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Cover: Detail from "Superior Court of Massachusetts, 1901," courtesy of the Administrative Office of the Massachusetts Superior Court. Included, from left to right, are: Justices Stevens, Bond, Sheldon, Braley, Maynard, Richardson, Sherman and Chief Justice Mason.
During this year, 2009, we mark the 150th anniversary of the establishment of the superior court. That court is so prominent a body in the Massachusetts legal constellation that we thought it appropriate to devote an entire issue of this Law Review to articles, essays, and a book review that commemorate the superior court. We have departed somewhat from the Spartan legal analysis that characterizes law reviews and in some of the contributions have allowed our writers to reflect, tell stories and celebrate. There are even some pictures.

Coincidentally, 2009 also marks the 35th anniversary of the effective date of the Massachusetts Rules of Civil Procedure and 30th anniversary of the Massachusetts Rules of Criminal Procedure. We take the occasion to publish three articles that assess aspects of some of the more profound changes in practice that the rules have produced. John M. Greaney and Lynn S. Muster trace the history, development and current application of summary judgment. Gael Mahony compares discovery before the Rules of Civil Procedure with discovery and its side effects after adoption of those rules. David Skeels performs a similar analysis of the 30-year experiment with discovery in criminal cases.

Barbara J. Rouse, chief justice of the superior court, gives us an account of the court’s creation that demonstrates Massachusetts politics in the mid-19th century were no less arch, inventive and rowdy than they are today. Our political ancestors also knew a thing or two about spin as they replaced the “Court of Common Pleas” with the more imposing “Superior Court.”

John C. Cratsley discusses litigation in which judges of the superior court have been asked to direct the action of governmental bodies, a form of judicial intervention he describes as “institutional remedial litigation.” He scrutinizes two cases, one involving the Boston Housing Authority and the second, the Metropolitan District Commission, in which the same judge, Paul G. Garrity, approached the task of court involvement very differently.

Michael B. Keating compares the atmospherics of the superior court in the 1960s, when he first appeared before it, with the larger and more managed court of the 21st century. E. Susan Garsh contributes an essay about how presiding at naturalization ceremonies reminds her that all citizens share responsibility to work for the cause of liberty, justice and equal opportunity. Julian T. Houston writes a brief history of African-Americans appointed to the superior court. His essay is a fragment of the standing exhibit he compiled, “The Long Road to Justice,” which is on display at the Edward W. Brooke Courthouse.

Paul A. Chernoff, in an essay entitled Picturing the Rule of Law, describes audio and visual materials the court has assembled that illustrate the court’s rich history. The panel exhibits have been installed in jury rooms in the various counties so that jurors may have a sense of the tradition they are continuing.

Finally, James F. McHugh III gets to the inner truth about the superior court in a stroll through novels, a play and movies in which the stories get played out in a trial court. The superior court, Judge McHugh demonstrates, can be good theater, inspires gripping plots, and has a bottomless cast of characters.

Happy anniversary, oh, great trial court. Keep up the good work.
Creation of the Superior Court: The Great and Historic Trial Court of the Commonwealth

By Barbara J. Rouse*

Barbara J. Rouse was appointed Chief Justice of the Superior Court in 2004, after having served as an associate justice since 1985.

As with many beginnings, the superior court was born from a desire for something better. In 1859, a confluence of popular and political forces led to the passage of an act establishing the superior court.1 Antislavery sentiment, frustration with the existing court structure and the slow pace of litigation and political maneuverings all played a part in the creation of the superior court — the Great and Historic Trial Court of the Commonwealth of Massachusetts.

One part of the story begins in 1854 with a slave by the name of Anthony Burns, who had escaped bondage in Virginia and was living and working in Boston. At the time, there were approximately 500 fugitive slaves in Boston.2 The federal Fugitive Slave Act of 18503 required the return of all runaway slaves to their masters, and in 1851, the Supreme Judicial Court (“SJC”) deemed the act constitutional in deference to decisions of the United States Supreme Court.4 On May 24, 1854, Burns was captured and, the next day, brought before Edward Greely Loring on an application for the rendition of a fugitive slave to his master in Virginia.5 Burns's master, Colonel Charles F. Suttle, had traveled from Virginia to claim him.6 Loring, a United States commissioner appointed pursuant to the Fugitive Slave Act, was charged with determining a claimant's right to an alleged runaway slave.7 Loring also held the office of judge of probate for Suffolk County.8

Richard Henry Dana, a prominent Boston attorney and a member of the Vigilance Committee, an antislavery organization that aided fugitive slaves, heard about Burns's plight and went to the courthouse where he was being held.9 Even though the Fugitive Slave Act did not provide for a legal defense, Dana offered to act as Burns's attorney.10 Though fearful that things would go worse for him if he opposed his own rendition, Burns reluctantly agreed to allow Dana to defend him.11 At the hearing, at which Dana was able to mount no real defense, Loring found, based on an authenticated record of a Virginia court proceeding, that Burns was indeed owned by Colonel Suttle and had escaped.12 Loring found the necessary identification established by Burns's own admissions during a conversation between Burns and Colonel Suttle on the night of Burns's arrest.13 Loring granted the application for rendition.14

Loring's decision set off a firestorm of protest. Antislavery sentiment was pervasive in Massachusetts;15 preachers railed against slavery from the pulpit and renowned authors such as Emerson and Thoreau wrote in opposition.16 On June 2, 1854, the day of Burns's departure, 50,000 people lined the route Burns would be marched

* The author owes a debt of gratitude to the late Judge Alan J. Dimond, who, on the occasion of the superior court's centennial, authored The Superior Court of Massachusetts: Its Origin and Development, a comprehensive history of the superior court. This more modest undertaking is not intended to duplicate that seminal work, which has been an invaluable resource, but aims to provide a more succinct explanation about, and somewhat different take on, the forces that led to the creation of the court. The author also wishes to express deep appreciation to Ashley Woodworth without whose assistance this article would not have been possible.

1. St. 1859, c.196, § 1.
3. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).
7. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850); see also Stevens, supra note 6, at 16.
9. Id. at 2, 19, 21. Dana was also the author of Two Years Before the Mast: A Personal Narrative of Life at Sea.
10. Von Frank, supra note 8, at 3.
11. Stevens, supra note 6, at 22.
12. The Case of Anthony Burns, supra note 5, at 181-82, 207.
13. Id. at 207-09.
14. Id. at 209-10.
15. Von Frank, supra note 8, at xii (characterizing Massachusetts as the “home of antislavery”).
16. See generally id. (discussing Transcendentalists’ response to Burns's rendition).
from the courthouse to the naval cutter that would return him to Virginia.\textsuperscript{17} The brick facades of buildings along the route were dressed in mourning and a black coffin labeled “Funeral of Liberty” was suspended from a window opposite the Old State House.\textsuperscript{18} Burns was placed in a hollow square formed by United States marshals and deputies to put him beyond the reach of outraged citizens.\textsuperscript{19} United States troops, the Boston police force, the Massachusetts militia and a cannon also escorted Burns down State Street.\textsuperscript{20} Recrimination for Loring was swift. Ostracized by his social circle, Loring lost his lucrative position as a lecturer at Harvard Law School for which he had been paid a handsome salary of $1,500 annually.\textsuperscript{21} He