (MCLE 2003).

5. *See* Thomas F. Maffei, *Chief Justice Edward F. Hennessey – A Fond Farewell*, 74 MASS. L. REV. 2 (1989).

6. *Edward F. Hennessey on Judging*, 74 MASS. L. REV. 147 (1989). *See also*, Supreme Judicial Court of Massachusetts, Office of Reporter of Decisions, *Paul Grattan Kirk Memorial*, 385 Mass. 1217 (1982), available at <http://www.massreports.com/memorials/385ma1217.htm>.

In Memoriam

Justice Martha B. Sosman (October 20, 1950 – March 10, 2007)



Justice Martha Browning Sosman died on March 10, 2007, after a protracted struggle with cancer. Appointed to the Massachusetts Supreme Judicial Court (“SJC”) by Governor Paul Cellucci, she was sworn in on September 7, 2000, and became the 18th occupant of the seat first occupied in 1801 by Simeon Strong, and thereafter by, among others, Raymond Wilkins, Ami Cutter, Benjamin Kaplan and her immediate predecessor, Neil Lynch. In her six and one-half years on the court, she wrote more than 100 majority opinions and another three-dozen dissents and concurrences.

Justice Sosman’s appointment followed her highly successful career in public and private practice, during which she had served as chief of the civil division of the United States Attorney’s office and, with four other women, had founded a respected and highly successful law firm. In 1992, she became an associate justice of the superior court, where she served with distinction until she was appointed to the SJC. A concert-grade pianist, avid gardener, indefatigable Red Sox fan and much, much more, she was a vibrant force on the legal landscape and beyond.

In the superior court, her skill as a trial judge quickly caught the bar’s attention. The courtrooms where she presided were places of

dignity and fairness. She listened actively, striving to understand the points the advocates were making and probing repeatedly with incisive questions until she got to the meat of the matter before her. She had that rare ability to unpack complexity without sacrificing nuance and to flatten out anticipated bumps in the sensational case so that, in the end, it did not seem so sensational at all. Her decisions on interlocutory matters came quickly and elegantly. In jury-waived cases, she often displayed her legendary ability to dictate from the bench well-crafted and succinct findings of fact and conclusions of law immediately after the trial concluded. She carried those skills with her to the SJC where, when she sat as a single justice, she displayed the same dignified fairness and the same impatience with attention-grabbing diversions that had been a consistent feature of her tenure on the superior court.

But it was through her opinions that most of us knew her best. When she wrote for the SJC, she did so comprehensively, addressing the issues from every angle, with forceful logic and with uncluttered prose that clearly revealed the path she had taken to the conclusions she reached. In dissent, she brought to mind Lord Nelson’s admonition to “forget about the maneuvers and just go straight at them,” though she usually went at them with a grace reflective of her view that ideas, not personalities, were alone in play. Her experience as a trial judge led her to embrace approaches to case management that were suited to courtroom realities and to reject those that were not. More broadly, the opinions she wrote typically provided trial judges with practical, comprehensible frameworks for resolving the difficult substantive and procedural problems they often faced. Neither “liberal” nor “conservative” in her overall outlook, she approached each case with an open, inquiring mind and a passion for achieving a result she believed was just.

In an interview she gave about a year and a half ago, Justice Sosman told a reporter for the Middlebury College alumni magazine that she had little concern for whether her opinions made dramatic changes in the law or the social order. “I’m proud if people think I did a good job of applying the law in a consistent, sensible, intellectually honest way,” she said. “That’s what I’m trying to do.”¹ At the end, she should have been very proud, indeed, and all of us are much richer for her effort.

– Board of Editors

1. John Wolfson, *Courting Justice*, MIDDLEBURY COLLEGE MAGAZINE (Fall, 2005), available at <http://www.middlebury.edu/administration/middmag/archive/2005/fall/features/justice.htm>.

Unpacking the Massachusetts Preliminary Injunction Standard

By Cameron F. Kerry*



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The words of the preliminary injunction standard spelled out in *Packaging Industries Group, Inc. v. Cheney*¹ over 25 years ago have become familiar to anyone who practices in a Massachusetts state court. The Supreme Judicial Court (“SJC”) instructed trial courts to use their discretion to strike a balance of a “combination of the moving party’s claim of injury and chance of success on the merits” in which “[w]hat matters as to each party is not the raw amount of irreparable harm ... but rather the risk of such harm in light of the party’s chance of success on the merits.”² These words are recited as boilerplate in every preliminary injunction brief and decision,³ so much so that they often are cited without quotation or elaboration.⁴ Tennyson wrote of repeating a word “till the word we know so well [b]ecomes a wonder, and we know not why.”⁵ This article sets out to wonder at these familiar words and ask why.

The article examines a quarter century of experience with the *Packaging Industries* standard and how the Massachusetts judicial system has applied and adapted the decision.⁶ Part I looks back at the *Packaging Industries* opinion to review the conceptual simplicity of the SJC standard in contrast to the formulaic four-part test applied in many federal courts, including in the First Circuit. Part II looks at the latter contrast and reviews the actual application of the standard in decided cases, analyzing first the moving party’s burden and then each side of the balance – the likelihood of success on the merits and the risk of irreparable harm. Part III considers the impact of the “public interest” on the grant or denial of preliminary injunctions, an issue that was not discussed in *Packaging Industries* but emerged later for application “in an appropriate case.”⁷ Finally, in Part IV, the article looks at the procedures adopted to consider and review injunctions under the *Packaging Industries* standard.

Understanding these standards and procedures is essential for litigators in Massachusetts. This state has adopted its own unique model for preliminary injunctions. Moreover, the accelerated provisional decision whether to grant a preliminary injunction can have a critical impact on the parties and on the outcome of litigation.⁸ Baseball games do not get called after the first inning, but lawsuits sometimes do. Because the call on a preliminary injunction can end the game, good umpiring and avoiding strikes and errors are essential.

I. *Packaging Industries* Revisited

Packaging Industries charted new standards⁹ in a familiar context: a former employee going into business in competition with his

* This article is an outgrowth of experience in a case several years ago that starkly presented the meaning of the Massachusetts preliminary injunction standard. On and off since that time, H. David Gold, Christopher R. Lane, Dean W. Atkins, Matthew L. Vittiglio, Jun Zhao and Marbree D. Sullivan have provided research assistance. I am especially grateful to my colleague Craig J. Tiedemann for his help in getting Part III from outline to text and to both him and Jennifer K. Alcaez for help that was indispensable in bringing the project to completion. Professor John Leubsdorf of Rutgers Law School generously provided helpful comments on a draft of this article.

1. 380 Mass. 609 (1980) (cited as “*Packaging Industries*”).

2. *Id.* at 617.

3. A Westlaw search as of August 27, 2007, showed *Packaging Industries* cited by the Massachusetts Superior Court in 336 cases, together with 64 case cites by the SJC, and 63 by the Massachusetts Appeals Court.

4. *See, e.g., Doe v. Attorney Gen.*, 425 Mass. 217, 222 (1997); *Rauseo ex rel. Suffolk/Medford Realty Trust v. Massachusetts Port Auth.*, No. 011053 BLS, 2001 WL 1334988, at *2 (Mass. Super. Ct. Apr. 2, 2001) (“The court need not recite in detail”).

5. ALFRED LORD TENNYSON, *IDYLLS OF THE KING, LANCELOT AND ELAINE*, lines 1021-22 (1859).

6. The article endeavors to be complete in its review of reported SJC and Appeals Court decisions. Superior court decisions have been reviewed comprehensively but are discussed or cited only to illustrate.

7. *Town of Brookline v. Goldstein*, 388 Mass. 443, 447 (1983).

8. Witness the resignation of the Massachusetts Turnpike Authority chair one day after Justice Francis Spina denied him preliminary relief against a removal hearing and, in a related case, granted a preliminary injunction against certain bylaw amendments designed to enhance the chair’s authority vis-à-vis a majority of the board. *See Amorello v. Romney*, No. SJ-2006-0311 (Mass. Order and Memorandum of Decision July 26, 2006); *Connaughton v. Amorello*, No. SJ-2006-305 (Mass. Memorandum and Order July 27, 2006).

9. By articulating a standard for preliminary injunctions, the SJC acted in contrast to the U.S. Supreme Court, which has never specifically addressed such standards despite conflicting circuit rules. *See Lea B. Vaughn, A Need for Clarity: Toward A New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 881 (1989).

erstwhile employer.¹⁰ The merits were routine, but the standards radically altered the grant and denial of preliminary injunctions in Massachusetts.

The SJC's discussion of the proper standard for issuing preliminary injunctions began by focusing on the preliminary nature of such relief. It is "[b]y definition ... granted or denied after an abbreviated presentation of the facts and the law" in which the outcome "may not correspond to the final judgment."¹¹ Justice Ruth Abrams' opinion for the court explained that this abbreviated hearing and the resulting risk of an erroneous interlocutory decision are justified in light of the limited aim of a preliminary injunction: to create or to preserve "insofar as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party."¹² This aim underlay the court's definition of irreparable harm for purposes of a preliminary injunction. Irreparable harm is not any kind of harm a party can invoke, but "a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits"¹³ or rights "not capable of vindication by a final judgment, rendered either at law or in equity."¹⁴

Recognizing that such loss of rights can occur on both sides of the "v," the court issued its often-quoted prescription for the balancing of harms:

If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. ... Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.¹⁵

In striking this balance, each side's harm must be factored by its probability of success (and the corresponding risk that rights will be lost due to an erroneous preliminary decision). Thus, "[w]hat matters ... is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits."¹⁶

Packaging Industries came in the wake of the then-recent procedural merger of law and equity in Massachusetts¹⁷ and the even more recent enactment of General Laws chapter 231, section 118, second paragraph, permitting interlocutory appeals of preliminary injunction decisions.¹⁸ The decision stripped away accreted maxims and formulas and reaffirmed equity as "not just a system correcting the defects of the common law system but also a flexible one, able to account for individual hardships."¹⁹ This period also saw a reappraisal of injunctions throughout Anglo-American law with several scholarly efforts to take a fresh look at injunctions.²⁰ Among these was a "now-classic,"²¹ "influential"²² article with a "bold argument"²³ on preliminary injunction standards by Rutgers Law School Professor John Leubsdorf.²⁴ In *Packaging Industries*, the SJC explicitly and thoroughly committed Massachusetts to Leubsdorf's model.

The court's discussion of the standard did not cite a single Massachusetts case. Instead, it relied mainly on law review articles, in particular Leubsdorf's then-recent article.²⁵ Criticizing some preliminary injunction standards as anachronistic, Leubsdorf sought to frame a restated model that balances the gravity of the interim injury against the possibility of an erroneous interlocutory decision.²⁶ The SJC's emphasis on the abbreviated hearing on preliminary injunctions,²⁷ definition of irreparable harm²⁸ and notion of weighing the gravity of harm in light of the chance of success²⁹ are almost straight from Leubsdorf. By citing generally to Leubsdorf's description of his model, the court effectively acknowledged it was

10. Reflecting Massachusetts' knowledge-based economy, numerous preliminary injunction cases since then have involved the enforcement of noncompete agreements. See, e.g., *Abrams v. Liss*, 53 Mass. App. Ct. 751, 752-53 (2002); *Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 490-91 (1986); *Juan v. La Rosa Del Monte Express, LLC*, No. 051153A, 2005 WL 3489877, at *1 (Mass. Super. Ct. Nov. 1, 2005); *W.B. Mason Co. v. Staples, Inc.*, No. 00-5042 BLS, 2001 WL 227855, at *1-*2 (Mass. Super. Ct. Jan. 18, 2001); *Am. Express Fin. Advisors, Inc. v. Walker*, No. 98-01673, 1998 WL 754620, at *2-*3 (Mass. Super. Ct. Oct. 28, 1998); *Lantor Inc. v. Ellis*, No. C.A. 98-01064, 1998 WL 726502, at *1-*2 (Mass. Super. Ct. Oct. 2, 1998).

11. *Packaging Industries*, 380 Mass. at 616.

12. *Id.*

13. *Id.*

14. *Id.* at 618 n. 11.

15. *Id.* at 617 (footnotes omitted).

16. *Id.*

17. The adoption of the rules of civil procedure in Massachusetts on the federal model in 1973 led to "one form of action." MASS. R. CIV. P. 2. This merger "does not alter the traditional substantive distinctions between legal and equitable remedies." *Id.* at reporter's notes (emphasis in original).

18. St. 1977, ch. 405. One can speculate that the SJC ordered direct appellate review to elaborate on this recently-enacted statute.

19. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 62 (2d ed. Foundation Press 1984).

20. See generally John W. Castles, *Interlocutory Injunction in Flux: A Plea for Uniformity*, 34 BUS. LAW 1359 (1979); Grant R. Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L. J. 240 (1980); D.

Laycock, *Book Review: Injunctions and the Irreparable Injury Rule*, 57 TEX.

L. REV. 1065 (1978-79); Doug Rendleman, *The Inadequate Remedy of Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981). One catalyst for this re-examination was the House of Lords decision in *Am. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.). For an account and analysis of *American Cyanamid* and subsequent erosion, see Hammond, *supra* note 20, at 249-59 and ADRIAN ZUCKERMAN, *CIVIL PROCEDURE* 276-82 (Lexis Nexis/Butterworths 2003).

21. Richard R. W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 388 (2005).

22. Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 576 (2001).

23. Hammond, *supra* note 20, at 271.

24. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

25. *Packaging Industries*, 380 Mass. at 616-18.

26. Leubsdorf, *supra* note 24, at 525.

27. See *id.* at 540-41 ("Since preliminary injunctions issue on the basis of rudimentary hearings, the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.").

28. See *id.* at 541; *Packaging Industries*, 380 Mass. at 616 (quoting Leubsdorf's definition of irreparable harm as "harm that final relief cannot redress").

29. Leubsdorf, *supra* note 24, at 542 ("[I]n theory, [a court] should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of irreparable loss that the defendant would suffer from exercising what turns out to be his legal right.").

adopting the model.³⁰ In this light, the Leubsdorf article provides a guide to understanding the *Packaging Industries* standard, and it has been cited regularly in subsequent cases.³¹

Packaging Industries also came down during a period of increased attention to the injunctive power of courts. The civil rights injunction was a recent focus of attention;³² in Massachusetts, United States District Court Judge W. Arthur Garrity not long before had issued a desegregation remedy for Boston schools,³³ and Superior Court Judge Paul Garrity was about to embark on his career as “the Sludge Judge,” supervising the cleanup of Boston Harbor.³⁴ Although such cases involved permanent injunctive relief, they put a spotlight on courts’ injunctive power. If the arsenal of judicial remedies was so potent, the grant of less sweeping interlocutory relief could hardly be extraordinary.

Viewed in this historical context, *Packaging Industries* was an effort to look afresh at preliminary injunctions and to restate principles of equity in a modern way. The frequent equation of irreparable harm with “no remedy at law”³⁵ dates from the early days of equity jurisdiction, when the Chancery Court was not authorized to act in cases where common law courts afforded a remedy.³⁶ By defining irreparable harm as harm that cannot be vindicated by a final judgment “rendered either at law or in equity,” the *Packaging Industries* court substituted the “no remedy at law” maxim with “no adequate remedy at final judgment.”³⁷ The SJC implicitly recognized that, after the merger of law and equity with the adoption of the Massachusetts Rules of Civil Procedure, notions of limited equity jurisdiction amount to an anachronism, at least in Massachusetts.³⁸ Hence, as discussed

further in Part II (A),³⁹ the court’s standard departed from the general notion that a preliminary injunction is an extraordinary remedy with an unusual burden, and made the preliminary injunction a regular part of the judicial arsenal.

II. Striking the Balance

Under the balancing called for by *Packaging Industries*, the degree of harm is a function of the probability of success. As expressed by Leubsdorf, the model “discounts each party’s injury by the probability that the final judgment will declare it lawfully imposed.”⁴⁰ This makes the elements of the analysis interchangeable rather than a checklist of elements.⁴¹ As the SJC later condensed the *Packaging Industries* standard, if there is any “substantial risk of irreparable harm to the moving party, it must be balanced against any similar risk to the other party in light of the chance of each party to succeed on the merits.”⁴²

This integrated and flexible approach departs from the “sequential”⁴³ or “fourfold test”⁴⁴ prevailing in federal courts, and from any other set of discrete elements.⁴⁵ As used in the First Circuit, the commonly used federal test has four elements:

A district court must weigh the following four factors: (1) the likelihood of the movant’s success on the merits; (2) the potential for irreparable harm to the movant; (3) a balancing of the relevant equities, i.e., “the hardship to the nonmovant if the restrainer

30. See *Packaging Industries*, 380 Mass. at 617-18 (citing Leubsdorf, *supra* note 24, at 540-44).

31. GTE Prod. Corp. v. Stewart, 414 Mass. 721, 724 (1993); Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass. App. Ct. 238, 247 (1991); Biotti v. Bd. of Selectmen, 25 Mass. App. Ct. 637, 640 (1988); Westinghouse Broad. Co. v. New England Patriots Football Club, Inc., 10 Mass. App. Ct. 70, 72 (1980); AFSCME Council 93 v. City of Lynn, No. 03-598, 2003 WL 1989604, at *5 (Mass. Super. Ct. Mar. 27, 2003); Knapik v. McGuire, No. 990908B, 1999 WL 1319239, at *1 (Mass. Super. May 19, 1999). In one case, the author of this article took to heart the advice of a former superior court judge that the Massachusetts judiciary relies on Leubsdorf’s article as a guide to preliminary injunction standards, and cited Leubsdorf’s criticism of emphasis on maintaining the “status quo” as a basis for preliminary injunctions. Cf. Leubsdorf, *supra* note 24, at 546 (“Emphasis on preserving the status quo is a habit without reason.”). This argument, however, was brushed aside with the opinion that maintaining the status quo is a “prime value” of preliminary relief “however critical legal scholars may be of the concept.” Global NAPs, Inc. v. Javanet, Inc., No. 99-J-750 (Mass. App. Ct. Order Jan. 5, 2000) (Laurence, J.).

32. See generally OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (Indiana University Press 1978) available at <http://www.law.yale.edu/documents/pdf/Faculty/injunction.pdf>.

33. See generally Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

34. See Jerry Ackerman, *Garrity, in Last Move As Judge, Orders 3-Year Harbor Supervision*, THE BOSTON GLOBE, Dec. 22, 1984, at 26; see generally CHARLES M. HARR, MASTERING BOSTON HARBOR: COURTS, DOLPHINS, AND IMPERILED WATERS (2005).

35. See, e.g., Jerome v. Ross, 7 Johns. Ch. 315, 2 N.Y. Ch. Ann. 305 (1823); David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L. J. 539, 555-62 (1986). Section 16 of the Judiciary Act of 1789 provided that “suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.” 1 Stat. 73, 82 (1789).

36. Leubsdorf, *supra* note 24, at 527.

37. GTE Prod. Corp. v. Stewart, 414 Mass. 721, 724 (1993) (emphasis added)

(citing Leubsdorf, *supra* note 20, at 551).

38. Rule 2 of the Massachusetts Rules of Civil Procedure provides for “one form of action to be known as ‘civil action.’” Mass. R. Civ. P. 2. “‘Merger’ does not alter the traditional substantive distinction between legal and equitable remedies,” and unified procedure “affords a more and effective way of enforcing [legal or equitable] rights.” *Id.* at reporter’s notes (1973) (emphasis in original). The Massachusetts Rules of Civil Procedure superseded forms of writs such as mandamus. Mass. R. Civ. P. 81(b). In contrast to the SJC’s adaptation of equity, Justice Antonin Scalia, writing for the U.S. Supreme Court in 1999, reaffirmed limits on equity jurisdiction based on the boundaries between law and equity that existed for the English Court of Chancery in 1789. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-19 (1999). He wrote, “We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined with the traditional boundaries of equitable relief.” *Id.* at 322.

39. See notes 50-57 and accompanying text, *infra*.

40. Leubsdorf, *supra* note 24, at 544.

41. As described above, the SJC’s analysis in *Packaging Industries* focused first on defining and balancing irreparable injury; probability of success then came into play in striking the balance of harms. Nevertheless, the *Packaging Industries* standard often is set out as an appraisal “first” of likelihood of success on the merits, and then “second” of probable harm, and such descriptions can read like an abbreviated version of the list of elements under the federal standard. See, e.g., Egbert v. Freedom Fed. Sav. and Loan Ass’n, 14 Mass. App. Ct. 383, 394 (1982) (quoting Westinghouse Broad. Co. v. New England Patriots Football Club, Inc., 10 Mass. App. Ct. 70, 72 (1980)); Am. Express Fin. Advisors v. Walker, No. 98-01673, 1998 WL 754620, at *4 (Mass. Super. Ct. Oct. 28, 1998); Sec’y of the Commonwealth v. Election Comm’rs of Boston, No. C.A. 00-5038, 2000 WL 1716249, at *2 (Mass. Super. Ct. Nov. 14, 2000).

42. Commonwealth v. County of Suffolk, 383 Mass. 286, 288 (1981).

43. Vaughn, *supra* note 9, at 840 n.3. (“In this [four-factor] form, the standard is called the traditional or sequential test.”)

44. Leubsdorf, *supra* note 24, at 256.

45. See text at notes 111-39 *infra*.

issues as contrasted with the hardship to the movant if relief is withheld,” ... and (4) the effect on the public interest of a grant or denial of the injunction.⁴⁶

This four-part checklist reappears widely and frequently amid shifting and sometimes confusing standards in federal courts. It even creeps into Massachusetts state court decisions to this day.⁴⁷ Reliance on such federal precedents in Massachusetts state preliminary injunction cases is unwise, when the SJC has so distinctly adopted a different model. More useful are precedents from the Seventh and Second Circuits that track more closely the model adopted in Massachusetts. In the Seventh Circuit, Judge Richard Posner introduced an approach similar to the Leubsdorf model,⁴⁸ and the *Packaging Industries* court was influenced by the Second Circuit’s standard.⁴⁹

Rather than reciting a formulaic list of factors, the simple conceptual framework of the Massachusetts standard makes preliminary injunctive relief more available because it does not contemplate an especially heavy burden and may allow relief even where the moving party’s chance of success is not clear-cut if the balance of harm is sufficiently

in its favor. Simplicity does not necessarily equate to clarity, though. Proper application of the *Packaging Industries* standard requires careful analysis of its elements and their relationship.

A. The Moving Party’s Burden: How High Is the Bar?

Packaging Industries departed from the notion of preliminary injunctive relief as extraordinary or drastic. In its wake, the issuance of a preliminary injunction has become one more instrument in a court’s procedural toolbox, reflective of its status in Rule 65 of the Massachusetts Rules of Civil Procedure⁵⁰ as one procedure among many. Wright and Miller summarize the common view of a preliminary injunction as “an extraordinary and drastic remedy” that should not issue unless the burden of persuasion is met with “a clear showing.”⁵¹ This view of injunctive relief as “extraordinary and drastic,” rooted in the limited jurisdiction of equity’s Chancery Court origins,⁵² still finds its way into Massachusetts opinions despite *Packaging Industries*’ departure.⁵³

Nowhere in *Packaging Industries* did the SJC suggest that the

grant the preliminary injunction if but only if $P \times H_p > (1-P) \times H_d$, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.

Am. Hosp. Supply Co., 780 F.2d at 593. Like the use of decision analysis for analyzing settlements or damages, among other quantitative analyses of litigation, such quantitative analysis cannot substitute for judgment but can be a useful analytical tool to test judgment. For a discussion of Judge Posner’s formulation, see LAYCOCK, *supra* note 48, at 118-23; Brooks & Schwartz, *supra* note 21, at 391; see also Linz Audain, *Of Posner, Newton, and 21st Century Law: An Economic and Statistical Analysis of The Posner Rule for Granting Preliminary Injunctions*, 23 Loy. L.A.L. Rev. 1215, 1218 (1990) (“Posner would certainly have made Sir Isaac Newton proud if Isaac Newton were alive today”); Linda S. Mullenix, *Burying (With Kindness) the Felicitic Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 543 (1987) (“Posner’s efforts to Benthamize civil procedure are an abomination in theory and practice”); Linda J. Silberman, *Injunctions by the Numbers: Less the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 282 (1987) (“the introduction of Judge Posner’s mathematical formula...does not clarify the standard and emerges as a disguised effort to extend the heavy hand of appellate review”).

49. See notes 61-64 and accompanying text *infra*.

50. MASS. R. CIV. P. 65.

51. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 129-30 (2d ed. 1995). This statement describes courts’ “shorthand formulations.” Wright and Miller go on to say that such standards “do not take the place of a sound evaluation of the factors relevant to granting relief under Rule 65(a).” *Id.* at 131.

52. See *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 724 (1993) (citing Leubsdorf, *supra* note 24, at 551).

53. See, e.g., *Custom Blends, Inc. v. Pearlco of Boston, Inc.*, No. 04-P-916, 2005 WL 2105937, at *1 (Mass. App. Ct. Sept. 1, 2005) (“extraordinary relief”); *Endodontic Assoc. of Lexington, Inc. v. Johnston-Neeser*, No. 053319, 2006 WL 933427, at *8 (Mass. Super. Ct. Mar. 16, 2006) (“drastic remedy”); *KGR Realty, LLC v. Iron Mountain Information Mgmt. Inc.*, No. 054569 BLS, 2005 WL 3670922, at *2 (Mass. Super. Ct. Nov. 28, 2005) (“extraordinary relief”); *Brockton Ret. Bd. v. Pub. Employee Ret. Admin. Comm’n*, No. 0400134B, 2005 WL 3106377, at *2 (Mass. Super. Ct. Aug. 16, 2005) (“drastic remedy” and “clear showing”); *Anderson v. LAM Builders, Inc.*, No. 20031106A, 2004 WL 2341338, at *1 (Mass. Super. Ct. Sept. 17, 2004) (“drastic remedy” and “clear showing”); *Carter v. Town of Douglas*, 2000 WL 1473571, at *2 (Mass. Super. Ct. Jun. 22, 2000) (“drastic remedy” and “clear showing”); *Envil. Waste Tec. v. Commonwealth*, No. 956203F, 1995 WL 1286564, at *2 (Mass. Super. Ct. Nov. 30, 1995) (“drastic remedy” and “clear showing”).

46. *Gately v. Massachusetts*, 2 F.3d 1221, 1224 (1st Cir. 1993) (quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991)). *Accord Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 115 (1st Cir. 2006). The First Circuit from time to time has flirted with a three-factor analysis or sliding scale, but has consistently reverted to the four-factor test. See Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 189-92 (1984). The four-factor test also prevails in the Fifth, Eleventh, and D.C. Circuits and, perhaps, the Seventh Circuit as well. See Vaughn, *supra*, note 9, at 840 n.3.

47. E.g., *New England Lumber Specialties, Inc. v. Jarvi*, No. 06382, 2006 WL 1360862, at *1 (Mass. Super. Ct. Mar. 15, 2006) (“[T]he standard for issuance of a preliminary injunction is well known. ... the moving party must establish that it has a reasonable likelihood of success on the merits, that it will suffer irreparable harm if the injunction is not granted, that the harm to it outweighs the harm to the opposing party, and that the public interest will not be adversely impacted by issuance of the injunction.”); *Town of Wellesley ex rel. Bd. of Selectmen v. Javamine, Inc.*, No. 06-394-B, 2006 WL 1345836, at *2 (Mass. Super. Ct. Mar. 14, 2006) (“must demonstrate (a) a likelihood of success upon the ultimate legal merits of its claim; (b) the threat or presence of actionable or inequitable irreparable harm in the absence of preliminary injunctive assistance; (c) the absence or the lesser degree of harm to the opposing party from the imposition of the requested preliminary injunction; and (d) the significance of a public interest, if any is present in the circumstances of the dispute”); *Eng’g Mgmt. Support, Inc. v. Puca*, No. MICV 200501082L, 2005 WL 1476462, at *1 (Mass. Super. Ct. Apr. 11, 2005) (“must show: a) a likelihood of success on the merits of the action; b) that the failure to issue the injunction would subject it to a substantial risk of irreparable harm; c) that the harm to the nonmoving party with entry of the injunction would not exceed the harm to [the plaintiff] in the absence of the injunction; and d) that, where appropriate, the public interest would be served by entry of the injunction”); *Am. Stop Loss Ins. Brokerage Serv., Inc. v. Prince*, No. 01-0215, 2001 Mass. Super. LEXIS 68, at *2 (Mass. Super. Ct. Feb. 20, 2001) (“a tripartite test” in which the plaintiff must show: “(1) [it] has a reasonable likelihood of success on the merits; (2) [it] will suffer irreparable harm if the injunction is not granted; and (3) the harm [it] will suffer if the injunction is not granted outweighs the injury [the defendant] will suffer if the injunction is granted”). This “tripartite test” is the federal four-factor test, minus the public interest factor. All these formulations omit the crucial and subtle ingredient of “the risk of [irreparable] harm in light of the party’s chance of success on the merits.” *Packaging Industries*, 380 Mass. at 617.

48. See *Am. Hosp. Supply Corp. v. Hosp. Prod., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986). Indeed, Professors Douglas Laycock, Richard Brooks and Warren Schwartz join Leubsdorf and Judge Posner together as the “Leubsdorf-Posner formula” or “Leubsdorf-Posner formulation.” DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 119, 120 (Oxford University Press 1991); Brooks & Schwartz, *supra* note 21, at 390. Judge Posner expressed the model in an equation:

moving party has an especially high burden of persuasion to obtain a preliminary injunction. Neither that decision nor any subsequent SJC case adopted the Wright and Miller “clear showing” formulation. While in 1993, the SJC – again citing Leubsdorf – declared that “a court is justified in requiring the plaintiff to bear a *slightly heavier* burden, given the problems of enforcing injunctions,”⁵⁴ this “slightly” heavier burden was a matter of administrative expedience, rather than the traditional restraint on equitable power. In the cited portion of his article, Leubsdorf wrote,

[T]he problems of enforcing injunctions do justify a burden slightly heavier than what those seeking judicial action usually bear, and special dangers of interlocutory decisions should require the plaintiff to show the real possibility of injury irreparable by later remedies. To go beyond these requirements is to risk injustice. A court should hesitate to grant a remedy that may inflict irreparable loss of rights, but it should hesitate equally to inflict such loss by denying a remedy on the grounds that the plaintiff has not met his particular burden.⁵⁵

Some additional burden is justified by the need for ongoing enforcement and the uncertainty associated with interlocutory relief rather than by institutional restraint.⁵⁶ “The policy here is not fear of specific or equitable relief, but fear of preliminary relief.”⁵⁷

B. Probability of Success on the Merits: How Low Can You Go?

The second clear departure in *Packaging Industries* from the prevailing standard was in the SJC’s treatment of probability of success. As often framed, the federal standard requires that the

plaintiff show “a likelihood of success on the merits.”⁵⁸ Usually, such language is interpreted to mean that the plaintiff must show success on the merits is more likely than not.⁵⁹ Under the *Packaging Industries* standard, the plaintiff does not necessarily have to get over this same hump. The “slightly heavier burden” under *Packaging Industries* allows injunctive relief on less than “a clear showing.”⁶⁰

In explaining its standard, the *Packaging Industries* court made it doubly clear that the discretion to weigh the risk of harm against the probability of success means that, in some circumstances, an injunction might issue even if the moving party does not establish it is more likely than not to succeed on the merits. First, the SJC cited to a law review note⁶¹ approvingly analyzing a Second Circuit case in which Judge Henry Friendly stated that “affirmance of the temporary injunction does not depend on a holding that [the plaintiff] had demonstrated a likelihood of success.”⁶² In turn, Judge Friendly had applied a version of the Second Circuit’s sliding scale for preliminary injunctions that deviated from the First Circuit and most other federal courts, under which a preliminary injunction may issue based on a showing of irreparable harm and *either* a likelihood of success *or* sufficiently serious questions on the merits and a balance of hardships tipping decidedly toward the moving party.⁶³ Second, the SJC noted its own version of the Second Circuit’s sliding scale: “If the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction.”⁶⁴ A “substantial possibility” implies less than a “likelihood” of success, and the accompanying citations make clear that this meaning was intended.

As subsequently interpreted, a “substantial possibility” of success means at least “some merit,”⁶⁵ “some likelihood of success,”⁶⁶ “a reasonable interpretation,”⁶⁷ a chance that is “not chimerical.”⁶⁸ All

54. *GTE Prod. Corp.*, 414 Mass. at 724 (emphasis added) (citing Leubsdorf, *supra* note 24, at 547).

55. Leubsdorf, *supra* note 24, at 547 (emphasis added).

56. See *McCormack v. Zimmerman*, No. 045500 BLS, 2005 WL 127036, at *5 (Mass. Super. Ct. Jan. 3, 2005), where the court acknowledged the risk of harm to the plaintiff’s law practice and his clients but, in light of the fiduciary and ethical obligations of the defendant law firm, did not see a basis to become involved in “delicate” relationships without more evidence that such obligations were being violated.

57. Douglas Laycock, *The Death of The Irreparable Injury Rule*, 103 HARV. L. REV. 687, 729-30 (1990). Professor Laycock posited that irreparable harm has ceased to be a meaningful requirement for permanent injunctive relief, but contrasts preliminary injunctions:

The irreparable injury rule has teeth at the preliminary injunction stage because it still serves a purpose there. At the preliminary injunction stage, the merits are unresolved, plaintiff may be undeserving, and it is still possible that plaintiff will not get any remedy at all. Defendant has legitimate interests in a full hearing and in freedom to act in ways not yet shown to be unlawful. These interests coincide with the court’s interest in avoiding error and being fair to both sides.

Id. at 732. See also LAYCOCK, *supra* note 48, at 37-98 (offering an extensive empirical survey of injunction cases in all jurisdictions and incisive conceptual analysis of remedies).

58. See *Nat’l Steel Car, Ltd. v. Canadian Pacific Ry.*, 357 F.3d 1319, 1325 (Fed. Cir. 2004).

59. *Id.*

60. *Cf. Loyal Order of Moose, Inc. v. Bd. of Health*, 439 Mass. 597, 602-03 (2003) (reversing denial of relief and directing issuance of preliminary injunction where harm was negligible but harm alleged by defendant was no clearer and defendant acted without legal authority). A heavy presumption against issuing relief might have found such a case too equivocal to make “a clear showing.”

61. *Packaging Industries*, 380 Mass. at 617-18 (citing Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 COLUM. L. REV. 165 (1971)).

62. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir.1970).

63. See, e.g., *Sonesta Intern. Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247, 250 (2d Cir. 1973). This alternate formulation is based on Judge Jerome Frank’s opinion in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742-43 (2d Cir. 1953). The Ninth Circuit also has adopted a similar standard. See, e.g., *Dep’t of Parks and Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006) (“The movant must demonstrate either: (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised as to the merits and that the balance of hardships tips in its favor.”) (citing *Arcamuzi v. Cont’l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987)). See generally William H. Mulligan, *Preliminary Injunctions in the Second Circuit*, 43 BROOKLYN L. REV. 831 (1977); Wolf, *supra* note 46, at 192-96.

64. *Packaging Industries*, 380 Mass. at 618 n. 11.

65. *LeClair v. Town of Norwood*, 430 Mass. 328, 337 (1999).

66. *Roy v. Town of Spencer*, No. C.A. 99-0494-B, 1999 WL 228712, at *3 (Mass. Super. Ct. Apr. 5, 1999).

67. *Healey v. Comm’r of Pub. Welfare*, 414 Mass. 18, 27 (1992).

68. *Roy*, 1999 WL 228712, at *3.

these formulations express something less than more-likely-than-not, or less than 50 percent probability. In theory at least, this sliding scale gives a court discretion to issue injunctive relief in response to a strong showing of irreparable harm even if the court is not convinced the plaintiff will prevail.⁶⁹ But such cases are few and far between. Even in the quoted cases where language is equivocal as to the likelihood of success, the actual reasoning suggests the prevailing party was the more likely winner.⁷⁰ While in practice the author has seen injunctions issued on such a basis, in no reported SJC or Appeals Court case has an injunction issued or been affirmed on less than a likelihood of success despite the *Packaging Industries* court's nod to the Second Circuit standard.

If there is no reasonable likelihood of success at all, an injunction is not in order even though irreparable harm is established.⁷¹ In such circumstances, there is too great a likelihood that the injunction will erroneously restrict the defendant's legitimate interest in "[f]reedom to act in ways not yet shown to be unlawful."⁷² Just as a party enjoined to comply with the law cannot complain that such compliance represents irreparable injury, a moving party cannot claim such injury where denial of a preliminary injunction permits lawful action.⁷³ If the nonmovant will not be entitled to relief on final judgment, there is no claim for such relief pending final resolution. Issuance of an

injunction in such circumstances can set relief on its head since the nonmovant may be lawfully entitled to the outcome that the moving party describes as irreparable harm. Courts will bend far to shield against far-reaching irreparable harm.⁷⁴ Nonetheless, some likelihood of success remains "critical" to the injunction.⁷⁵

C. Gauging the Harm: When Is It Irreparable?

Irreparable harm remains a *sine qua non* for preliminary injunctions. The SJC has made clear that "[w]here the moving party has failed to demonstrate that denial of the injunction would create any substantial risk that it would suffer irreparable harm, the injunction must be denied, no matter how likely it may be that the moving party will prevail on the merits."⁷⁶

As defined in *Packaging Industries*, irreparable harm is "harm that final relief cannot address."⁷⁷ The focus therefore is on what will occur "between the hearing on the preliminary injunction and final adjudication...."⁷⁸ Injury to "time-sensitive" constitutional rights,⁷⁹ irreversible change to the landscape,⁸⁰ or loss of benefits such as delay of education and training triggering immediate economic loss⁸¹ all present harm that cannot be redressed once it occurs. Even less serious harm can be the basis for an injunction if it would become permanent

69. Cf. Silberman, *supra* note 48, at 305 (Posner formula "does not suggest that any threshold amount of harm or probability of success is necessary").

70. See *LeClair*, 430 Mass. at 336-37 (supporting plaintiff's claim that town should have advertised services for bid); *Healey*, 414 Mass. at 25 (agreeing that statute involved "cannot logically be read" to support defendants' interpretation).

71. *John T. Callahan & Sons, Inc. v. City of Malden*, 430 Mass. 124, 131 (1999); see *J.F. White Contracting Co. v. Massachusetts Port Auth.*, 51 Mass. App. Ct. 811, 817 (2001) ("We therefore conclude that White's request for a preliminary injunction was properly denied because White had demonstrated no reasonable likelihood of success on the merits of his claim."); *Egbert v. Freedom Fed. Sav. & Loan Ass'n.*, 14 Mass. App. Ct. 383, 395 (1982) ("While the trustees may have met their burden of demonstrating irreparable harm in the absence of injunctive relief, they have failed on this record to show a likelihood that they will prevail on the merits."); *Akoury v. Roman Catholic Archbishop of Boston*, No. 043803B, 2004 WL 2341333, at *4 (Mass. Super. Ct. Sept. 14, 2004) (great harm in parish church closing, but "no substantial possibility of success on the merits"). See *Cavel Int'l, Inc. v. Madigan*, No. 07-2658, 2007 U.S. App. LEXIS 18654, at *6, *12 (7th Cir. July 18, 2007) (Posner, J.) (applying preliminary injunction standards to injunction pending appeal and granting injunction to prevent shutdown of business even though "[w]e do not suggest [appellant] has a winning case or even a good case," but "[i]f an appeal has no merit at all, an injunction pending the appeal should of course be denied"); *Centurion Reinsurance Co., v. Singer*, 810 F.2d 140, 145 (7th Cir. 1987) ("No matter how strongly the balance of irreparable harms may incline in favor of the party asking for a preliminary injunction, it is error to grant the injunction if the party has no chance or only a very slight chance of prevailing on the merits.").

72. *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 725-26 (1993) (quoting Laycock, *supra* note 57, at 732).

73. See *John T. Callahan & Sons*, 430 Mass. at 131-32 (injury caused by competitive bidding statute "is consistent with the purposes of the ... statute"); *Healey*, 414 Mass. at 28 (harm to individuals "cannot excuse the department from compliance with the categorical terms of federal legislations").

74. See, e.g., *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609 (1993).

75. *Healey*, 414 Mass. at 23 ("the likelihood of success question is ... critical to the injunction"); see *John T. Callahan & Sons, Inc.*, 430 Mass. at 130-31 (decided

on probability of success on the merits alone).

76. *Packaging Industries*, 380 Mass. at 621 (citing *Sampson v. Murray*, 415 U.S. 61, 88 (1974)); accord *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 723 & 726 (1993) (even though GTE established the existence of a "serious dispute factually," the court declined to grant preliminary injunction because GTE did not establish irreparable harm); *Ballotte v. City of Worcester*, No. 951747A, 1995 WL 1146157, at *3 (Mass. Super. Ct. Sept. 1, 1995) ("Even if this Court were to assume, *arguendo*, that [the moving party] has presented sufficient facts that her suit has a good chance of success on the merits, she has not adequately shown that she faces a substantial risk of irreparable harm."); *Ottenberg v. Vanguard Fiduciary Trust Co.*, No. 892951, 1995 WL 809492, at *6 (Mass. Super. Ct. June. 2, 1995) (denying a preliminary injunction where applicant relied solely on likelihood of success on the merits); *Plastic Surgical Serv. of New England, P.D. v. Hall*, No. 925004, 1993 WL 818637, *2 (Mass. Super. Ct. Sept. 22, 1993) ("Putting aside the issue of the likelihood of success on the merits, the requested preliminary injunction must be denied because the plaintiff has failed to demonstrate that without such relief he will be irreparably harmed.").

77. *Packaging Industries*, 380 Mass. at 616 (quoting *Leubsdorf*, *supra* note 24, at 541); see *FISS & RENDLEMAN*, *supra* note 19, at 59 (irreparable harm is "defined as harm that cannot be (fully? adequately?) [sic] repaired by remedies available in common law courts").

78. *Packaging Industries*, 380 Mass. at 616 n. 10.

79. *Planned Parenthood League of Mass. v. Operation Rescue*, 406 Mass. 701, 708-09 (1990); see also *Doe v. Attorney Gen.*, 425 Mass. 217, 221-22 (1997) (violation of double jeopardy); *T&D Video, Inc. v. City of Revere*, 423 Mass. 577, 582 (1996) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *O'Sullivan v. Sec'y of Human Serv.*, 402 Mass. 190, 197-98 (1988) (seclusion and restraint of mental patients in violation of statute and regulation).

80. *Biotti v. Bd. of Selectmen*, 25 Mass. App. Ct. 637, 643 (1988) ("blasting and earth removal ... irreversibly alters the land which is the subject of this litigation").

81. *Healey v. Comm'r of Pub. Welfare*, 414 Mass. 18, 27-28 (1992); *Minnefield v. McIntire*, No. C.A. 99-3349, 1999 WL 823890, at *10 (Mass. Super. Ct. Aug. 27, 1999).

before final relief can be granted.⁸² These present situations where the moving party's ability to obtain meaningful relief would be altered irreversibly during the pendency of the litigation.

Bearing in mind that the standard balances harm on both sides,⁸³ the court also must consider what happens to the defendant during that time if relief is granted.⁸⁴ It is a matter of the nature, not the degree, of the harm. It is immaterial that the harm is great if it can be redressed on final relief (though the greater the harm, the more material any differences in relief may become).⁸⁵ It is also immaterial if the final relief is equitable or legal so long as it is adequate.⁸⁶

The classic example of injury that can be remedied on final judgment is the award of damages – the quintessential adequate remedy at law.⁸⁷ But even this legal remedy may be inadequate if it becomes unavailable before a case reaches final judgment. Injunctive relief for economic damage can be available if “denial of injunction might result in disposal of funds prior to determination on [the] merits.”⁸⁸ In *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co. (MMWEC)*,⁸⁹ the court upheld a preliminary injunction requiring that the municipal electric company continue payments to MMWEC under power sales agreements pending arbitration.⁹⁰ The court “recognize[d] that [the municipal company's] failure to make payments is economic loss and that economic loss alone does

not usually rise to the level of irreparable harm” that warrants a preliminary injunction.⁹¹ The court nevertheless found irreparable harm based on evidence that “nonpayment is harm which would threaten the very existence of MMWEC's business.”⁹²

In deference to the general principle that economic loss can be compensated on final judgment and does not warrant preliminary relief, this decision often is read on its facts as a narrow exception that applies if the survival of the defendant's enterprise is threatened.⁹³ But the exception is broader, as reflected above. At a minimum, it stands for the proposition that a preliminary injunction may order continuation of periodic payments on ongoing obligations.⁹⁴ Moreover, injunctions protecting the ability to obtain money damages – or avoiding the need to seek damages or prevent economic losses for which damages may not be obtained⁹⁵ – should be available on grounds equivalent to those for prejudgment security.⁹⁶ It is the adequacy of final relief that must be threatened rather than the existence of the defendant's enterprise.⁹⁷

The appropriateness of preliminary relief also involves questions of efficiency both in effectiveness of final versus interlocutory relief and in the use of judicial resources. *Town of Brookline v. Goldstein*⁹⁸ is a vivid example. In *Goldstein*, town officials sought to enjoin a town gadfly named Goldstein from repeated groundless proceedings

82. See, e.g., *Town of Brookline v. Goldstein*, 388 Mass. 443, 449-50 (1983) (repetitive complaints to officials and lawsuits); *Joyal v. City of Marlborough*, No. C.A. 947562, 1995 WL 809017, at *3 (Mass. Super. Ct. Feb. 27, 1995) (“significant, irreparable harm” caused by odors from composting facility); *Davis v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, No. C.A. 942887, 1995 WL 808968, at *3 (Mass. Super. Ct. Jan. 19, 1995) (ineligibility to pitch an entire softball season).

83. See *Am. Grain Prod. Processing Inst. v. Dep't of Pub. Health*, 392 Mass. 309, 326-27 (1984) (abuse of discretion not to weigh harm to defendant.).

84. See *Transp. Workers Union v. Massachusetts Bay Transp. Auth.*, No. 994672F, 1999 WL 1203806, at *9 (Mass. Super. Ct. Nov. 15, 1999) (three-judge panel pursuant to Mass. Gen. Laws. ch. 212, § 30 (2006)) (loss of employees' seniority and benefits to plaintiffs outweighed by potential for injunction on implementation of contract to disrupt or shut down MBTA service).

85. See *Am. Grain Prod.*, 392 Mass. at 327-28 (banned food products not perishable and can be restored to shelves if plaintiff succeeds in overturning ban); *Ballotte v. City of Worcester*, No. 951747A, 1995 WL 1146157, at *3 (Mass. Super. Ct. Sept. 1, 1995) (seniority and benefits as well as lost income can be restored after final judgment).

86. See, e.g., *Satloff v. Massachusetts Bd. of Registration in Dentistry*, No. 05-3054-A, 2005 WL 2746556, at *5 (Mass. Super. Ct. Oct. 5, 2005) (“denial or the postponement of preliminary injunction relief now does not expose [plaintiff] to the threat or the presence of irreparable harm incurable by alternate immediate judicial review later”); *Ballotte*, 1995 WL 1146157, at *3 (“A successful disposition at trial can provide Ballotte with a remedy at law or equity for any losses suffered with respect to her claims arising out of her layoff”).

87. E.g., *Egbert v. Freedom Fed. Sav. & Loan Ass'n*, 14 Mass. App. Ct. 383, 394 (1982) (injunction vacated where economic harm to plaintiff outweighs harm to defendant but damages remedy available). For a critique of the primacy of damages as a remedy, see *Laycock, supra* note 57, at 691, 703-21.

88. *General Accident Ins. Co. v. Bank of New England, N.A.*, 403 Mass. 473, 475 n. 4 (1988). Cf. *Packaging Industries*, 380 Mass. at 621 (“no evidence that [the defendant] would be unable to pay any damages which [the plaintiffs] might be awarded”); *Goldberg v. Omega Assoc.*, No. C.A. 04-5122, 2005 WL 406428, at *5 (Mass. Super. Ct. Feb. 14, 2005) (preliminary injunctive relief may be proper to protect against monetary loss “where there is a risk that funds generated by a contract between the parties would be disposed of prior to a hearing on the merits,” or in the “absence of assurances that the defendant would be able to pay a judgment ...”).

89. 399 Mass. 640 (1987).

90. *Id.* at 641, 649.

91. *Id.* at 643.

92. *Id.*

93. E.g., *Tri-Nel Mgmt., Inc. v. Bd. of Health*, 433 Mass. 217, 227 (2001) (no irreparable harm where evidence showed smoking bans have little to no effect on restaurant revenues); *Boston Teachers Union v. City of Boston*, 382 Mass. 553, 567 (1981) (uncertain source of funding for municipal collective bargaining agreement); *Boston Athletic Ass'n v. Int'l Marathons, Inc.*, 392 Mass. 356, 362 (1984) (risk that funds generated under the challenged contract would be dispersed).

94. See *Laycock, supra* note 48, at 18 & nn. 1-56.

95. See *Loyal Order of Moose, Inc. v. Bd. of Health*, 439 Mass. 597, 602-03 (2003) (decrease in revenues from members and likelihood of employee layoffs in addition to non-economic harm).

96. See *The Frontier Group of Mass., Inc. v. Price*, No. C.A. 98-0347-A, 1998 WL 755187, at *2-4 (Mass. Super. Ct. Oct. 14, 1998) (granting injunction to escrow funds as prejudgment security, applying *Packaging Industries*). Rule 4.1(c) of the Massachusetts Rules of Civil Procedure requires “a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment.” *Id.* The rule does not address what showing of need is required except to provide that judgment must be likely to exceed the amount of coverage. In practice, however, this requirement is extended to mean that the plaintiff show “insecurity,” i.e., that judgment may not be satisfied without relief. See JAMES W. SMITH & HILLER B. ZOBEL, *RULES PRACTICE*, 6 MASS. PRACT. § 4.1.2 (2d. ed. 2006); Michael C. Gilleran, *Massachusetts Prejudgment Security Devices: Attachment, Trustee Process, and Reach and Apply*, 69 MASS. L. REV. 156, 161-62 & nn. 61-62 (1984).

97. Here, the United States Supreme Court's jurisprudence diverges sharply from the SJC's modern recasting of injunction law. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the Supreme Court held that a federal district court could not issue an injunction preventing a defaulting debtor from transferring assets. *Id.* at 332. Justice Scalia reasoned that, because such relief was not available under equity principles administered in the English Court of Chancery in 1789, it exceeded the district court's authority in the absence of a prior judgment for money damages. *Id.* Ironically, English law now permits a “freezing injunction” to prevent removal of or dealing with assets pending litigation. See ZUCKERMAN, *CIVIL PROCEDURE* 264 (2003) (citing CPR 25.1 (f)).

98. 388 Mass. 443 (1983).

and personal harassment of the officials.⁹⁹ The SJC vacated the portion of a trial court injunction that required court approval prior to bringing proceedings, leaving the plaintiffs to their remedies for unmeritorious claims under General Laws chapter 231, section 6F.¹⁰⁰ The SJC upheld an injunction against communicating with officials but remanded to narrow the injunction so as to focus on harassment of individuals.¹⁰¹

As great a nuisance as Goldstein evidently became, his activities probably could have been addressed by final relief without material additional harm to the plaintiffs. But, faced with a clear pattern of activity “beyond all reasonable bounds”¹⁰² that included repetitive lawsuits, requiring full adjudication on the merits before granting relief would have forced the plaintiffs to undergo still further unnecessary litigation with Goldstein.¹⁰³ Both that part of the injunction vacated as well as that upheld conserved judicial resources, and the issuance of injunctive relief offered a “complete, practical, and efficient”¹⁰⁴ remedy.

Preliminary relief is often characterized as preserving the “status quo” pending litigation.¹⁰⁵ Leubsdorf (among others)¹⁰⁶ was justifiably critical of this description.¹⁰⁷ The “status quo” often is used as shorthand for freezing the relationship between the parties. This is not necessarily the same as preserving a state of affairs that permits a meaningful final remedy. Freezing the parties’ relationship by enjoining the exercise of a lawful right to alter the relationship (for example, a right to invoke the termination provision of a contract) overlooks that “it sometimes happens that the status quo is a condition not of rest, but of action”¹⁰⁸ In such circumstances, an injunction meant to create a condition of rest can erroneously restrict the defendant’s legitimate interest in “freedom to act in ways

not yet shown to be unlawful.”¹⁰⁹

The requirement of some demonstrable harm flows simply from the interlocutory nature of the relief: in the absence of harm that cannot be redressed after a final judgment, there is no need for the court to engage on an interlocutory basis and risk acting erroneously based on “an abbreviated presentation of the facts and the law.”¹¹⁰ The definition of irreparable harm embodies this prudential restraint.

D. Discounting Harm By Likelihood of Success: How Does It Add Up?

The variations in injunction cases are too numerous and too subtle to allow a comprehensive matrix for balancing harm and likelihood of success.¹¹¹ But certain patterns do emerge. There is the greatest room for discretion where both factors are close. If either factor is close, a slight advantage on the other factor can tip the decision for or against relief. On the other hand, if one factor is clear in one direction, it can govern the outcome even if the other factor is in doubt.

Since injury and the merits must be considered in “combination,” it makes little difference which one comes first.¹¹² Evidently, then, recitations as to which factor is considered first or second should be considered purely descriptive, and not a standard. What factor is argued or considered first is a matter of the jugular vein: whichever affords the stronger argument or easier grounds to dispose of the case is likely to come first.¹¹³ Thus, in the first post-*Packaging Industries* decision, the Appeals Court gave little weight to either party’s showing of harm, but affirmed denial of injunctive relief based on the conclusion that the defendant was the likelier party to succeed.¹¹⁴

In a great many cases, the assessments of irreparable harm and the

99. *Id.* at 444.

100. *Id.* at 448.

101. *Id.* at 451-52.

102. *Id.* at 449.

103. *Cf. Aristud-González v. Gov’t Dev. Bank*, 501 F. 3d 24, 27-28 (1st Cir. 2007) (discussing standards for when repetitive litigation can become irreparable harm warranting injunctive relief).

104. Laycock, *supra* note 20, at 1071.

105. *E.g., Petricca Const. Co. v. Commonwealth*, 37 Mass.App.Ct. 392, 399-400 (1994) (“the purpose of a preliminary injunction is ‘only to preserve the status quo while the case is under consideration.’”) (quoting *Jet-Line Servs., Inc. v. Bd. of Selectmen*, 25 Mass.App.Ct. 645, 649-50 (1988)).

106. *See Wright & Miller, supra* note 51, § 2948 at 137-38 (status quo is a “makeweight”); Vaughn, *supra* note 9, at 850 (“manipulable and subjective . . . [a]s a principle, it does not inform the deliberations for a preliminary injunction in any meaningful way”); Note, *Developments in the Law: Injunctions*, 78 HARV. L. REV. 1055, 1058 (1965) (“lacks sufficient stability to provide a satisfactory foundation for judicial reasoning”).

107. Leubsdorf, *supra* note 24, at 546 (“The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it.”).

108. *Toledo, A. A. & N.M. Ry. v. Pennsylvania Co.*, 54 F. 730, 741 (C.C.N.D. Ohio 1893).

109. *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 725-26 (1993) (quoting Laycock, *supra* note 57, at 732).

110. *Packaging Industries*, 380 Mass. at 616; *see also Juan v. La Rosa Del Monte Express, LLC*, No. 051153A, 2005 WL 3489877, at *3-*4 (Mass. Super. Ct. Nov. 1, 2005) (resolving a motion for a preliminary injunction filed before significant discovery); *Taura v. O’Malley*, No. 3236B, 2005 WL 3537650, at * 3-*4 (Mass. Super. Ct. Oct. 26, 2005); *Akoury v. Roman Catholic Archbishop of Boston*, No. 043803B, 2004 WL 2341333, at * 3 (Mass. Super. Ct. Sept. 14, 2004) (plaintiffs filed a motion for a preliminary injunction two weeks after filing the complaint); Leubsdorf, *supra* note 24, at 541.

111. *But see Audain, supra* note 48, at 1245-59 (developing a “Posner Rule and the Probability of Harm Matrix (PRPHRM)” with 14 categories of cases based on different ranges of value for variables in Posner’s equation). For Judge Posner’s expression of a preliminary injunction rule as an equation, *see* note 48 *supra*.

112. Case law reflects no system or consistency in this regard. *Compare Packaging Industries*, 380 Mass. at 617-18 (discussing irreparable harm first), with *Am. Grain Prod. Processing Inst. v. Dep’t of Pub. Health*, 392 Mass. 309, 329 (1984) (likelihood of success on the merits is “second factor to be evaluated”) and *Healey v. Comm’r of Pub. Welfare*, 414 Mass. 18, 21 (1992) (“We first consider whether the plaintiffs have shown a likelihood of success.”).

113. *Cf. John T. Callahan & Sons, Inc. v. City of Malden*, 430 Mass. 124, 130-31 (1999) (quoting *Packaging Industries* that it must “initially” consider irreparable harm, but then proceeding to consider “initially” whether statutory violation has taken place and deciding on probability of success on the merits alone); *GTE Prod. Corp.*, 414 Mass. at 725 n. 8 (the court did not consider the moving party’s likelihood of success on the merits because it failed to establish a risk of irreparable harm).

114. *Westinghouse Broad. Co. v. New England Patriots Football Club, Inc.*, 10 Mass. App. Ct. 70, 73-74 (1980).

merits are inextricably bound up together. Because the *Packaging Industries* balancing approach makes the degree of harm a function of the probability of success, irreparable harm cannot be calculated standing alone. Recent cases with divergent outcomes illustrate the relationship between the two factors.

First, substantial certainty on the merits can reduce the significance of irreparable harm. The SJC decision in *Loyal Order of Moose, Inc. v. Board of Health of Yarmouth*,¹¹⁵ is an example of an injunction granted without a strong showing of harm.¹¹⁶ There, the SJC reversed a denial of preliminary relief against a local anti-smoking ordinance on the basis of its conclusion that the town's authority was limited to a ban where facilities are "public places," and that there was no evidence to show the fraternal lodge was open to public use.¹¹⁷ The showing of harm cited was negligible – unspecific evidence open to question that the lodge would lose patronage and perhaps have to lay off employees pending litigation, harm that in hindsight was perhaps imaginary¹¹⁸ – and contrasted with an earlier decision finding no irreparable harm from an anti-smoking ordinance.¹¹⁹ But, where harm alleged by the town was no clearer and was outside the scope of municipal authority, the court not only reversed the denial of relief, but also directed the issuance of a preliminary injunction.¹²⁰

Even though in *Loyal Order of Moose* the harm to the lodge pending final judgment was slight, if any, the balance tipped slightly in the lodge's favor since the town showed no harm except insofar as it had legal authority to ban smoking. Professor Douglas Laycock has suggested that, with respect to permanent injunctive relief on final judgment, the irreparable harm requirement has withered away.¹²¹ *Loyal Order of Moose* affirms that, if the merits on preliminary injunction approach the certainty that could be reached on full adjudication, the irreparable harm requirement is small.

Correspondingly, in *Wilson v. Commissioner of Transitional Assistance*,¹²² the SJC vacated an injunction even though it acknowledged that if deprived of their unemployment benefits, the plaintiffs "would bear significant hardship."¹²³ After analysis of the statutes involved comparable to a full review on the merits, however, the court found no statutory violation.¹²⁴ Discounted by the

probability of success, the significant hardship did not weigh enough in the balance.¹²⁵ As one writer summarized the analogous Posner formulation, "there is a trade-off between the *relative* harm between the parties and the *relative* probability of success on the merits."¹²⁶ In each of these cases, the court's high level of certainty on the merits transformed the significance of the irreparable harm.

A second way the merits are tied up with equities is in analysis of what constitutes irreparable harm. Harm is a function of whatever interests are entitled to protection under applicable law. To count as irreparable harm, the injury alleged must be legally remediable – that is, it must be within the range of harm against which the substantive law protects. The relationship of the merits to irreparable harm in *Wilson* also can be looked at through the interests involved: since the hardship did not result from violation of law, it was not remediable because compliance with law does not cause cognizable harm.¹²⁷ As Leubsdorf put it, "only irreparable harm to [substantive] legal rights ... should count. If the defendant has no right to pasture goats in front of the plaintiff's windows, any harm he suffers from an injunction against doing so comes not from the dangers of interlocutory decision, but from the substantive law."¹²⁸ Thus, a loss of "litigational advantage" due to a former employee's retention of documents is not irreparable harm because the court "reject[s] the claim that there is a right to compel long and expensive discovery ..."¹²⁹

Third, in cases involving enforcement of constitutional or statutory rights, analysis of likelihood of success and of irreparable harm is almost interchangeable. Although in the case of abortion rights, the SJC has stated, "the time-sensitive nature of this right can transform a temporary delay of its exercise into a complete denial of the right,"¹³⁰ most cases protect the exercise of a constitutional right without regard to whether its exercise is time-sensitive. It is a fair statement that "[w]hen an alleged deprivation of a constitutional right is involved, typically no further showing of irreparable injury is necessary."¹³¹ Thus, establishing on the merits violations of First Amendment rights,¹³² due process privacy,¹³³ procedural due process rights to notice and a hearing before termination of license,¹³⁴ or double jeopardy¹³⁵ effectively establishes per se irreparable harm.

115. 439 Mass. 597 (2003).

116. *Id.* at 603.

117. *Id.* at 602.

118. See DIVISION OF PUBLIC HEALTH PRACTICE, HARVARD SCHOOL OF PUBLIC HEALTH, TOBACCO RESEARCH PROGRAM, EVALUATION OF THE MASSACHUSETTS SMOKE-FREE WORKPLACE LAW: A PRELIMINARY REPORT 15-16 (2005), available at http://www.hsph.harvard.edu/php/pri/tcrtp/Smoke-free_Workplace.pdf (finding no decline in patronage of eating and drinking establishments due to smoking bans).

119. Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 227-28 (2001) (no evidence that the possibility of slight revenue loss threatened the business of restaurants open to the public).

120. 439 Mass. at 603-04.

121. Laycock, *supra* note 57 *passim*. See *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306, 323 (2003) (assertion that permanent injunction requires showing of irreparable harm "mistakenly seeks to graft onto a permanent injunction criteria that apply to preliminary injunctive relief").

122. 441 Mass. 846 (2004).

123. *Id.* at 858.

124. *Id.* at 851-58.

125. *Id.* at 858-59.

126. *Audain, supra* note 48, at 1248 (emphasis in original).

127. *Id.*

128. Leubsdorf, *supra* note 24, at 541.

129. *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 725 (1993).

130. *Planned Parenthood League of Massachusetts, Inc v. Operation Rescue*, 406 Mass. 701, 710 (1990).

131. *Whitney v. Ashburnham-Westminster Sch. Dist.*, No. 9603655, 1996 WL 1185116, at *1 (Mass. Super. Ct. Feb. 22, 1996).

132. *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 582 (1996) (citing *Elrod v. Burns*, 427 U.S. 347 (1975)).

133. *Doe v. Sex Offender Registry Bd.*, No. C.A. 97-2462, 1997 WL 819765, at *9 (Mass. Super. Ct. Dec. 22, 1997) (irreparable harm caused by public's access to sex offender information about plaintiff).

134. *Sullivan v. Reilly*, No. C.A. 00446-H, 2000 WL 776414, at *9 (Mass. Super. Ct. May 23, 2000).

135. *Donuts of Swansea, Inc. v. Comm'r of Revenue*, No. 96-6623-F, 2000 WL 1909779, at *3 (Mass. Super. Ct. Jan. 8, 1997).

On the other side of the coin, failure to establish a likely violation of rights falls short of establishing irreparable harm.¹³⁶ The same is true, though with some exceptions, for statutory violations¹³⁷ or for infringement of intellectual property rights.¹³⁸ Each substantive area brings to bear its own set of policies that affect the measurement of harm.¹³⁹

Balancing irreparable harm with probability of success is the essence of the equitable function. It is not simply an intuitive judgment about what is right. It requires careful analysis of the protected interests at stake in the litigation: What are the legally cognizable interests for which injunctive relief is sought? Is injury to the interests at issue? And how does preliminary relief change this injury compared to relief on final judgment?

III. Expanding the Model: The Public Interest

Conspicuously missing from *Packaging Industries* was any discussion of the “public interest.”¹⁴⁰ This omission appears to have been intended, given the SJC’s wholesale adoption of the Leubsdorf model in which the public interest was deemed irrelevant.¹⁴¹ Three years later, however, the SJC opened the door to the public interest as a factor in preliminary injunctions by noting in *Goldstein* that the risk of harm to the public interest could be considered “[i]n an appropriate case.”¹⁴²

The court did not explain in *Goldstein* what made that case or any other an appropriate case. Subsequent appellate decisions have offered some guidelines, but these have been vague and changing. The result has been inconsistent and sometimes idiosyncratic application of the public interest as trial courts are left to wrestle with when, why, and how to consider this factor. This section will review the treatment of the public interest in Massachusetts preliminary injunction decisions. It will then look to see what framework these decisions provide to the question what makes an “appropriate case,” and seek to fill out this skeleton.

As discussed below, “the public interest” is usually a misnomer

either for public policy implicated in the substantive law and interests of the parties to the suit or for the interests of third parties. What is legitimately considered under the public interest heading can be analyzed more systematically through analysis of these substantive interests.

A. The Public Interest Unchained

Soon after *Goldstein*, the SJC found an “appropriate case” in which to consider the public interest. In *Commonwealth v. Mass. CRINC*,¹⁴³ the court held that the effect of the requested preliminary relief upon the public interest must be considered where the attorney general sues to enforce violations of public laws or effectuate legislative policy.¹⁴⁴ In *Mass. CRINC*, the attorney general brought suit against wholesale beer distributors to enforce the Massachusetts Antitrust Act¹⁴⁵ and the newly adopted bottle bill.¹⁴⁶ According to the SJC, examining the impact of the requested injunction on the public interest was necessary because the attorney general had sued to enforce these public laws and policies, acting for the public.¹⁴⁷ The *Mass. CRINC* court also clarified that *Packaging Industries* had not considered the public interest because that case was a dispute between private parties.¹⁴⁸ Beyond this distinction between private cases and public enforcement, however, *Goldstein*’s “appropriate case” category remained largely undefined in *Mass. CRINC*.

The task of building on this foundation was picked up by the Appeals Court in *Bank of New England N.A. v. Mortgage Corp. of New England*,¹⁴⁹ in which Boston’s largest realty company asserted that its scale made the bank’s exercise of creditor’s remedies a matter of public interest.¹⁵⁰ In that case, the Appeals Court analyzed the role of the public interest head-on, considering what the SJC said in *Mass. CRINC* and *Goldstein* and vacating the injunction because the lower court had considered the public interest in impermissible ways.¹⁵¹ The *Bank of New England* court stated expressly what the SJC implied in *Mass. CRINC*: the public interest is not appropriately considered in cases between private parties involving private substantive law.¹⁵² Taking its cue from *Mass. CRINC*’s explanation of

136. Nolan v. Police Comm’r, 383 Mass. 625, 627 (1981); see *Planned Parenthood*, 406 Mass. at 713-14 (no irreparable harm where restrictions on picketing are narrowly tailored to avoid infringements of First Amendment rights).

137. Healey v. Comm’r. of Pub. Welfare, 414 Mass. 18, 21 (1992); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 98-100 (1984); *Minnefield v. McIntire*, No. C.A. 99-3349, 1999 WL 823890, at *10 (Mass. Super. Ct. Aug. 7, 1999).

138. *Atlas Box and Crating Co., v. Valerus*, No. 052163, 2005 WL 3721353, at *1 (Mass. Super. Ct. Dec. 2, 2005) (trade secrets); *Allen Field Co., v. Jam Plastics, Inc.*, No. 050706B, 2005 WL 1812455, at *1 (Mass. Super. Ct. May 31, 2005) (trade secrets); *Speechworks Intern., Inc. v. Cote*, No. 024411BLS, 2002 WL 31480290, at *1-3 (Mass. Super. Ct. Oct. 11, 2002) (trade secrets); *Pioneer Technology, Inc. v. Ellis*, No. 944579, 1994 WL 902989, at *1 (Mass. Super. Ct. Sept. 14, 1994) (patent and trade secrets).

139. See notes 206-14 and accompanying text *infra* (the “public interest” is usually a function of such policies).

140. See *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 245-46 (1991). By comparison, in the First Circuit, the public interest is thoroughly embedded as an element of preliminary injunction analysis. *E.g.*, *Planned Parenthood League of Boston v. Bellotti*, 641 F.2d 1006,

1009 (1st Cir. 1981) (must weigh the impact the allowance or denial of the requested injunction might have on the public interest).

141. See Leubsdorf, *supra* note 24, at 549-50. In its first injunction case after *Packaging Industries*, *Boston Teachers Union v. City of Boston*, 382 Mass. 553 (1981), the SJC decided the issue without any discussion of the public interest.

142. *Town of Brookline v. Goldstein*, 388 Mass. 443, 447 (1983).

143. 392 Mass. 79 (1984).

144. *Id.* at 88-89.

145. St. 1978, c.459, §1 (codified as amended at MASS. GEN. LAWS ch. 93, §§ 1-14A (2006)).

146. St. 1981, c.571, §2 (codified as amended at MASS. GEN. LAWS ch. 94, §§ 321-27 (2006)).

147. *Mass. CRINC*, 392 Mass. at 88.

148. *Id.*

149. 30 Mass. App. Ct. 238 (1991).

150. *Id.* at 243.

151. *Id.* at 245-47.

152. *Id.* at 247.

Packaging Industries' omission of the public interest as based on the private status of the parties (and again citing Leubsdorf), the Appeals Court concluded there is no reason to allow interlocutory relief based upon wider public interests where private parties are litigating matters governed by private substantive law and only those private parties will be affected by final judgment.¹⁵³

In *Bank of New England*, the Appeals Court identified three categories of cases where the public interest can be relevant. First, there are cases like *Mass. CRINC*, where a governmental body or a citizen empowered to act as a private attorney general sues to enforce a public law or policy.¹⁵⁴ Second, there are cases like *Goldstein* where any public entity is a party.¹⁵⁵ Third, there are private party cases where the underlying substantive law involves public interests and issues.¹⁵⁶

Although the Appeals Court drew this blueprint from the same sources as *Packaging Industries*, the SJC has not used this framework consistently. Two years later, in 1993, the SJC overlooked *Bank of New England's* "private party" formula and, returning to *Goldstein's* more amorphous "appropriate case" language, referred to public interest analysis in a dispute involving only private parties and private substantive law.¹⁵⁷ Other courts have followed these confusing signals in diverse directions. Numerous courts have applied the public interest – or not – without clear explanation.¹⁵⁸ Many more cite *Goldstein* for the proposition that the public interest can be considered in an appropriate case, treating the public interest as one more part of the standard, as it is in federal law.¹⁵⁹ Other courts have weighed matters of generalized public concern having little or nothing to do with the interests of the private parties or the underlying substantive law in the case.¹⁶⁰ Just what is "an appropriate case" and how to consider the "public interest" have proved elusive.

B. Unpacking the Public Interest

The vagueness and malleability of the public interest invite courts to consider open-ended interests untethered to the competing interests of the parties or the law and policies at issue. This invitation can be a ticket to arbitrary or idiosyncratic preliminary injunction decisions and may stray along the boundaries of legislative policy-

making. The party with the short end of the injunction stick could be aggrieved (erroneously) if the *Packaging Industries* balance tipped against it because the trial judge considered irrelevant, generalized or *ex cathedra* policy considerations that ultimately play no role in the substantive decision on the merits of the law applicable to the parties' claims.

It is for such reasons that the public interest as a criterion in injunction decisions has been criticized widely. Judge Posner called it a "wild card,"¹⁶¹ and commentators have observed how it can be an amorphous makeweight used to support the desired result.¹⁶² Such criticism also figures in the design of Leubsdorf's model to avoid the "thoughtless and inconsistent application" of preliminary injunction standards lacking "articulated rationale."¹⁶³ In leaving the public interest out of his model, Leubsdorf suggested that a court "must determine whose interests it should consider by reference to the substantive law that will apply when the case goes to trial on the merits."¹⁶⁴

The *Packaging Industries* standard had its origins in a movement toward more focused analysis. The confusion around the meaning of the public interest is antithetical to *Packaging Industries'* goal of a simplified, consistent standard balancing the competing rights and interests of the parties to the litigation.

This amorphous factor is more precisely and productively understood through the policies and interests underlying the substantive claims. Seen in this light, the "public interest" is a misnomer either for public policy¹⁶⁵ or for judicially significant interests of third parties. Looking at public policies implicated by substantive law or, in the case of third parties, by the law of standing, offers firmer ground than the shifting sands of the "public interest." These anchor decision-making in analysis familiar from other areas of law, such as constitutional law or conflict of laws. The label does not matter where the analysis is correct, but the semantic choice may help focus the analysis on policies and interests genuinely in dispute and avoid issues not before the court.

The categories elucidated in *Bank of New England* provide a useful starting point for re-examining such analysis. They help to systematize the public interest factor and rationalize its role in preliminary injunction decisions. In addition, a thoughtful *Texas*

153. See *id.* at 245-47; see also Part III B.3, *infra* for a discussion of cases that consider public interests in private party/private law cases.

154. *Bank of New England*, 30 Mass. App. Ct. at 246; see also Part III. B.1, *infra*.

155. *Bank of New England*, 30 Mass. App. Ct. at 246; see also Part III. B.2, *infra*.

156. *Bank of New England*, 30 Mass. App. Ct. at 246; see also Part III. B.3, *infra*.

157. *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 723 (1993).

158. See, e.g., *TLT Constr. Corp. v. Town of Bedford Sch. Comm.*, No. 06-P-740, 2006 WL 1726197, at *3 (Mass. App. Ct. June 23, 2006); *Payson's Trucking, Inc. v. Yeskevicz*, No. 20060155B, 2006 WL 1075462, at *1 (Mass. Super. Ct. Mar. 27, 2006); *Town Adm'r Screening Comm. of Webster v. Bd. of Selectmen of Webster*, No. 051795, 2005 WL 2864795, at *3 (Mass. Super. Ct. Oct. 7, 2005).

159. See, e.g., *GTE Prod. Corp.*, 414 Mass. at 723; *Driscoll v. Commerce Bank and Trust*, No. 2006403A, 2006 WL 1075463, at *1 (Mass. Super. Ct. May 27, 2006); *Metro. Removal Co. v. D.S.I. Removal Specialists, Inc.*, No. 20051503, 2006 WL 619111, at *1 (Mass. Super. Ct. Feb. 2, 2006).

160. See, e.g., *Andrews v. City of Springfield*, No. 04-P-102, 2005 WL 1335874,

at *1-2 (Mass. App. Ct. Jun. 7, 2005); *INTMB, Inc. v. Town of Westborough*, No. 041814A, 2004 WL 2345081, at *3 (Mass. Super. Ct. Sept. 29, 2004).

161. *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986).

162. Donald B. Haller, *Granting Preliminary Injunctions Against Dealership Terminations in Antitrust Injunctions*, 67 VA. L. REV. 1395, 1403-04 (1981); Vaughn, *supra* note 9, at 864; Wolf, *supra* note 46, at 234; see generally, Orin H. Lewis, *The Wild Card That Is The Public Interest: Putting A New Face on The Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849 (1994).

163. Leubsdorf, *supra* note 24, at 565-66.

164. *Id.* at 549. Leubsdorf argued that "[t]o consider interests irrelevant to the final decision at the preliminary stage will only increase the cost of litigation and undermine the substantive law." See also *Town of Brookline v. Goldstein*, 388 Mass 443, 447 (1983).

165. See WRIGHT & MILLER, *supra* note 51, at §2948.4. ("Focussing [*sic*] on this factor is another way of inquiring whether there are policy considerations that bear on whether the [injunction] order should issue.")

Law Review note on the role of this factor in such cases identifies two categories of public interest: “intrinsic” – “policy considerations embodied in the movant’s cause of action that will be resolved in the subsequent trial on the merits” – and “extrinsic” – those that “do not underlie the substantive law that will be at issue in a trial on the merits.”¹⁶⁶ The latter may include supervening policies such as laches or abstention doctrines that influence whether relief can be granted,¹⁶⁷ or they may be extraneous altogether. Examination of the interests implicated by each of these categories, as well as in cases asserting harm to nonparties (a category excluded from consideration in *Bank of New England*), indicates that most Massachusetts cases in which the public interest is invoked fit this intrinsic-extrinsic rubric.

1. Public Entity or Private Enforcement Actions Seeking Injunctions

This is the category recognized in *Mass. CRINC*, where a governmental body sues to enforce a public law or policy. As in *Mass. CRINC*, this category most often involves statutes that authorize the attorney general or another public official to bring suit to enforce public laws.¹⁶⁸ The same kind of authorization exists for private parties (as “private attorneys general” or otherwise) seeking injunctions to enforce underlying public substantive law.¹⁶⁹ Such statutory injunctions are the primary role of the public interest criterion even under the federal standard.¹⁷⁰

The basis for considering the public interest in such cases is rooted in the substantive law – the statute that authorizes the enforcement action. In *Mass. CRINC*, the SJC stated, “When the government acts to enforce a statute or make effective a declared policy of [the legislature], the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.”¹⁷¹ To obtain an injunction on this basis, the government enforcer must show that relief is needed to vindicate the policy involved: the court must consider “specifically” the likelihood of statutory violations and then weigh the impact of such violations on the relevant public interests.¹⁷² A court must determine what these

policies are, but can defer to the legislative decision (by statute or delegation) that certain conduct violates law or affects the public and therefore may warrant injunctive relief. While this analysis in enforcement cases ostensibly substitutes entirely for irreparable harm analysis, the underlying legislative policy judgments establish the interests and harm involved.¹⁷³ Thus, the role of the public interest in such cases is not open-ended. On the contrary, not only must it be grounded in cognizable public policy, but the sources and force of such policy are subject to examination. How strong is a legislative presumption that certain violations of law cause irreparable injury? What degree of deference should apply to agency decision-making underlying the policy? What level of scrutiny applies to legislative policy-making?

Likewise, because a statute authorizes injunctive relief does not necessarily mean it is warranted under the circumstances of a particular case or that such relief should be preliminary. The same prudential concerns that argue for awaiting full adjudication should apply if the public interest or other interests can be vindicated on final judgment. The plaintiff must show how the public interest is actually affected in the interim.¹⁷⁴

*LeClair v. Town of Norwell*¹⁷⁵ is a private enforcement action in which the SJC looked at the policies at issue and found that they were not advanced by injunctive relief despite a likelihood of success. In *LeClair*, taxpayers acting as private attorneys general sued to enjoin the Town of Norwell’s award of a public school construction design contract on grounds the town violated certain requirements of the designer selection and public bidding statutes, as well as town bylaws, in making the award.¹⁷⁶ Applying *Mass. CRINC*, the SJC looked first at the plaintiffs’ likelihood of success and found that the town had violated the applicable statutes and bylaws and that the plaintiffs’ claims had merit.¹⁷⁷ The court then framed the second part of the inquiry as (1) the effect of the requested injunction (voiding an already awarded contract) on the public interest, and (2) the impact of the proven statutory and regulatory violations on the interests of the public.¹⁷⁸

Although the *LeClair* court thus framed the issue in terms of

166. Lewis, *supra* note 162, at 856, 853 n. 14.

167. *See id.* at 864-66.

168. *See generally* Commonwealth v. Mass. CRINC, 392 Mass. 79 (1985). For examples of cases in this category, see *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306, 309 & n. 4 (2003) (attorney general’s action to enjoin gender discrimination consolidated with private suits); *Commonwealth v. Can-Port Amusement Corp.*, No. 2005-0295, 2005 WL 937312, at *1 (Mass. Super. Ct. Mar. 31, 2005) (district attorney’s action to enjoin defendants from maintaining an alleged nuisance and from removing fixtures from property); *Sec’y of the Commonwealth v. Election Comm’rs of Boston*, No. C.A. 00-5038, 2000 WL 1716249, at *1-*2 (Mass. Super. Ct. Nov. 14, 2000) (secretary of the commonwealth obtaining injunction requiring election commissioners to recount votes because of counting mistakes).

169. *See LeClair v. Town of Norwell*, 430 Mass. 328, 331-32 (1999) (citing *Edwards v. City of Boston*, 408 Mass. 643, 646-47 (1990)); *Carter v. Town of Douglas*, No. 001011A, 2000 WL 1473571, at *1-*2 (Mass. Super. Ct. June 22, 2000); *Roy v. Town of Spencer*, No. 99-0494-B, 1999 WL 228712, at *4 (Mass. Super. Ct. Apr. 5, 1999).

170. *See* WRIGHT & MILLER, *supra* note 51, at § 2948.4.

171. *Mass. CRINC*, 392 Mass. at 89 (quoting *United States v. D’Annolfo*, 747 F.

Supp. 220, 222 (D. Mass. 1979) (citations omitted)).

172. *Id.*; *cf. LeClair*, 430 Mass. at 331-32 (taxpayers acting as private attorneys general must show likelihood of success on claimed statutory violation and also that the requested relief would promote, or not negatively affect, the public interest).

173. *See Mass. CRINC*, 392 Mass. at 89-90 (citing *Hecht v. Bowles*, 321 U.S. 321, 330-31 (1944)); *accord LeClair*, 430 Mass. at 331 (citing *Edwards*, 408 Mass. at 646-47).

174. *See Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 648 (1987) (weighing “risk of harm to the public”); *Mass. CRINC*, 392 Mass. at 89 (“how such statutory violations affect the public interest”).

175. 430 Mass. 328 (1999).

176. *Id.* at 329. This outcome provides a counterpoint to *Bank of New England*, 30 Mass. App. Ct. 238 (1991), where the Appeals Court reversed the grant of injunctive relief because the public interest should not have been considered. In *LeClair*, the court affirmed the grant of relief on the basis of the public interest. 430 Mass. at 339-40.

177. *Id.* at 331-37.

178. *Id.* at 337.

the public interest in general, its inquiry focused on the substantive policies of the statutes and town bylaws at issue – to insure fairness in the public bidding process and obtain high quality design of the public structure.¹⁷⁹ The SJC concluded that even though the town had violated certain statutory and regulatory requirements, its contract award was made fairly in an effort to obtain high quality design services for the benefit of the town.¹⁸⁰ The court found this to be consistent with the “public interests” and noted that only a statutory transgression at odds with these policies would require injunctive relief voiding a public contract.¹⁸¹

In both of these cases, although the SJC’s opinion spoke of the “public interest,” its analysis focused on the specific public policies intrinsic to government contracts law – the statute authorizing relief in *Mass. CRINC*, and the challenged statutes and bylaws in *LeClair*.¹⁸² The “public interest” was not something extrinsic to the case, but instead was rooted in these substantive foundations. As prescribed in *Mass. CRINC*, the court weighed the impact of statutory violations on the substantive law at issue in the case.

2. Public Entities as Parties

Similar policy analysis arises in the second category, cases like *Goldstein*, where a public entity is a party.¹⁸³ Whatever other uncertainties have persisted as to when the public interest must be considered, it has become axiomatic that it is a factor where relief is sought against government action¹⁸⁴ or where the government is otherwise a party.¹⁸⁵

When a party to litigation is a public entity, it seems self-evident that the interests of one party implicate a governmental interest of some kind. In turn, such an interest can be described as an interest of the public represented by that government party.¹⁸⁶ The weight of these governmental interests is a function of the substantive law involved. In some cases where a government acts in a governmental capacity, constitutional law or other policies trigger closer scrutiny of the interests that support the government party’s actions.¹⁸⁷

Considering whether governmental action is lawful often depends on the strength of governmental interests. In others, governmental interests are entitled to the same deference given to most government action. Where a government appears in its proprietary capacity, the public fisc may be affected but the government entity may be otherwise little different from a private party.¹⁸⁸ Whatever weight such interests carry, as discussed above¹⁸⁹ the analysis – whether of irreparable harm or of the public interest – overlaps with analysis of success on the merits.

Take, for example, *Coe v. Sex Offender Registry Board*,¹⁹⁰ one of a series of cases involving the public identification of convicted sex offenders.¹⁹¹ There the SJC upheld challenged legislation requiring Internet publication of “offender-specific” information enacted to protect the public from a “substantial public safety threat” posed by those offenders.¹⁹² Convicted “level three” sex offenders, all determined to present a high risk of re-offending and to be a danger to the public, claimed that the statute unconstitutionally infringed their privacy and liberty rights under the Massachusetts Declaration of Rights.¹⁹³

In weighing the level three offenders’ likelihood of success, the SJC balanced the plaintiffs’ privacy and liberty interests and the “range of potential adverse consequences” to them from Internet publication of offender-specific information¹⁹⁴ against the range of governmental interests involved. The SJC found a countervailing state constitutional interest in “the rights of our citizens as a whole, and the right of each individual, to be safe and secure from criminal and predatory acts of others,”¹⁹⁵ and a policy interest in public safety, noting that “[a]ny crime is an offense against the public as well as a violation of the victim’s rights.”¹⁹⁶ The court’s consideration of the “public interest” was entirely integrated with this analysis of the merits, not a separate stage of that decision.

As in enforcement cases, the use of language about the “public interest” in public entity cases suggests a separate injunction factor. On closer analysis, however, the appropriate interests to examine are those that the public party is authorized to advance or protect or those implicated by substantive law applicable to the public party.

179. *Id.*

180. *Id.*

181. *Id.* at 338-39.

182. *See id.* at 337-38.

183. *See* Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass. App. Ct. 238, 246 (1991). *See, e.g.,* LeClair v. Town of Norwell, 430 Mass. 328, 337-39 (1999) (denying requested injunction in the public interest); Biotti v. Bd. of Selectmen, 25 Mass. App. Ct. 637, 640 (1988) (denying requested injunction in the public interest).

184. *E.g.,* Coe v. Sex Offender Registry Bd., 442 Mass. 250, 256 (2004); Siemens Bldg. Tech., Inc. v. Div. of Capital Asset Mgmt., 439 Mass. 759, 762 (2003); Loyal Order of Moose, Inc. v. Bd. of Health, 439 Mass. 597, 601 (2003); Tri-Nel Mgmt., Inc. v. Bd. of Health, 433 Mass. 217, 219 (2001); John T. Callahan & Sons, Inc. v. City of Malden, 430 Mass. 124, 130 (1999); T&D Video, Inc. v. City of Revere, 423 Mass. 577, 581-83 (1996); J.F. White Contracting Co. v. Massachusetts Port Auth., 51 Mass. App. Ct. 811, 814-16 (2001); Biotti, 25 Mass. App. Ct. at 640.

185. Duarte v. Healy, 405 Mass. 43, 46-51 (1989); Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 648 (1987).

186. *Cf. Biotti*, 25 Mass. App. Ct. at 643 (“strong interest” in enforcement of zoning bylaws “reflective of the will of the town”).

187. *T&D Video, Inc.*, 423 Mass. at 581-82 (First Amendment); Doe v. Attorney Gen., 425 Mass. 217, 219-22 (1997) (Double Jeopardy Clause); O’Sullivan v. Sec’y of Human Serv., 402 Mass. 190, 193-98 (1988) (seclusion and restraining alleged to violate statute and regulations).

188. *E.g.,* Boston Teachers Union v. City of Boston, 382 Mass. 553, 566-67 (1981) (injunction entered to fund collective bargaining agreement without reference to public interest).

189. *See* notes 130-39, 187 and accompanying text *supra*.

190. 442 Mass. 250 (2004).

191. *Doe*, 425 Mass. at 218; Doe v. Sex Offender Registry Bd., No. C.A. 97-2462, 1997 WL 819765, at *1 (Mass. Super. Ct. Dec. 22, 1997).

192. *Coe*, 442 Mass. at 250-52 & n. 2.

193. *Id.* at 250 & n.2.

194. *Id.* at 257-58.

195. *Id.* at 261.

196. *Id.* at 258.

3. Private Party Cases Implicating Public Interests

The third category of public interest cases enumerated in *Bank of New England* is private party cases where the underlying substantive law involves public interests and issues. Such cases involve public rights that a private litigant is entitled to enforce.¹⁹⁷ The analysis of policies and interests in such cases does not differ greatly from those where one party is a public entity or official.

*Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*¹⁹⁸ is a prime example. In *Planned Parenthood*, private plaintiffs¹⁹⁹ sought to enjoin privately organized individuals from blocking access to family planning clinics, thereby denying women the opportunity to obtain constitutionally protected abortions and counseling or other family planning services.²⁰⁰ The demonstrator-defendants countered that they had constitutionally protected rights to assemble and express their anti-abortion views, although they conceded that some of their demonstration tactics were illegal.²⁰¹

Balancing of harms required the court to weigh the parties' competing constitutional interests and, in turn, the underlying public policies.²⁰² In an analysis that blended likelihood of success, irreparable harm and the public interest, the SJC found that the defendants were unlikely to succeed on the merits of their constitutional claims where their demonstration tactics violated public laws, and enjoined the demonstrators from engaging in these illegal acts.²⁰³ The court then weighed the parties' legitimate constitutional interests and tailored the injunction accordingly, framing injunctive relief to protect free access to the clinic while permitting the defendants to exercise lawful forms of expression, subject to reasonable time, place and manner restrictions.²⁰⁴

This balancing is very similar to that in *Coe*, where the challenges to the sex offender identification scheme involved functionally similar constitutional and public rights claims by private plaintiffs against a government defendant.²⁰⁵ In each case, the court weighed interests of the parties in the context of the claims on the merits and the policies

implicated by these claims.

The private party cases that implicate public policies are wide-ranging and are not limited to claims of constitutional rights like those in *Planned Parenthood*. Even cases that arise from purely private law – i.e., contract cases – may turn on public policy. One common category of preliminary injunction cases is litigation seeking to enforce covenants not to compete.²⁰⁶ These are private agreements, but they are constrained by public policy.²⁰⁷ The loss of business goodwill constitutes prima facie irreparable harm to the enforcing party.²⁰⁸ On the other hand, the public has an interest in each person carrying on his or her trade or occupation freely, and agreements prohibiting another's trade or business are “contrary to public policy.”²⁰⁹ In these cases, courts weigh the interests of the parties to the agreements and generally enforce otherwise valid agreements that are limited in time and scope and thus not deemed “injurious to the public interest.”²¹⁰ The decision to grant or deny injunctive relief turns substantially on these questions of policy, which determine the likelihood of success, the balance of harms and the public interest interchangeably.

That the “public interest” comes into play in a category of cases clearly within *Bank of New England's* category of private cases – indeed, the very category in which *Packaging Industries* fell – reinforces that the term “public interest” refers to public policy and to interests that such policies recognize as legitimate, regardless of who the parties are. As with covenants not to compete, the issuance of injunctive relief turns on policy considerations that vary according to the substantive law involved – with “the juristic nature of the dispute.”²¹¹ Noncompete agreements²¹² are treated differently from trademarks²¹³ are treated differently from fundamental constitutional rights.²¹⁴

Such variations and policy considerations can be addressed by analyzing whether the plaintiff is likely enough to succeed or whether the harm is cognizable under substantive law, just as they were in *Packaging Industries*. Tying the “public interest” to these constants helps to prevent excursions into issues and considerations that are not part of the case before the court.

197. *E.g.*, *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701 (1990) (protected access to abortion clinics and First Amendment rights); *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306 (2003) (gender discrimination).

198. 406 Mass. 701 (1990).

199. The plaintiffs were private corporations, representative organizations, a male physician and a fictitious woman “representing all women who wish to obtain abortions at the plaintiff clinics.” *Id.* at 701.

200. *Id.* at 706-07, 710.

201. *Id.* at 712-14.

202. *See id.* at 710-14.

203. *Id.*; *see also* notes 71-75 and accompanying text, *supra* (no harm where no legal right under substantive law). In focusing its analysis in this way, the SJC sidestepped sticky questions about the plaintiffs' (organizations and one male individual) standing to assert constitutional rights of women, and instead upheld the injunction based upon the state's interest in preventing defendants' illegal demonstration tactics. *Planned Parenthood*, 406 Mass. at 716-17. In a strong dissent, the late Justice Francis O'Connor argued that the plaintiffs lacked standing to allege the harm of nonparty “women everywhere.” *See id.* at 718-20 (O'Connor, J., dissenting). For a discussion of appropriate legal interests to allege nonparty harm, *see* Part B.4, *infra*.

204. *Planned Parenthood*, 406 Mass. at 710-13.

205. 442 Mass. at 251-52. *See* notes 190-96 and accompanying text, *supra*.

206. *See* cases cited at note 10 *supra*.

207. *See, e.g.*, *Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. 635, 639 (2004); *Becker College of Business Admin. and Secretarial Sci. v. Gross*, 281 Mass. 355, 358 (1933); *Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 498 (1986).

208. *All Stainless, Inc. v. Colby*, 364 Mass. 773, 779-80 (1974).

209. *Woolley's Laundry v. Silva*, 304 Mass. 383, 387 (1939).

210. *Id.*

211. *Hammond*, *supra* note 20, at 278. Professor Hammond suggests that a “universal model” for preliminary injunctions is inadequate because whether injunctive relief is available varies with the type of dispute. *See also eBay Inc. v. MerExchange, L.L.C.*, 126 S. Ct. 1837, 1842 (2006) (Kennedy, J., joined by Souter and Breyer, JJ., concurring) (“the potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.”).

212. *See* note 10, *supra*.

213. *See, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 480 (1986); *RK Enter., Inc. v. Tech Auto., LLC*, No. 2004-1229, 2004 WL 2003694, at *1-3 (Mass. Super. Ct. Aug. 24, 2004).

214. *See* notes 130-36 and accompanying text, *supra*.

4. Third Party Interests

The interests of nonparties were not included in *Bank of New England's* list of categories in which the public interest may be an "appropriate" factor. Instead, the Appeals Court in that case followed Leubsdorf's model strictly in reasoning that "[t]hose whom the law excludes from protection at the final hearing have no greater claim to be taken into account earlier."²¹⁵ Among the interests that the court deemed irrelevant were those of tenants and employees of the very large residential realty manager whose bank liens were the focus of the case.²¹⁶

Other cases have considered whether such interests of nonparties can fulfill the requirement of irreparable harm. The Appeals Court has followed the path of *Bank of New England* in rejecting a public hospital's request to enjoin application of a regulation based on the irreparable harm the hospital claimed enforcement would inflict on its patients.²¹⁷ The court stated that the "proper focus in evaluating irreparable harm ... is on the plaintiffs and not their nonparty patients."²¹⁸ Even though public entities were on both sides of the "v," and the hospital's patients were members of the public, the Appeals Court held that "the [claimed irreparable] harm to the plaintiffs must be direct, that is, it is not enough for the plaintiffs ... simply to allege general harm to the public interest."²¹⁹

The SJC has been more willing to entertain the interests of customers affected by an injunction decision. It mandated continued payments to the Massachusetts Municipal Wholesale Electric Company due to the harm the breach would have not only on MMWEC itself, but also on its customers (preventing them from obtaining low-cost utility service).²²⁰ In another case, although denying injunctive relief against pesticide regulations, the court addressed (with reservations²²¹) the asserted impact of these regulations on consumer prices in determining that the harm was not irreparable.²²²

It seems overly strict to exclude consideration of such interests altogether. If, for example the tenants could lose their housing as a

result of bank foreclosure or utility customers would suffer dramatic, nonrefundable rate increases or even loss of electric service as a result of a dispute between power suppliers, should a court disregard such consequences in granting or denying an injunction? Under such circumstances, these nonparties could intervene in the lawsuit.²²³ Should the interests they could assert as interveners go unrepresented because they have not been joined as parties and may not have notice of the action? On the other hand, open-ended assertion of nonparty interests risks becoming the kind of wild card that the generalized public interest can be.

The cases involving these interests contain suggestions that provide a road-map for entertaining nonparty interests without opening a door wide. These are cases where the "public interest" presented the interests of nonparties in privity with the plaintiff. In *American Grain Products Processing Institute v. Department of Public Health*,²²⁴ a trade association sought to enjoin enforcement of a regulation banning chemicals used in its members' manufacturing,²²⁵ claiming, among other things, that a cost increase to its members would affect consumers across the nation who purchased the plaintiff's members' products.²²⁶ In a suggestive footnote, the SJC wondered "whether the [association] ha[d] standing to complain of a rise in consumer prices either nationally or in Massachusetts."²²⁷ The court decided it need not reach this question because the plaintiff in the case had not demonstrated adequate irreparable harm.²²⁸

This footnote implies that plaintiffs alleging third party harm must demonstrate standing, or some close relationship to the nonparties and their harm, to justify judicial examination of that harm in the interest balancing analysis.²²⁹ In all the above examples of nonparty interests, the nonparties were at least arguably in privity with the plaintiff. There are legally protected interests in customer relationships that provide a supportable legal nexus to the harmed third party.²³⁰ In turn, the *Bank of New England* court expressed the view that if it were to entertain the public interest asserted, "such harm [must] be demonstrated by a specific showing and not by broad,

215. *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 247 (1991) (quoting Leubsdorf, *supra* note 24, at 549).

216. *Id.* at 239.

217. *Norfolk County Hosp. v. Commonwealth*, 25 Mass. App. Ct. 586, 588-89 (1988).

218. *Id.* at 588.

219. *Id.* at 588-89.

220. *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 399 Mass. 640, 643-44 (1987). Finding that the enabling legislation authorized MMWEC to provide electricity for the "public benefit," and that the plaintiff's breach of contract might interfere with the public's ability to receive low cost, efficient utility service, the SJC upheld the injunction in furtherance of the public interest. *Id.* at 643-44, 648. For further discussion of this case, see text at notes 89-92 *supra*.

221. See text at notes 227-28 *infra*.

222. *Am. Grain Prod. Proc. Inst. v. Dep't of Pub. Health*, 392 Mass. 309, 327 (1984).

223. See Mass. R. Civ. P. 19.

224. 392 Mass. 309 (1984).

225. *Id.* at 309 & n.2.

226. *Id.* at 327.

227. *Id.* at 327 n. 24.

228. *Id.*

229. In *Roy v. Town of Spencer* No. C.A. 99-0494-B, 1999 WL 228712, at *1 (Mass. Super. Ct. Apr. 5, 1999), the superior court addressed the representational standing issue in the context of a private movant's requested preliminary injunction to vindicate public rights. An individual resident of the Town of Spencer sought to enjoin town selectmen and property owners from violating statutes against interfering with the public use of public property. *Id.* at *1. The defendants claimed the plaintiff lacked standing to assert public rights of access to the property at issue. *Id.* The trial court found that a private individual has standing to bring a lawsuit against public officials to compel performance of a public duty "when the question is one of public right and ... no other remedy is open." *Id.* at *2. The trial court concluded that the plaintiff had such standing to vindicate the public's right of access to the property at issue, and enjoined the town in furtherance of the public interest. *Id.* at *4.

230. Among other things, the law protects goodwill and the relationship with customers from tortious interference and unfair competition. Goodwill has been defined as "the employer's positive reputation in the eyes of its customers or potential customers ... generated by repeat business with existing customers or by referrals to potential customers." *Bowne of Boston, Inc. v. Levine*, No. C.A. 97-5789A, 1997 WL 781444, at *3 (Mass. Super. Ct. 1997) (citing *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287-89 (1974)).

sweeping, and vague statements”²³¹ This suggests a requirement of “particularized nonparty harm.”²³²

The benchmarks of standing and specific, demonstrable harm provide a measured basis on which to consider the interests of third parties where the interests of justice warrant doing so. Perhaps in the preliminary injunction context, full-blown standing requirements need not apply. A preliminary injunction is preliminary, after all and, as with other factors, the exigencies of an expedited proceeding on a limited record may not allow full adjudication. But, as with other branches of the “public interest,” the interests of third parties must be rooted in the substantive claims at issue. Requiring that the plaintiff have a legally significant relationship with such parties and also demonstrate specific harm to that relationship helps ensure that they are.

IV. Procedural Checks on the Balance

A. Appellate Review after *Packaging Industries*

1. The *Packaging Industries* Standard of Review

In *Packaging Industries*, after laying out the standard for preliminary injunction decisions, the SJC proceeded to explain how such decisions should be reviewed on appeal. The standard of review enunciated in *Packaging Industries* creates a tension between the equitable discretion of the trial court and the appellate court’s review. This tension is evident in decisions following *Packaging Industries* that applied its standard of review.

The SJC’s initial language in *Packaging Industries* acknowledged that appellate review proceeds under an abuse of discretion standard limited to the decision on injunctive relief and to “those questions basic to and underlying the specific order” appealed.²³³ Despite this apparent deference to trial courts, however, the SJC inferred (from legislative provisions for interlocutory review of preliminary injunctions) a broad scope for appellate courts to exercise their own discretion in such review.²³⁴

The trial court’s legal conclusions “are subject to broad review and will be reversed if incorrect.”²³⁵ While this on its face is little different from any other appellate review,²³⁶ it takes on added significance given the observation that a decision to grant or deny injunctive relief “turns on ‘mixed questions of fact and law.’”²³⁷ The

factors in the decision present mixed questions because the ultimate balance is a function of the probability of success. Hence, “broad review” of legal conclusions can alter the assessment of the equities. In addition, where live testimony is involved, “we follow the judge’s resolution of issues of credibility,” but where the decision below is based entirely on documentary evidence, the SJC declared “we may draw our own conclusions from the record.”²³⁸ Since more often than not preliminary injunctions are heard on affidavits and documents, most cases are subject to this de novo review on appeal.

The latitude that *Packaging Industries* provides to examine mixed questions of fact and law and to conduct independent review of the documentary record has given the SJC and Appeals Court latitude to exercise their own discretion over the issuance of preliminary injunctions, drawing their own conclusions from a documentary record, applying their own legal determinations, or altering the balance between claims of injury and chances of success. The next section will examine the degree to which appellate courts have exercised such discretion or have respected the discretion of trial courts.

2. “Broad Review” at Work

The first decision to apply the *Packaging Industries* standard of review came down from the Appeals Court just one month later in *Westinghouse Broadcasting Company v. New England Patriots Football Club, Inc.*²³⁹ When the Billy-Sullivan-era Patriots took advantage of late payments on an option for broadcast rights to terminate the option, the broadcaster sought injunctive relief and was denied.²⁴⁰ The Appeals Court affirmed, quoting as the standard language from another New England Patriots case, that involving coach Chuck Fairbanks’ departure for the University of Colorado: “An appellate court ‘will not reverse [a preliminary injunction] if there is a supportable legal basis for the (trial) court’s action even if, on final analysis, it may prove to be mistaken.’”²⁴¹ This standard has been followed in other cases.²⁴²

In its own next preliminary injunction opinion, the SJC affirmed an injunction enjoining the Mayor of Boston from setting the city’s tax rate until he submitted a school committee request for appropriations necessary to fund collective bargaining agreements.²⁴³ Although this relief was far-reaching,²⁴⁴ the SJC framed its review as a matter of “the sound discretion of the trial judge”²⁴⁵ and its findings on irreparable harm and the balance of equities as matters of what the judge “could

231. *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 248 (1991) (citing *Cont’l Group, Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 358 (10th Cir.1980)).

232. *Lewis*, *supra* note 162, at 857.

233. *Packaging Industries*, 380 Mass. at 615 & n. 9.

234. *Id.* at 613-16 (citing MASS. GEN. LAWS ch. 231, § 118) (1981)

235. *Id.* at 616 (quoting *Buchanan v. United States Postal Serv.*, 508 F.2d 259, 267 n. 24 (5th Cir. 1975)).

236. *E.g.*, *Luchini v. Comm’r of Revenue*, 436 Mass. 403, 405 (2002) (“These are questions of law, which we review de novo.”); *Demoulas v. Demoulas Super Mkt., Inc.*, 424 Mass. 501, 510 (1997) (“We are not bound, however, by the judge’s conclusions of law, and we must ensure that the judge’s ultimate findings and conclusions are consistent with relevant legal standards.”).

237. *Packaging Industries*, 380 Mass. at 616 (quoting *Buchanan*, 508 F.2d at 267

n. 24).

238. *Id.*

239. 10 Mass. App. Ct. 70 (1980).

240. *Id.* at 70-71.

241. *Id.* at 75 (quoting *New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1200 (1st Cir. 1979)).

242. *E.g.*, *Lawless-Mawhinney Motors, Inc. v. Mawhinney*, 21 Mass. App. Ct. 738, 743 (1986).

243. *Boston Teachers Union, Local 66 v. City of Boston*, 382 Mass. 553, 554-55 (1981).

244. *Compare with Hancock v. Commissioner of Educ.*, 443 Mass. 428 (2005), in which the SJC declined to enter relief against reliance on local property taxes for school funding. *Id.* at 429.

245. *Boston Teachers Union*, 382 Mass. at 566.

have concluded.”²⁴⁶

Within a year, however, the Appeals Court issued another decision citing the broad discretion of appellate courts not only to review trial court decisions on preliminary injunctions, but also to issue their own injunctions.²⁴⁷ The court construed the power of a single justice under General Law chapter 231, section 118 “to modify, annul, or suspend the execution of any interlocutory order entered in the Superior Court”²⁴⁸ to enable the single justice to grant relief where the superior court has denied it.²⁴⁹ Although the Appeals Court expressed caveats that such authority should be “exercised in a stinting manner”²⁵⁰ and that the court should “exercise care not to substitute [its] judgment for that of the trial court where the records disclose reasoned support for its action,”²⁵¹ it read the *Packaging Industries* framework for review as calling “for the exercise of independent judgment”²⁵² and issued relief rather than remand to the trial court because the harm seemed imminent.²⁵³ Correspondingly, the Appeals Court vacated another injunction where the appellate court drew its own conclusions from the written record.²⁵⁴

In the intervening years, many decisions have ratified the trial court’s exercise of discretion.²⁵⁵ More often than not, an appellate court has left room for the trial court’s discretion on fact-finding.²⁵⁶ In *Packaging Industries* itself, the court ultimately supported the trial court’s balance of harm based on what that court “could easily have concluded” from the record.²⁵⁷ More recent decisions suggest the “exercise of independent judgment” has the upper hand by making clear that appellate review is “not perfunctory.”²⁵⁸

The 2004 decision in *Wilson v. Commissioner of Transitional*

*Assistance*²⁵⁹ is almost as different from the 1980 *Patriots* case as that year’s football team was from its 1980 predecessor. In *Wilson*, the SJC reversed a trial court’s injunction against a reduction in employment assistance pending legislative approval of a supplemental budget.²⁶⁰ Irreparable harm was indisputable; the court acknowledged sympathy and the “significant hardship” to the plaintiffs, but found that the commissioner had not acted unlawfully in the absence of a supplemental appropriation.²⁶¹ Justices Roderick Ireland and John Greaney dissented.²⁶² Relying on that first *Patriots* decision,²⁶³ they argued that the trial court’s decision had a “supportable basis”²⁶⁴ because, even if the superior court judge’s interpretation of the statute involved proved to be error on appeal, there had been a “substantial possibility”²⁶⁵ of success.²⁶⁶ A year earlier, the court similarly altered the outcome by issuing an injunction based on its own analysis of the merits as well as its assessment of the record in *Loyal Order of Moose*.²⁶⁷

The *Wilson* dissent overlooked that the “broad review” of legal conclusions has been a constant.²⁶⁸ Such scrutiny is consistent with other appellate standards; for example, review of administrative agency decisions under an “arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law” standard treats legal error as a form of abuse of discretion.²⁶⁹ The trial court decision in *Wilson* was based on interpretation of legislation. The majority’s conclusion that the legislation permitted the benefit reductions at issue opened the door to rebalancing the merits and of the equities; the dissenters’ real point of divergence with the majority was on statutory interpretation.²⁷⁰ Had the trial court based its decision

246. *Id.* at 567.

247. *Edwin R. Sage Co. v. Foley*, 12 Mass.App.Ct. 20, 26 (1981).

248. *Id.* at 22 (citing MASS. GEN. LAWS ch. 231, § 118 (1981) (appeal from interlocutory orders)).

249. *Id.* at 22-23.

250. *Id.* at 25.

251. *Id.* at 26.

252. *Id.*

253. *Id.* at 29.

254. *Egbert v. Freedom Fed. Sav. & Loan Ass’n*, 14 Mass. App. Ct. 383, 388, 395 (1982).

255. *Wornat Development Corp. v. Vakalis*, 403 Mass. 340, 348 (1988) (trial court “could well have found, on the record before [it], that [the plaintiff] was entitled to a preliminary injunction”); *General Acc. Ins. Co. of America v. Bank of New England-West, N.A.*, 403 Mass. 473, 475-476 (1988) (trial court “could properly have concluded that the plaintiffs demonstrated a likelihood of success on the underlying merits, that they had demonstrated a sufficient showing of irreparable harm, and that the harm to the plaintiffs resulting from the denial of the injunction was greater than the harm to the defendants if the injunction were granted”); *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 399 Mass. 640, 642 (1987) (“reasonably suspect”); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 94 (1984) (trial court “could have correctly concluded that [allegedly unlawful activity] did not promote the public interest”); *Boston Teachers Union v. City of Boston*, 382 Mass. 553, 566-567 (1981) (trial court “could have found that failure to issue the injunction would have subjected the plaintiffs to a substantial risk of irreparable harm”); *Biotti v. Bd. of Selectmen*, 25 Mass. App. Ct. at 637, 640-641 (1988) (“The trial judge also could have distinguished this situation....”).

256. *E.g.*, *Town of Brookline v. Goldstein*, 388 Mass. 443, 447 (1983) (“we may reach own conclusions, although we give deference to the exercise of discretion by the judge below”).

257. 380 Mass. 609, 621. In fact, *Packaging Industries* turned significantly on the trial judge’s resolution of credibility. The briefs dealt at length on the judge’s termination of the evidentiary hearing after reaching the conclusion that he did not find the plaintiff’s testimony on the scope of a noncompete agreement at issue to be credible. See Brief for The Plaintiff-Appellants, *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609 (1980) (No. SJC 1949) at 50-58. The SJC made relatively short shrift of this issue in the context of its broader discussion, finding the record “amply supports” the trial judge’s conclusion and “we will not displace the judge’s assessment of the credibility of witnesses.” *Id.* at 619-20.

258. *O’Sullivan v. Sec’y of Human Serv.*, 402 Mass. 190, 197 (1988).

259. 441 Mass. 846 (2004).

260. *Id.* at 849, 859.

261. *Id.* at 858.

262. *Id.* at 859 (Ireland, J., joined by Greaney, J., dissenting).

263. *Id.* at 860 (Ireland, J., joined by Greaney, J., dissenting) (citing *New England Patriots, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1200 (1st Cir. 1979)).

264. *Id.* at 863 (Ireland, J., joined by Greaney, J., dissenting) (quoting *Lawless-Mawhinney Motors, Inc. v. Mawhinney*, 21 Mass.App.Ct. 738, 743 (1986) (citation omitted)).

265. *Id.* at 860 n. 1 (Ireland, J., joined by Greaney, J., dissenting) (quoting *Packaging Industries*, 380 Mass. at 609).

266. *Id.* at 863 (Ireland, J., joined by Greaney, J., dissenting).

267. *Loyal Order of Moose, Inc. v. Bd. of Health*, 439 Mass. 597, 601-04 (2003).

268. *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999) (quoting *Packaging Industries*, 380 Mass. at 616).

269. MASS. GEN. LAWS ch. 30A, §14 (2006). See *John T. Callahan & Sons, Inc. v. City of Malden*, 430 Mass. 124, 130 (1999); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 86 (1984).

270. *Wilson*, 441 Mass. at 860-63 (Ireland, J., joined by Greaney, J., dissenting).

on something less than a likelihood of success that, in combination with the “significant hardship” to the plaintiffs, warranted relief, the SJC would have had to face the trial court’s discretion in balancing the equities. Likewise, had the majority been less certain of its interpretation (if, for example, it turned on facts to be resolved at trial), the court’s opinion could have treated the interpretation of the legislation as a fair question for litigation in which the irreparable harm to benefit recipients tipped the balance in favor of injunctive relief.

By reaching the merits and acting, the court effectively acknowledged the dispositive impact of a preliminary injunction and conserved resources that otherwise would have been expended on full adjudication. Either way, review under the *Packaging Industries* standard has broad scope. Given the latitude that the *Packaging Industries* standard allows to issue an injunction in the first instance and the risk of error inherent in such a decision, this scrutiny provides a check on arbitrariness or error. The availability of appellate review of interlocutory injunctions reflects an understanding of the overriding importance the decision may have on the parties.²⁷¹

B. Trial Court Procedures

Just as the potential importance of a preliminary injunction decision coupled with its inherent uncertainty affects appellate review, they heighten the sensitivity of process before the trial court as well. As *Packaging Industries* framed it, the preliminary injunction is necessarily “granted or denied after an abbreviated presentation of the facts and the law.”²⁷² The scope and quality of this presentation affects the degree of uncertainty involved, and this uncertainty must be balanced against the impact of issuing or withholding injunctive relief – both the exigencies of the harm that is the basis for seeking relief and the impact of the decision on the case.

Many injunction decisions end up resolving the case.²⁷³ Moreover, the early adjudication a preliminary injunction affords can produce numerous benefits for the parties and the courts. Often, a motion for preliminary injunction is a tactic to get before the court, force

an early decision on issues, and strengthen a party’s hand in ensuing litigation or negotiations. The opportunity to present their cases to a neutral third party offers the parties some of the value of mediation or other dispute resolution, and the compressed paper presentation resembles a summary trial. Combined with the preview of the outcome that comes with the assessment of likelihood of success and, perhaps the impact on parties of the grant or denial of relief, this early adjudication is a powerful settlement tool. The opportunity for early relief may prevent less tractable litigation or more serious damages.

These practical realities put a premium on getting the right result. Courts could make more use of the tools available. While in practice most injunctions are heard on affidavits and briefs, a stated preference for findings of fact²⁷⁴ may call for evidentiary hearings where there are facts in dispute, especially where credibility is an issue.²⁷⁵ The urgency of the claim for relief needs to be balanced against the other party’s due process rights²⁷⁶ and, in some instances, right to jury trial.²⁷⁷ Additional time affords time to respond, and may benefit the court with a fuller presentation. Expedited trial is “generally desirable in an appropriate case,”²⁷⁸ it provides a way to address these procedural rights, achieve the greater certainty of final judgment, and mitigate the harm of an injunction wrongly entered or denied.²⁷⁹ The more opportunity to develop the record, the less uncertainty, the less chance of an erroneous injunction. The investment of more time up front may reduce judicial and party resources needed in the long run.

The definition of irreparable harm as injury that cannot be redressed by final remedies shapes the relief that should be granted. Since the goal of preliminary relief is “a state of affairs such that after the full trial, a meaningful decision may be rendered for either party,”²⁸⁰ it follows that preliminary relief should be tailored to go no further than necessary to prevent whatever irreparable harm may occur pending final relief.²⁸¹ The additional tools of an injunction bond and an accelerated trial on the merits can help to tailor relief. The injunction bond mitigates the risk of an injunction erroneously granted by protecting the defendant.²⁸² Although Rule 65 provides for a bond in mandatory language – “no restraining order or

271. Cf. FISS & RENDLEMAN, *supra* note 19, at 397.

272. 380 Mass. at 616.

273. Hammond, *supra* note 20, at 280; FISS & RENDLEMAN, *supra* note 19, at 397. For an example of a case where a preliminary injunction decision was decisive, see note 8 and accompanying text, *supra*.

274. See *Packaging Industries*, 380 Mass. at 616 n. 6.

275. Cf. *Sims v. Green*, 161 F.2d 87, 88 (3d Cir. 1947) (without an evidentiary hearing “the trial court will be left in the position of preferring one piece of paper to another”).

276. Cf. MASS. R. CIV. P. 65(b)(1) (“No other party”); Hammond, *supra* note 20, at 275-76 (due process “encompasses the notion that a court should not lightly intercede between two citizens prior to final judgment of a court of competent jurisdiction”).

277. See LAYCOCK, *supra* note 48, at 213-17.

278. *Packaging Industries*, 380 Mass. at 616 & n. 10.

279. According to the SJC, adoption of Rule 65(b)(2) of the Massachusetts Rules of Civil Procedure was meant “to encourage consolidation” and consolidation minimizes “[t]he risk that a party will suffer irreparable harm during the time between the hearing on the preliminary injunction and final hearing on the merits.” *Packaging Industries*, 380 Mass. at 616 n. 10.

280. *Id.* at 616.

281. *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 717 (1990) (injunction is narrowly tailored); *Town of Brookline v. Goldstein*, 388 Mass. 443, 451 (1983) (injunction remanded because it reaches too far); *Boston Teacher’s Union v. City of Boston*, 382 Mass. 553, 566 (1981) (where injunction against setting tax rate is appropriate “it should be confined within narrow limits”).

282. See *Thayer Co. v. Binnall*, 326 Mass. 467, 480 (1950) (“one cannot recover damages arising from the wrongful issuance of an injunction against him in the absence of a bond given as a condition to the issuance of the injunction...”); *Teel v. Hamilton-Wenham Reg’l Sch. Dist.*, 13 Mass. App. Ct. 345, 352 (1982).

preliminary injunction shall issue except upon the giving of security ...²⁸³ – the bond is up to the discretion of the court²⁸⁴ and often waived, addressed pro forma, or as an afterthought. In contrast to Massachusetts, under Federal Rule 65, security also is optional but failure to consider security is error.²⁸⁵ By mitigating the risk of error, a bond can facilitate the grant of injunctive relief in close cases at the same time as protecting interests of the defendant. An accelerated hearing on the merits likewise mitigates the risk of error by getting to a full adjudication of the merits and, if the interlocutory decision proves erroneous, shortening the time that unwarranted interlocutory relief is in force or that a deserving plaintiff must go without relief.

Courts as well as parties could use the preliminary injunction process more actively as a tool for case management. The early case assessment it necessitates can be a functional equivalent of the mandatory federal (and optional state) Rule 16 conference.²⁸⁶ Just as the court that hears a preliminary injunction motion can set the case down for early trial in lieu of preliminary relief, a court could use a preliminary injunction hearing or an order denying or granting a preliminary injunction to chart the course more specifically than tracking orders do. Such an approach would recognize explicitly the role of preliminary injunction litigation in shaping and resolving civil litigation.

Conclusion

From its earliest origins in Chancellor's court, the preliminary injunction has been a powerful tool for doing justice by preventing harm that would make final relief hollow. In *Packaging Industries*, the SJC adapted "this useful though somewhat indefinable branch of jurisprudence"²⁸⁷ to the modern era of merged law and equity.

The court made this indispensable tool even more powerful by giving trial courts added latitude to issue preliminary injunctive relief. The quarter-century of experience under *Packaging Industries* reviewed in this article shows that today the preliminary injunction is an ordinary remedy, readily available on a proper showing, and adaptable to a wide variety of circumstances.

The flexibility of the *Packaging Industries* standard and the breadth of the term "public interest" make them imprecise. As Leubsdorf wrote about the model adopted by the SJC, "[c]ourts must resort to intuitive analysis in which the objective impact of the loss and its significance in light of relevant legal policies blend with some degree of personal judgment."²⁸⁸ The challenge of analyzing standards for equitable relief is as old as the notorious "Chancellor's Foot."²⁸⁹

Injunctive standards nevertheless are not empty vessels into which courts or counsel can pour what they want. Predicting the likely outcome of cases is a skill that lawyers and judges are supposed to develop, so even as early as the preliminary injunction stage, analyzing likelihood of success should be a manageable task. Irreparable harm and the public interest call for careful, concrete analysis of the interests that the parties may legitimately seek to protect, rather than resort to abstract historical concepts such as inadequate remedy at law. Injunction procedures can be utilized to make prediction more certain. The availability of interlocutory appeal with meaningful review guards against aberrant outcomes in the trial court.

Packaging Industries and its progeny establish the preliminary injunction as one of the most important and useful remedies in the kit of tools available to modern courts. It is a tool not easily calibrated but, applied with analytical care, it can craft specific relief to fit almost any situation.

283. MASS. R. CIV. P. 65(c) provides in full:

Unless the court, for good cause shown, shall otherwise order, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of the Commonwealth or of a political subdivision of the Commonwealth or of any officer or agency of any of them.

284. See *Manousos v. Sarkis*, 382 Mass. 317, 323 (1981) (trial judge acted within discretion to condition continuance of injunction on posting of security); *Damaskos v. Bd. of Appeal of Boston*, 359 Mass. 55, 59 (1971) ("Bonds may also be required, under usual equity principles, in connection with granting or dissolving injunctions and possibly other equitable relief, as a matter of judicial discretion.") (emphasis added); *Herman v. Home Depot Inc.*, No. 1345, 2001 WL 705725, at *5 (Mass. App. Div. June 19, 2001) (paraphrasing *Am. Circular Loom Co. v. Wilson*, 198 Mass. 182, 211 (1908) ("[U]nder Rule 65 (c) a court need not require a bond. The court's decision on such matters is discretionary. Failure to require a bond is not a jurisdictional defect.")).

285. MOORE'S FED. PRAC. § 65.50 [1].

286. FED. R. CIV. P. 16(b), 26(f); MASS. R. CIV. P. 16.

287. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 23 Mass. 376, 402 (1828).

288. Leubsdorf, *supra* note 24, at 554.

289. It has been famously said and repeated that equity varies with the length of "the Chancellor's Foot." John Selden, an eminent 17th century jurist declared:

Equity in Law, is the same that the Spirit is in Religion, what every one pleases to make it; sometimes they go according to Conscience, sometimes according to Law, sometimes according to the Rule of Court. Equity is a Roughtish thing, for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot the Chancellor's Foot, what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.

Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 248 n. 39 (1995) (citing JOHN SELDEN, TABLE TALK 64 (1689)).

Case & Statute Comments

Criminal Law – Constitutional Objection

Commonwealth v. Galicia, 447 Mass. 737 (2006)

Last November, in *Commonwealth v. Galicia*,¹ the Supreme Judicial Court (“SJC”) decided significant Sixth Amendment confrontation clause issues arising under the rule of *Crawford v. Washington*² as construed by the United States Supreme Court in the then-recent case of *Davis v. Washington*.³ For that reason, *Galicia* will be much studied and frequently cited, but the case is noteworthy also for a wholly distinct reason which is the subject of this comment. It is the first Massachusetts case to provide a definition of the term “constitutional objection,” more than 40 years after the existence of such a procedural device was signaled by the Supreme Court in *Douglas v. Alabama*.⁴

I. The Legal Background

One of the major accomplishments of the Supreme Court under Chief Justice Earl Warren, from 1953 to 1969, was the incorporation of most of the criminal justice protections of the Bill of Rights into the Fourteenth Amendment’s due process clause, thereby making those protections binding in all state prosecutions.⁵ The result was to place on the criminal procedure of every state a federal constitutional overlay which, in the context of a state criminal trial, might well require an evidentiary ruling completely at variance with the statute or common law of the particular state.⁶

In *Douglas*, an Alabama case of assault with intent to murder, the prosecution had effectively put before the jury the confession of a nontestifying codefendant implicating Douglas as the shooter in the crime, without any opportunity for cross-examination of the

codefendant by Douglas’ counsel.⁷ Defense counsel objected to “this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, [and] it was not subject to cross-examination.”⁸ The Alabama Court of Appeals agreed that the admission of the confession had been error violative of state law requiring confrontation and cross-examination of adverse witnesses.⁹ However, it held that the error had been “waive[d]” because Douglas’ counsel had not persisted in his objections.¹⁰ The Supreme Court granted certiorari and reversed, on the ground of the denial to Douglas of “the right of cross-examination secured by the Confrontation Clause.”¹¹ In doing so, it stated the rule that “the adequacy of state procedural bars to the assertion of federal questions is itself a federal question.”¹² It applied the principle “that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.”¹³

Two years later, in *Chapman v. California*,¹⁴ the Supreme Court held that constitutional error would not automatically result in a new trial for the defendant,¹⁵ but would require a new trial unless the state could meet the burden to show that the error was harmless.¹⁶ Harmlessness in this context was to be gauged not according to the state “harmless-error” standard,¹⁷ but according to a uniform federal standard requiring reversal if there was a “reasonable possibility” that the constitutional error “might have contributed to the conviction.”¹⁸ The Supreme Court held that on such a standard, “before a federal

1. 447 Mass. 737 (2006).

2. 541 U.S. 36 (2004). The rule of *Crawford* is that, under the confrontation clause of the Sixth Amendment to the U.S. Constitution, “testimonial” hearsay cannot be admitted at trial against a criminal defendant unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. *See id.* at 53-54, 68.

3. 126 S.Ct. 2266 (2006). “Davis ... elucidated the distinction between nontestimonial (and therefore admissible) statements and testimonial (and therefore inadmissible) statements left open in *Crawford*.” *Galicia*, 447 Mass. at 738-39.

4. 380 U.S. 415 (1965).

5. MELVIN BELL, *THE LAW REVOLUTION* 29, 31, 175-76 (Leisure Books 1970).

6. *See, e.g.,* *Davis v. Alaska*, 415 U.S. 308, 311, 314-19 (1974) (state statute protecting anonymity of juvenile offender outweighed by defendant’s federal constitutional right to cross-examine witness for possible bias); *Chambers v. Mississippi*, 410 U.S. 284, 294-98 (1973) (state common law rule precluding

defendant from impeaching own witness interfered with defendant’s federal constitutional rights to present a defense and confront and cross-examine adverse witnesses).

7. *Douglas*, 380 U.S. at 416-17, 419-20.

8. *Id.* at 421 n.4.

9. *Id.* at 418.

10. *Id.*

11. *Id.* at 418-19.

12. *Id.* at 422; *accord* *Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990).

13. *Douglas*, 380 U.S. at 422.

14. 386 U.S. 18 (1967).

15. *Id.* at 21-22.

16. *Id.* at 24.

17. *Id.* at 22-23.

18. *Id.* at 23, (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

constitutional error can be held harmless, the [appellate] court must be able to declare a belief that it was harmless beyond a reasonable doubt.”¹⁹

Therefore, “constitutional errors that are preserved before or during trial are reviewed [by the appellate court] to determine whether they are harmless beyond a reasonable doubt.”²⁰ This is a standard more favorable to a defendant on appeal than the “nonprejudicial error” standard applied to preserved “[n]onconstitutional errors.”²¹ The constitutional standard requires reversal if the error “might have had” an effect on the jury’s verdict.²² The nonconstitutional standard allows the commonwealth to avoid reversal if the appellate court is persuaded with “fair assurance” that the verdict was not “substantially swayed” by the error.²³

II. Preserving a Claim of Constitutional Error in the Trial Court

Regardless of the standard of review, one must first determine how constitutional error is “preserved” in the trial court. The question arises in the mind of every attorney who prepares a petition for certiorari to the Supreme Court, for a rule of the Court requires a petitioner seeking review of a state court judgment to specify the

stage in the proceedings ... in the court of first instance... when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by [that] court[]; and pertinent quotations of specific portions of the record ... with specific reference to the places in the record where the matter appears ..., so as to show that the federal question was timely and properly raised....^[24]

With regard to evidence sought to be suppressed as

unconstitutionally obtained, the manner of preservation is obvious. Suppression is sought by a pretrial written motion that must “state the grounds on which it is based.”²⁵ Such a motion invariably states the specific federal and state constitutional provisions on which it is grounded.²⁶ When the motion is denied prior to trial by a judge of the trial court, preservation of the constitutional issue or issues for appellate review is complete. The defense need not object when the evidence sought to be suppressed on constitutional grounds is introduced at trial.²⁷

More problematic are constitutional claims on appeal grounded on objections made in the heat of trial. Objections made in such contexts as the admission or exclusion of evidence, or curtailment of cross-examination, or claimed error in the judge’s instructions to the jury, rarely are accompanied by specification of any constitutional authority.²⁸ Moreover, the SJC has undertaken numerous complex constitutional analyses without providing a clear description of the trial objection on which the constitutional claim on appeal was based.²⁹ However, in the case of *Commonwealth v. Fowler*,³⁰ it gave a detailed description of objections which failed to preserve a clear constitutional error, namely violations of the due process rule of *Doyle v. Ohio*.³¹

In *Fowler*, the defendant was arrested in Seattle on a charge of murder and, after having been given *Miranda* warnings,³² was interrogated by a police detective and an FBI agent.³³ Both the detective and the FBI agent testified, over defense objection, that the defendant answered some questions but, after being told by the detective that no one was going to believe him, declined to speak further.³⁴ The SJC held that the defendant had thereby invoked his right to silence³⁵ and that “it was a *Doyle*-type error for the two officers to mention that the defendant chose to [do so].”³⁶

Although objections had been made by defense counsel to the testimony of both the Seattle detective and the FBI agent,³⁷ neither

19. *Id.* at 24.

20. *Commonwealth v. Molina*, 439 Mass. 206, 211-12 (2003) (summarizing *Commonwealth v. Vinnie*, 428 Mass. 161, 163 *cert. denied*, 525 U.S. 1007 (1998)).

21. *Vinnie*, 428 Mass. at 163.

22. *Molina*, 439 Mass. at 212.

23. *Vinnie*, 428 Mass. at 163 (quoting *Commonwealth v. Flebotte*, 417 Mass. 348, 353 (1954)). Nonconstitutional errors that are properly preserved are reviewed according to a nonprejudicial error standard. An error is nonprejudicial only if the court is sure that the error did not influence the jury, or had but a very slight effect. *Vinnie*, 428 Mass. at 163. The nonprejudicial error standard is derived ultimately from *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). See *Commonwealth v. Alphas*, 430 Mass. 8, 13-14 n.7 (1999); *id.* at 23 (Greaney, J., concurring); *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 445 (1983). It is a “less onerous” standard for the commonwealth to meet than the standard of *Chapman* for constitutional error. See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

24. Sup. Ct. R. 14(1)(g)(i).

25. MASS. R. CRIM. P. 13(a)(2).

26. State constitutional errors must also be held “harmless beyond a reasonable doubt” to avoid reversal. See *Commonwealth v. McGrail*, 419 Mass. 774, 777-80 (1995).

27. *Commonwealth v. Martin*, 447 Mass. 274, 279 (2006); *Commonwealth v. Whelton*, 428 Mass. 24, 25-26 (1998). The rule is otherwise with respect to a pretrial motion in limine seeking the exclusion of evidence on nonconstitutional

grounds. See *infra*. notes 62-63 and accompanying text.

28. Compare *Commonwealth v. Johnson*, 365 Mass. 534, 540-42 (1974), and *Commonwealth v. Joyce*, 382 Mass. 222, 226 n.4 (1981) (where the colloquies between defense counsel and the trial judge underlying the constitutional claim on appeal are set out in their entirety and in substantial part, respectively).

29. See, e.g., *Commonwealth v. Nolin*, 448 Mass. 207, 217-20 (2007); *Commonwealth v. Peixoto*, 430 Mass. 654, 657-61 (2000); *Commonwealth v. Miles*, 420 Mass. 67, 70-73 (1995); *Commonwealth v. Moreira*, 385 Mass. 792, 794-97 (1982); *Commonwealth v. Munoz*, 384 Mass. 503, 505-10 (1981); *Commonwealth v. Funches*, 379 Mass. 283, 291-94 (1979); *Commonwealth v. Marini*, 375 Mass. 510, 516-19 (1978).

30. 431 Mass. 30 (2000).

31. 426 U.S. 610 (1976).

32. E.g., *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (warnings required to be given to a defendant in custody before any police interrogation of the defendant may take place).

33. *Fowler*, 431 Mass. at 38.

34. *Id.* at 36-37, 40.

35. *Id.* at 38.

36. *Id.* at 39. The rule of *Doyle* is that the use for impeachment purposes of a defendant’s silence after having received *Miranda* warnings violates the defendant’s rights under the due process clause of the Fourteenth Amendment. *Doyle*, 426 U.S. at 619. An analogous state constitutional rule exists under Article 12 of the Massachusetts Declaration of Rights. See *Peixoto*, 430 Mass. at 658-59.

37. *Fowler*, 431 Mass. at 40-41.

objection was sufficient to preserve the constitutional issue.³⁸ Objections to the detective's testimony were not based on the defendant's right to remain silent, but on other grounds.³⁹ In objecting to the FBI agent's testimony, defense counsel "offered no ground,"⁴⁰ and, although under the Rules of Criminal Procedure a party is not required to state the grounds for an objection,⁴¹ the result of the omission here was that the objection was not sufficient to "alert[] [the] judge" to the substance of the constitutional argument made on appeal.⁴² The defendant was therefore relegated, for appellate review of the constitutional error, to the standard for unreserved error.⁴³

Fowler thus established the minimum requirement for an objection to qualify as a constitutional objection that it apprise the trial judge of the substance of the issue to be presented on appeal. It did not, however, indicate what language needs to be used to preserve the constitutional ground of the issue. That gap has now been filled by the SJC's recent decision in *Galicia*.

III. The Factual Background of *Galicia*

Galicia presented the common situation of a 9-1-1 telephone call to the police by the victim of a domestic assault reporting the assault while it was in progress, followed by the response of police officers to the scene and their taking of statements from the victim there.⁴⁴

In those hearsay statements, the victim accused her husband, Carlos Galicia, of having pushed, choked and kicked her.⁴⁵ The victim did not testify at trial,⁴⁶ but the commonwealth filed a motion in limine to introduce her statements to the 9-1-1 dispatcher and to the responding officers.⁴⁷ The judge, after hearing testimony on the motion from the two officers, ruled that the victim's statements were admissible under the hearsay exception for "excited utterances" and

granted the motion in limine over the defendant's objection.⁴⁸ The officers and a police dispatcher then testified to the victim's hearsay accusations at a jury-waived trial held the same day before the same judge, who found the defendant guilty.⁴⁹

On appeal, the defendant claimed that, in light of the intervening decisions of the Supreme Court in *Crawford v. Washington*⁵⁰ and *Davis v. Washington*,⁵¹ the admission at trial of the victim's hearsay statements to the responding officers had violated his rights under the confrontation clause of the Sixth Amendment to the United States Constitution,⁵² and that he was therefore entitled to a reversal of his convictions unless the unconstitutionally admitted evidence could be held "harmless beyond a reasonable doubt."⁵³

IV. Determining the Existence of a "Constitutional Objection"

The SJC held that, under *Davis v. Washington*, the victim's hearsay statements to the responding officers had been "precluded from admission by the Sixth Amendment absent the unavailability of the witness and prior opportunity for the defendant to cross-examine her" and that the admission at trial of those statements had been constitutional error.⁵⁴ But the commonwealth argued that the "harmless beyond a reasonable doubt" standard of review should not be applied because no "constitutional objection" had been preserved by the defendant at trial.⁵⁵

At trial, when the commonwealth introduced the victim's statements to the responding officers, defense counsel had merely stated an objection "for the record."⁵⁶ Ordinarily, an objection "for the record" raises no issue for the appeal, because the appellate court perceives it as not reflecting actual dissatisfaction with the objected-to ruling of the trial judge.⁵⁷ The SJC agreed with the commonwealth

38. *Id.* at 40-41 & n.19.

39. *Id.* at 40-41 & nn.17, 19. Defense counsel's first objection was that the interchange between the detective and the defendant was not contained in any report. *See id.* at 40 n.17. The next objection was that the detective had opined in the question that triggered the defendant's invocation of the right to remain silent that he (the detective) found the defendant's story "incredible." *See id.*

40. *Fowler*, 431 Mass. at 40-41.

41. *Id.* at 41 n.19; see MASS. R. CRIM. P. 22; Opinion of the Justices to House of Representatives, 378 Mass. 892 (1979).

42. *See Fowler*, 431 Mass. at 41 n.19 (citing cases).

43. *Id.* at 42 & n.20. In a capital case (a case in which the defendant was convicted of murder in the first degree), the standard for reversal on the basis of unreserved error is denominated a "substantial likelihood of a miscarriage of justice." See MASS. GEN. LAWS c.278, § 33E (2006); *Fowler*, 431 Mass. at 42. In a non-capital case, the unreserved error standard is called a "substantial risk of a miscarriage of justice." *Commonwealth v. Lennon*, 399 Mass. 443, 448-49 n.6 (1987). The former may be somewhat more advantageous to a defendant-appellant than the latter, but the difference, if any, has never been the subject of detailed analysis by the SJC. *See Id.*, 399 Mass. at 449 n.6. The "substantial risk" standard puts the burden on the defendant to show that unreserved error could have "materially influence[d]" the guilty verdict. *Alphas*, 430 Mass. 8, 13, 23 (1999) (Greaney, J., concurring).

44. *Commonwealth v. Galicia*, 447 Mass. 737, at 740-41 (2006).

45. *Id.* at 738, 741.

46. *Id.* at 738.

47. *Id.* at 739.

48. *Id.* at 739-40 & nn.6, 7.

49. *Id.* at 740 & n.7, 747.

50. 541 U.S. 36 (2004). The *Crawford* decision was handed down after the trial of the *Galicia* case. *Galicia*, 447 Mass. at 747 (referring to objection at trial based on case law that "then governed confrontation clause analysis" and citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) abrogated by *Crawford v. Washington*, 541 U.S. 36 (2004)).

51. 126 S.Ct. 2266 (2006).

52. *Galicia*, 447 Mass. at 745-46. After the decision in *Davis*, the defendant withdrew his confrontation clause challenge to the statements made by the victim in the 9-1-1 call, *see id.* at 745 n.15, but the SJC considered it anyway. *See id.* at 737, 745-46.

53. *Id.* at 746.

54. *Id.* at 745-46.

55. *Id.* at 746.

56. *Id.*

57. *Commonwealth v. Olszewski*, 416 Mass. 707, 721-22 (1993), *cert. denied*, 513 U.S. 835 (1994) (error for judge to discharge juror without a hearing, but defense counsel's subsequent objection "for the record" to juror's having been excused outside defendant's presence indicated no prejudice in absence of motion for mistrial or request for remedial measure); *Commonwealth v. MacKenzie*, 413 Mass. 498, 508-09 (1992) (defense counsel did not raise "proper objection" to challenged testimony where, after placing objection to it "on the record," he went on "virtually to concede" its admissibility, rendering his "objection ... essentially form over substance").

that “in most cases,” a general objection “for the record” would be “insufficient to preserve the constitutional claim.”⁵⁸ However, it ruled that the “adequacy of the objection ha[d] to be assessed in the context of the trial as a whole,”⁵⁹ and in this case, that meant examining what defense counsel had said at the hearing on the commonwealth’s pretrial motion in limine.⁶⁰

A motion in limine is a motion “at the threshold,”⁶¹ i.e., a motion heard just prior to the beginning of trial. It has been a part of Massachusetts’ criminal practice since the 1970s. It is designed to resolve, in advance, issues in the admission or exclusion of evidence that are likely to arise at trial. It is a useful procedural device but, for defense counsel in criminal cases, it can be a trap for the unwary. This is so because objection by defense counsel to the judge’s ruling on the motion *in limine* preserves nothing for appeal; the objection must be repeated at trial to preserve a ruling for appellate review.⁶² “It is well established that a motion *in limine*, seeking a pretrial evidentiary ruling, is insufficient to preserve appellate rights unless there is an objection at trial.”⁶³

Against the background of that rule of procedure, the objection of defense counsel in *Galicia* “for the record” is plainly recognizable as relating back to, and incorporating by reference, counsel’s oral objection to the evidence stated in the pretrial hearing on the commonwealth’s motion *in limine*.⁶⁴ The SJC, therefore, looked to what was said by defense counsel in objecting to the hearsay statements at the hearing on the motion *in limine*.⁶⁵ There defense counsel had “noted ... that admission in evidence of the victim’s statements to the police dispatcher and to responding officers was inadmissible hearsay that bore insufficient ‘indicia of reliability’ and deprived the defendant of the opportunity to ‘cross-examine’ the witness.”⁶⁶ Because defense counsel had used the “terminology and principles” that then governed confrontation clause analysis,⁶⁷ he had “objected to the statements at issue with sufficient specificity to note

an objection on constitutional grounds.”⁶⁸

The SJC relied on no case law authority in arriving in *Galicia* at its definition of a “constitutional objection” as one grounded in the “terminology and principles” of a particular constitutional doctrine.⁶⁹ However, it noted as lending support to its “constitutional objection” ruling the fact that in *Davis v. Washington*, the Supreme Court had held sufficient to preserve a Sixth Amendment objection counsel’s contentious remark of dissatisfaction with the trial court’s ruling, where the remark contained the words “cross examine.”⁷⁰

Conclusion

The SJC’s ruling in *Galicia* that defense counsel had made a “constitutional objection” to the admission of the hearsay there at issue did not ultimately benefit the defendant, because the victim’s hearsay statements to the police dispatcher in the 9-1-1 call were held to have been properly admitted⁷¹ and her hearsay statements to the responding officers, though erroneously admitted, were held “harmless beyond a reasonable doubt.”⁷²

In stating a test for determining whether a “constitutional objection” has been made at trial, however, the SJC filled a procedural void which had lasted for more than 40 years and thereby provided valuable guidance for both trial and appellate defense counsel in criminal cases. The test emphasizes substance over form and is easy for trial counsel to meet. Counsel need simply explain the defendant’s entitlement to a particular evidentiary ruling or instruction by the judge and then object at trial to a denial of the ruling or instruction sought. The language of criminal procedure has become so thoroughly constitutionalized since the era of the Warren Court that a simple explanation by counsel that is rooted in federal or state constitutional doctrine will certainly qualify an ensuing objection as “constitutional” under *Galicia*.

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58. *Galicia*, 447 Mass. at 746.

59. *Id.* (quoting *Commonwealth v. Koney*, 421 Mass. 295, 299 (1995)).

60. *Id.* at 746-47.

61. The Latin word *limen* means “threshold”. See LANGENSCHIEDT’S SHORTER LATIN DICTIONARY 188 (1955).

62. This is so even if the issue is fully presented by the motion in limine and ruled on in that context with finality by the eventual trial judge. See, e.g., *Commonwealth v. Hardy*, 47 Mass. App. Ct. 679, 679-81 (1999).

63. *Whelton*, 428 Mass. at 25(citing *Commonwealth v. Keniston*, 423 Mass. 304, 308 (1996)).

64. *Galicia*, 447 Mass. at 746-47. As to the oral nature of the objection, see *id.* at 739 & n.5.

65. *Id.* at 746-47.

66. *Id.* at 747.

67. Prior to the Supreme Court’s decision in *Crawford*, hearsay was not barred under the Constitution from use against a criminal defendant, notwithstanding the Sixth Amendment confrontation clause, “on a mere judicial determination of [its] reliability.” *Crawford*, 541 U.S. at 62; see *id.* at 60-65 (overruling in part *Ohio v. Roberts*, 448 U.S. 56 (1980)).

68. *Galicia*, 447 Mass. at 746.

69. See *id.* at 746-47.

70. *Id.* at 747 (“That doesn’t give us the opportunity to cross examine.... Makes me mad”) (citing *Davis*, 126 S.Ct. at 2266, 2272).

71. *Id.* 447 Mass. at 744-45.

72. *Id.* at 746-48.

Criminal Law – Malice as Element of Criminal Harrassment and Stalking

Commonweath v. O’Neil, 67 Mass. App. Ct. 284 (2006)

Introduction

In the recent case of *Commonwealth v. O’Neil*,¹ the Appeals Court addressed the malice requirement of the criminal harassment statute.² In doing so, the court reaffirmed the principle that one does not have to specifically intend offensive conduct to be guilty of misdemeanor criminal harassment. The ruling also provides clear guidance for the jury instruction to be used in such cases and should lead to a correction of the instruction used in stalking cases.³ An unintended consequence of the ruling is that it brings the Massachusetts criminal harassment law (and stalking law) closer to a new model law combating stalking behavior.⁴

Case Background

In August and September, 2002, Dennis O’Neil, an inmate of the Hampshire County jail, began making collect telephone calls to the family home of a young woman who had attended his high school. The victim testified at trial that while she attended the same school as the defendant, she had no social contact with him. The family did not return any of the calls. Nevertheless, the calls continued, but the location of the caller changed to Bridgewater State Hospital in January, 2003.⁵

Also beginning in January, 2003, the family started receiving letters from the defendant. There were a total of seven letters received by the family with varying requests and pleas that demonstrated an increasing “obsessive tone and fabricated familiarity.”⁶

The first letter, postmarked January 25, 2003, asked the victim to send letters to certain unnamed persons and a particular judge to let him know that she was concerned about the defendant. The

letter ended with: “Nobody understands what it will take to make you happy like I do. I know this letter is not very good, but in the future you will see how much I care about you.”⁷

In a letter postmarked February 3, 2003, the defendant apologized for the inappropriate content of the earlier letter. The letter concluded with the defendant telling the victim that he has added her name to his telephone list and that he would call her house on that next Monday.⁸ The victim testified that she found this letter “very alarming.”⁹ She wrote to Bridgewater State Hospital and asked that the administration block all letters and phone calls from the defendant to her household.¹⁰ In March, she wrote a similar letter to the Hampshire House of Correction.¹¹

The next letter addressed to the victim was postmarked April 22, 2003, and showed the defendant’s increasing obsession and delusion by referring to an incident that the victim did not recall ever happening.¹² On April 23, 2003, the defendant was served with a “no trespass order” barring actual or attempted contact with the victim or her family.¹³ Undeterred, the defendant sent four more letters to the victim’s home.¹⁴

In a May 10, 2003 letter, the defendant denied ever threatening the victim and told her father that he appreciated that the father was helping the victim because other than the father and the defendant there are no “people that will help her out unconditionally.”¹⁵ He went on to say that he cared more about the victim than anybody else and that he knew what was best for her and how to keep her safe. He ended the letter by asking the father to “help me to convince her to drop this complaint that’s what’s best for her, for me, for you, for everyone.”¹⁶

In a letter two days later, the defendant told the victim he wanted her to help him get out of jail and not to do anything to keep him in it. He stated he would not “bother” her in the future and that he

1. 67 Mass. App. Ct. 284 (2006).

2. The criminal harassment statute provides:

Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished...

MASS.GEN.LAWS ch.265 §43A (2006).

3. Criminal harassment is a lesser included offense under the stalking law.

Stalking occurs whenever one

(1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury.

MASS.GEN.LAWS ch.265 §43 (2006).

4. A model code was first proposed by the National Institute of Justice in 1993. See Annual Report to Congress under the Violence Against Women Act, Appendix B (April, 1996). That code has been reviewed and revised with a new model code released in January of this year by the National Center for Victims of Crime. See

pdf file at <http://www.ncvc.org/src/>.

5. *O’Neil*, 67 Mass. App. Ct. at 284. The defendant apparently saw the victim’s picture and got her name from their high school yearbook. *Id.* at 289 n.5.

6. *Id.* at 285-86.

7. *Id.* at 285.

8. *Id.* at 285-86.

9. *Id.* at 289.

10. *Id.*

11. *Id.*

12. *Id.* at 286.

13. “No trespass” orders are authorized by MASS.GEN.LAWS ch.266 §120 (2006). A violation of such an order only results in a maximum fine of \$100 or 30 days in jail. A defendant can only be arrested for violating such orders if the trespass is committed in the presence of the police. Such orders are different from civil injunctions because the complainant does not have to file an action in court. Simply posting a notice or serving an individual with a written notice triggers the protection of this statute that was first enacted in 1862. St. 1862, c. 89.

14. Brief of Commonwealth-Appellee at 3, *Commonwealth v. O’Neil*, No. 05-P-142 (Mass. App. Ct. June 27, 2005).

15. *O’Neil*, 67 Mass. App. Ct. at 286-87.

16. *Id.* at 287.

did not mean to in the past. He then stated, “I still want to be friends with you. If anybody ever thinks about trying to bother you in the future I will handle defending you a lot more responsibly than the courts will.” He concluded by telling her that he is not obsessed with her.¹⁷ But a month later, he sent a long, rambling letter telling the victim that he thinks “about [her] all day long, it’s not like I forgot about you.”¹⁸ The defendant’s final letter came after the family had complained to local police. The letter repeated his obsession.¹⁹

Based on the letters and phone calls, Dennis O’Neil was indicted for criminally harassing the victim in violation of section 43A of Massachusetts General Laws chapter 265. He was tried without a jury and sentenced to two years probation.²⁰ The issues on appeal concerned the required state of mind for proving willful and malicious conduct and the requirements for proving substantial emotional distress under the criminal harassment statute. This comment will focus on the state of mind requirement as the court’s decision on the requirements of substantial emotional distress was not novel or ground-breaking and followed existing law.²¹

Legal Analysis

As stated above, the criminal harassment statute requires “willful” and “malicious” conduct as elements of the crime.²² The Appeals Court defined both terms in responding to Dennis O’Neil’s appeal. O’Neil argued that willfulness required not only that he intended the conduct, but also that he intended its harmful consequences.²³ The court disagreed and straightforwardly ruled that “wilful means intentional without making reference to any evil intent.”²⁴ No ill will or malevolence is required.²⁵ The court pointed to the defendant’s persistent contact with the victim after she had twice asked the prison authorities to block his mail and he was told, orally and in writing, not to contact her or her family. Thus, the defendant’s conduct was “willful and not accidental.”²⁶

But, “malice” would seem to include the exact ill will or malevolence

that is not present in mere willful, i.e., non-accidental, conduct. For example, in *Commonwealth v. Peruzzi*,²⁷ the Appeals Court traced the history of the term “malice” and found that “the terms wilful and malicious are not used redundantly” and convey different meanings within the context of criminal destruction of property.²⁸ The court held, “[t]he word ‘wilful’ means intentional and by design in contrast to that which is thoughtless or accidental. Malice, on the other hand, refers to a state of mind of cruelty, hostility or revenge.”²⁹ The court went on to state, “[b]oth elements are required for the crime of destruction of property or as it is sometimes referred to, malicious mischief.”³⁰

In most other crimes, the mere willful “doing of an unlawful act is a sufficient basis for a finding of malice....”³¹ “Malice aforethought” in a murder case “does not necessarily require a showing of ill will toward the victim. Rather it comprehends any intent to inflict injury without legal justification or palliation.”³² This latter formulation of malice as arising from the willful doing of an unlawful act, and nothing more, is generally found in tort claims based in malicious conduct as well.

After *O’Neil* was decided, the Supreme Judicial Court (“SJC”) in *Chervin v. Travelers Ins. Co.*,³³ substituted the “improper purpose” element as defined by section 676 of the Second Restatement of Torts in place of the element of “malice” in malicious prosecution cases.³⁴ The SJC’s “substitution” was not so much that as it was a refinement of the definition of malice found in several older cases. In the 1832 case of *Wills v. Noyes*,³⁵ the SJC stated that in order to maintain an action for malicious prosecution, “[t]he malice necessary ... is not necessarily revenge or other base malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious.”³⁶ Similarly, in the more recent case of *Beecy v. Pucciarelli*,³⁷ malice was defined as an improper motive, that “may be one of vexation, harassment, annoyance, or attempting to achieve an unlawful end or a lawful end through an unlawful means.”³⁸ The formulation of “malice,” then, in malicious prosecution cases looks remarkably similar to the

17. *Id.*

18. *Id.* at 288.

19. *Id.* at 289.

20. *Id.* at 284, 285 n.1. Probation included specific conditions that he (1) have no direct or indirect contact with the victim or her family; (2) report to the probation department as directed; (3) participate in a counseling program deemed appropriate by the probation department; and (4) reside with his parents until further order of the court. *Id.* at 285 n.1.

21. *O’Neil*, 67 Mass. App. Ct. at 294 (citing *Commonwealth v. Robinson*, 444 Mass. 102 (2005)).

22. *Supra* note 2.

23. *O’Neil*, 67 Mass. App. Ct. at 290.

24. *Id.*

25. *Id.* (citing *In re Adoption of Minor*, 343 Mass. 292, 297 (1961)) (interpreting MASS.GEN.LAWS. ch.210 §3 (2006)). The model jury instruction defines “willful” as an act that is “done intentionally and by design, in contrast to an act which is done accidentally.” INSTRUCTION 5.621 MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT (2000). This instruction is virtually identical to the model instruction for stalking: “[a]n act is done willfully if it is done intentionally and not out of mistake or accident. INSTRUCTION 5.62 MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT (1997).

26. *O’Neil*, 67 Mass. App. Ct. at 291.

27. 15 Mass. App. Ct. 437(1983).

28. *Id.* at 443.

29. *Id.*

30. *Id.*

31. *Id.*; see also *Commonwealth v. Boateng*, 438 Mass. 498, 517 (2003)(“in the context of assault with intent to murder, malice has a different definition: the absence of justification, excuse, or mitigation”).

32. *Commonwealth v. McInerney*, 373 Mass. 136, 140 (1977); *Commonwealth v. Scanlon*, 373 Mass. 11, 18 (1977); see generally *O’Neil*, 67 Mass. App. Ct. at 292 n.7; Patricia A. O’Neill and Katherine E. McMahon, *Recent Developments in the Law of Malice and Homicide*, 84 MASS. L. REV. 158 (2000).

33. 448 Mass. 95 (2006).

34. *Id.* at 110. Section 676 of the Restatement states: “To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.” RESTATEMENT (SECOND) OF TORTS §676 (1977).

35. 29 Mass. (12 Pick.) 324 (1832).

36. *Id.* at 327.

37. 387 Mass. 589 (1982).

38. *Id.* at 593-94.

formulation in *O'Neil*.

In *O'Neil*, the court pointed out that the requirement of malice under criminal harassment is fully satisfied by intent minus any justification or mitigation and “any reasonably prudent person would have foreseen the actual harm that resulted.”³⁹ Unlike criminal destruction of property cases, no ill will is required.⁴⁰ So like the *Chervin* case described above, the malice for criminal harassment seems implied or simply reflective of an “improper motive,” i.e., “one of vexation, harassment, annoyance, or attempting to achieve an unlawful end or a lawful end through an unlawful means.”⁴¹

The holding in *O'Neil*, however, contradicts the dicta contained in a case relied on by that defendant, *Commonwealth v. Jenkins*.⁴² In *Jenkins*, the Appeals Court, in reviewing the knowing standard contained in the stalking jury instruction, commented that malice under stalking “requires a showing that the defendant’s conduct was motivated by cruelty, hostility or revenge.”⁴³ That requirement is found in the model jury instruction for stalking and came from a malicious destruction of property case, *Commonwealth v. Armand*.⁴⁴ The Appeals Court in *O'Neil*, however, explained that malice needed in property destruction cases is different than that in cases involving harm to people. Thus, in cases involving individuals, it is closer to the lower standard of proving improper motive or means found in the civil cases described above. Essentially, the Appeals Court in *O'Neil*, like the SJC in *Chervin*, substituted an improper purpose definition of malice for one requiring cruelty, hostility or revenge.⁴⁵

Conclusion

The *O'Neil* result makes sense because the case involved serious harm to a person rather than destruction of property. As the court pointed out, property injuries can (and perhaps should) be addressed

civily unless there is some greater social harm due to heightened malicious intent.⁴⁶ Historically, it was held there must be a “special depravity or special hostility towards the owner which makes a crime of that which would otherwise be a mere trespass to property.”⁴⁷ In other words, affronts to individuals should be viewed by the law differently, if not more seriously, than conduct limited to damaging property.⁴⁸

Moreover, the *O'Neil* formulation follows a clear legislative intent of early intervention in stalking cases that have not risen to the level of explicitly threatening conduct.⁴⁹ Essentially, the legislature in enacting the criminal harassment statute adopted a general intent standard that recognizes that

[s]talkers may suffer from a mental disorder that causes them to believe that their victim will begin to return their feelings of love or affection if properly pursued...[Thus] a general intent requirement holds the accused stalker responsible for his intentional behavior if, at the very least, he should have known that his actions would have caused the victim to be afraid...⁵⁰

That general intent requirement informs the malice needed to prove criminal harassment. It appropriately comports with the Model Penal Code’s treatment of culpable mental states as descriptors without requiring a subjective exploration of the actor’s feelings of ill will.⁵¹ That last point is important in stalking or harassment cases. Too often, as in Dennis O’Neil’s case, the stalker truly believes he or she is expressing good will without any evil intent. But, as shown by this same case, the obsessive consequences of that belief can be disturbingly harmful to the target of the conduct. It is that evil consequence that is forbidden.

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39. *O'Neil*, 67 Mass. App. Ct. at 293; see Boateng, 438 Mass. at 517.

40. As an ironic aside, it should be noted that many stalkers frequently engage in destruction of their target’s property. See Mohandie, et. al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, 51 JOURNAL OF FORENSIC SCIENCE 147 (2006).

41. *Beecy*, 387 Mass. at 593-594 n.9. This notion of implied malice rather than actual malice is discussed in a very different setting involving an employment relationship in another recent case, *Blackstone v. Cashman*, 448 Mass. 255 (2007). In that case, the SJC held that an employee of a closely held corporation suing a director of the corporation must show actual malice to recover for tortious interference of a contract. The court found that actual malice involves a higher burden of proof, requiring a showing of “a spiteful, malignant purpose unrelated to the legitimate corporate purpose,” whereas, a lower standard of proof is required by “implied malice,” which requires only a showing of “improper motive or means.” *Id.* at 260-261.

42. 47 Mass. App. Ct. 286 (1999).

43. *Id.* at 291.

44. 411 Mass. 167, 171 (1991). The *Armand* definition of malice is indistinguishable from “actual malice” as described in *Blackstone*, 448 Mass. 255. See *supra* note 41.

45. The definition of malice that the Appeals Court announced in *O'Neil*, is exactly what the court would have instructed the jury using the model criminal harassment instruction. Presumably, it is also the definition that the trial judge was considering in finding Dennis O’Neil guilty. See *Commonwealth v. Watkins*, 63 Mass. App. Ct. 69, 75 (2005)(judges in jury-waived trials are presumed to know and correctly apply the law). Yet, the model jury instruction for stalking requires a showing of “cruelty, hostility, revenge, or other wrongful motive.”

Supra text accompanying note 24. “Malice” after *O'Neil*, should be defined the same for both stalking and criminal harassment. Therefore, the stalking model jury instruction needs to be changed.

46. *O'Neil*, 67 Mass. App. Ct. at 292-93; *Peruzzi*, 15 Mass. App. Ct. at 443; see also, the following destruction of property statutes where malice is an element: MASS.GEN.LAWS ch.266 §127 (2006)(malicious destruction of property); MASS.GEN.LAWS ch.266 §101 (2006) (destruction by explosion); MASS.GEN.LAWS ch.266 §126A (2006) (barring graffiti); MASS.GEN.LAWS ch.272 §73 (2006) (destruction of memorials to the dead); and similar statutes protecting private and public property contained in MASS.GEN.LAWS ch.266 §§95-98 (2006).

47. *Commonwealth v. Goodwin*, 122 Mass. 19, 35 (1877). For an even deeper history of the development of knowledge and malice and the emerging doctrine of “mens rea” see Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635.

48. See also *Commonwealth v. Lamothe*, 343 Mass. 417, 419 (1961) (distinguishing arson from other injury to property and holding that malice in arson need not be express, but may be implied from the wrongful act itself without proof of ill will).

49. See *O'Neil*, 67 Mass. App. Ct. at 293 (“We...should not construe the statute in such a way as to negate the Legislature’s clear attempt to protect victims of harassment before that behavior escalates into more dangerous conduct.”).

50. *State v. Neuzil*, 589 N.W. 2d 708, 711-712 (Iowa 1999) (quoting Christine B. Gregson, Comment, *California’s Antistalking Statute: The Pivotal Role of Intent*, 28 GOLDEN GATE U.L. REV. 221, 244-45 (1998)).

51. 1 Model Penal Code and Commentaries section 2.02, at 243-44 (Official Draft and Revised Comments 1985); see Gardner, *supra* note 47.

Book Review

Civility, by Michael B. Keating in *Business and Commercial Litigation in the Federal Courts*, Robert Haig, Ed., vol. 5, section 60 et seq. (2nd edition, 2005).

Introduction

Often, you have to dig for gold. And so it is with the second edition of the multi-volume treatise, *Business and Commercial Litigation in the Federal Courts*, edited by the estimable Robert Haig. The eight volume set comprises 96 chapters on subjects ranging from RICO¹ to electronic discovery to removal to ERISA². All of the chapters, prepared by seasoned practitioners and jurists, are solid and thorough – or so critics and commentators well-schooled in the mysteries of complex federal litigation have universally agreed.³ Most lawyers, however, don't know where the PSLRA⁴ ends and SLUSA⁵ begins, and so are unlikely to turn to the pages of the treatise in search of useful nuggets. That's too bad because, buried deep in *Business and Commercial Litigation in the Federal Courts*, there is something of good practical use to the common lawyer; to wit, Michael Keating's wonderful, accessible chapter entitled simply "*Civility*."

Aspirational Codes of Conduct

Christopher von Maack, writing for the *Utah State Bar Journal*, recently observed: "As a self-regulated profession . . . lawyers have an individual and collective role to play in maintaining civility in the practice of law. Undoubtedly, the primary responsibility is on the individual lawyer to act civilly. However, when the individual lawyer falters, other lawyers, e.g., opposing counsel, judges or the bar, must take some manner of action to maintain civility."⁶ To be sure, this describes a sensible approach to a serious problem. However, in practice it is often difficult to impose high standards of decorum on fellow lawyers precisely because there are no standards. While uniform codes like the American Bar Association's ("ABA") Model Rules of Professional Conduct and Model Code of Professional Responsibility⁷ set out clear, *mandatory* rules governing the ethical limits of the practice of law, there is no similar codification of rules governing civility.

Well, that's not quite true. Bar associations in many states have promulgated *advisory* codes of conduct for lawyers. In the commonwealth, for example, the Massachusetts Bar Association ("MBA") adopted a "Statement on Lawyer Professionalism" in 1989.⁸ The MBA lawyer's creed provides that "[a] lawyer should conduct himself or herself before the court in a manner which demonstrates sensitivity to the necessity of preserving decorum and the integrity of the judicial process."⁹ It goes on to state that lawyers should "communicate respectfully with other attorneys . . . respect the schedule of opposing counsel . . . avoid creating unnecessary animosity . . . [and] utilize the least contentious method for dispute resolution."¹⁰ However, the MBA emphasizes that the principles contained in the statement "are offered [only] as guidelines of ideal conduct to which the profession and its members should aspire, but are not intended to create standards to which any person shall be bound."¹¹

In addition to the MBA guidelines, the Boston Bar Association ("BBA") has promulgated standards of conduct, denominated "Civility Standards for Civil Litigation."¹² Directed specifically at issues of courtesy, the civility standards offer a fairly comprehensive body of suggested rules relating to inter-lawyer relations. The BBA code begins with many of the same basic precepts set out in the more general MBA document: a lawyer should "communicate respectfully with other lawyers . . . respect the schedule of opposing lawyers . . . [and avoid] unnecessarily burdening opposing lawyers by discovery or otherwise."¹³ However, the BBA's civility standards then explore in considerable detail – far more detail than the MBA statement – such topics as requests for continuances ("[a] first extension should be allowed even if the lawyer requesting it has previously refused to grant an extension"),¹⁴ service ("[p]apers should not be served so close to a court appearance that they might inhibit the ability of opposing lawyers to prepare for that appearance or to respond to the papers"),¹⁵ depositions ("depositions should be taken only where actually needed to ascertain facts . . . [and] never used as a means of harassment"),¹⁶ and motion practice ("before filing or serving a motion, a lawyer should engage the opposing lawyer in more than a mere pro forma discussion of its purpose in an effort to resolve the issue").¹⁷ Virtually every possible point of contact between lawyers engaged in a civil

1. Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961-68 (2000).

2. Employee Retirement Security Act of 1974, 29 U.S.C. 1001-1461 (2000).

3. See, e.g., Paul Sandler, Esq., "A New 'Must Have' for Legal Libraries," THE DAILY RECORD (Baltimore), August 11, 2006, at 38; Hon. Richard C. Wesley, "Business and Commercial Litigation in the Federal Courts, 2d Edition," NYSBA JOURNAL, July/August, 2006, at 50.

4. Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4-78u-5 (2000).

5. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. 78bb(f) (2000).

6. Christopher M. Von Maack, "Civility in the Practice of Law," UTAH BAR JOURNAL, March 2007.

7. American Bar Association, Center for Professional Responsibility, Professionalism Codes <http://www.abanet.org/cpr/profcodes.html> (last visited July 15, 2007).

8. Massachusetts Bar Association, (May 1989), [http://www.massbar.org/forattorneys/publications/lawyersjournal/2001/december/mba statement of lawyer professionalism](http://www.massbar.org/forattorneys/publications/lawyersjournal/2001/december/mba%20statement%20of%20lawyer%20professionalism) (last visited July 15, 2007).

9. MASSACHUSETTS BAR ASSOCIATION, Statement on Lawyer Professionalism I(A) (1).

10. *Id.* at II(A)(b),(c), (i).

11. *Id.* at Preamble

12. BOSTON BAR ASSOCIATION, Civility Standards for Civil Litigation, *available at* <http://www.bostonbar.org/prs/civility.htm>.

13. *Id.* at §§A(2), (3), and (4).

14. *Id.* at §B(1)(a).

15. *Id.* at §B(2)(b).

16. *Id.* at §B(5)(a).

17. *Id.* at §B(8)(a).

dispute is contemplated by the civility standards. However, like the MBA, the BBA emphasizes that its civility standards are intended only as guidelines – “aspirational and voluntary” in the words of the BBA.¹⁸

Keating’s Proposed Approach

Keenly aware of this lack of any formal binding regulations governing civility, Keating delineates a practical strategy for getting the best out of opposing counsel. He starts by building a convincing case for the view that standards of civility have declined dramatically during the past few decades. As possible causes of this phenomenon, Keating cites the advent of mega-firms, the overall increase in the number of lawyers, and the increasing reliance on e-mail as the primary method of communication among lawyers.¹⁹ These changes, he suggests, foster a sense of anonymity that emboldens lawyers to misbehave. In addition, Keating points to the modern “perception that rude litigators obtain better results for their clients.” The “SOB lawyer,” Keating claims, has become a sort of urban hero to be emulated by young practitioners looking for a shortcut to success. And clients do their part to nurture the stereotype, often looking for “the ‘meanest dog in the junkyard’ to represent them.”²⁰ Whatever the cause, there is little question that the trend toward incivility is real. As Barrie Althoff, Washington State Bar counsel, recently observed: “For many lawyers, incivility and ‘sharp’ practices by other lawyers, judges and clients are among the most irksome aspects of the practice of law. Many lawyers believe such behavior is increasingly common and that professionalism among members of the legal profession is declining.”²¹

To combat incivility, Keating proposes a combination of self-help and court intervention. As an initial matter, Keating suggests sending a letter to opposing counsel at the outset of a new case “setting forth suggestions for proceeding, reasonableness in setting deadlines, accommodations for busy schedules when possible, a willingness to discuss matters of disagreement, and the hope for a professional relationship notwithstanding any hostility between clients.”²² Establishing a spirit of cooperation from the beginning, Keating asserts, is often all that is required to ensure congenial relations throughout litigation.²³

However, if the subtle approach fails to promote professional conduct, Keating suggests documenting the misconduct of an opposing lawyer. As he notes, “savvy opposing counsel are less likely to be uncivil if their behavior is being recorded.” When the

posturing starts, “request that counsel communicate solely via letter or e-mail.”²⁴ If a lawyer refuses, Keating urges keeping a “written record of every threat or disparaging remark communicated orally, sending the writing to the offending attorney” ostensibly to ensure accuracy. This not only serves a potential normative function, but also creates a useful written record in the event court intervention ultimately is required.²⁵

In extreme cases, Keating contends that it may be helpful to remind an uncivil lawyer that oppressive behavior can provide the basis for sanctions. The Fifth Circuit recently upheld an award of \$25,000 obtained on the basis of uncivil behavior, including “repeatedly calling opposing counsel and parties rude names and referring to the work of other attorneys as ‘garbage.’”²⁶ Similarly, a federal district court in Florida reduced a statutory fee award to attorneys who were “disruptive during discovery,” “harassed the court reporter,” and called an opponent “a second-grade loser.”²⁷ Finally, the Eleventh Circuit upheld sanctions against a lawyer who “made personal attacks on opposing counsel, including remarks on his physical traits.”²⁸ Hitting a lawyer in his pocketbook – or even threatening to do so – is often a great way to get his attention, Keating argues.²⁹

If self-help fails, and only then, Keating recommends seeking judicial intervention to curb uncivil behavior. This can take several forms, depending on the context of the misdeeds – i.e., inside or outside the courtroom. In terms of outside-the-courtroom opportunities for misbehavior, discovery, according to Keating, is far and away “the area in which uncivil conduct is most likely to arise.”³⁰ In particular, misconduct during depositions is very common. Typical abuses include conducting unnecessary depositions to harass an opposing party, improperly directing witnesses not to answer and harassing the witnesses of opposing parties.³¹ Fortunately, courts have broad authority to curb such abuses. Possible sanctions for such pre-trial offenses range from the imposition of costs associated with depositions delayed or obstructed by uncivil conduct to dismissal where the misconduct is extreme.³²

When incivility occurs in the courtroom, Keating opines that it is generally best to leave the question of discipline to the discretion of the judge. However, if a particular judge seems disinclined to act, and opposing counsel’s misconduct poses a significant threat to the interests of a client, Keating proposes two possible courses of action. First, a lawyer may request a sidebar “where the attorney should clearly and politely articulate his or her concern about the adversary’s conduct.”³³ Provide as many specific examples as possible, Keating suggests. Alternately, a lawyer may file a motion for curative relief,

18. *Id.* at Preamble.

19. See Michael B. Keating, *Civility*, in *BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS*, §60.2 (Robert L. Haig ed., 2nd ed., 2005).

20. *Id.*

21. Barry Althoff, “*Ethics and the Law: The Ethics of Incivility*,” WASHINGTON STATE BAR ASSOCIATION, April, 2003, available at: http://www.wsba.org/media/publications/barnews/archives/2000/jul_99_civility.htm.

22. Keating, *supra* note 17, at §60.4.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (discussing *In re Bancorporation of Texas, Inc.*, 282 F. 3d 864, 866 (5th Cir. 2002)).

27. *Id.* (discussing *Lee v. American Eagle Airlines Inc.*, 93 F. Supp. 2d 1322, 1327 (S.D. Fla. 2000)).

28. *Id.* (discussing *Thomas v. Tenneco Packaging, Inc.*, 293 F. 3d 1306, 1324 (11th Cir. 2002)).

29. *Id.*

30. *Id.* at §60.5.

31. *Id.*

32. MASS. R. CIV. P. 37.

33. Keating, *supra* note 19 at §60.7.

“setting forth [the] factual basis [for the claim], including supporting affidavits if the complained of conduct [includes acts that are] not a matter of record.”³⁴ As with remedies for pre-trial misconduct, relief for courtroom incivility can take many forms. Relief might include striking particular statements, providing a curative charge or even, in extreme cases, declaring a mistrial. Indeed, Keating cites a number of instances in which various forms of serious misconduct – including physical violence and verbal abuse – provided the basis for mistrials.³⁵

Regardless of whether misconduct occurs inside or outside the courtroom, to maximize the chance of obtaining relief from the courts, Keating advises that “[i]t is critical that counsel maintain decorum in the wake of incivility.”³⁶ A lawyer with “unclean hands” is very unlikely to persuade a court that he or she deserves relief. Along these lines, Keating cites the example of a federal district court judge in New Hampshire who refused to award sanctions, despite a finding that counsel “has incontrovertibly abused the discovery process,” on the grounds that his opponent had responded in kind.³⁷ Further, and perhaps more important, fighting fire with fire is, according to Keating, likely to succeed only in exacerbating acrimony among lawyers.³⁸

Conclusion

Keating observes that “[b]ad habits are learned early in a litigator’s career, and it is critical that more experienced lawyers serve as role

models for younger lawyers.”³⁹ Consistent with this view, Keating emphasizes throughout his chapter that refusing to respond in kind to guerilla tactics is always the best approach – whether your goal is merely to reduce rancor or to position yourself for some form of relief. He also warns that lawyers should never yield to client demands for a tougher approach. As Keating points out, “[a]ll litigators must be mindful that they – not the client – should control how the litigation is developed, and it is their reputation – not the client’s – that is at risk in the proceedings.”⁴⁰ This is sound advice.

There is no question that *Business and Commercial Litigation in the Federal Courts* is intended for a specialized audience. For this reason, it is too bad, perhaps, that Keating’s fine chapter on civility should find a home there. In a perfect world, Keating’s essay would achieve much broader circulation, for it contains valuable lessons for all lawyers, regardless of their specialty.⁴¹ Indeed, even transactional lawyers who never set foot in a courtroom will find valuable information in “*Civility*.” It is worth seeking out, both to improve any lawyer’s effectiveness as an advocate, as well as to promote the best possible working environment for lawyers generally.

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34. *Id.*

35. *Id.*

36. *Id.* at §60.5.

37. *Id.*

38. *Id.* at §60.6.

39. *Id.* at §60.2.

40. *Id.*

41. To promote this worthy goal, Foley Hoag LLP will provide free reprints of “*Civility*” upon request. Please apply to Foley Hoag LLP (attention, Michael B. Keating, Esq.), 155 Seaport Blvd., Boston, MA 02210-2600.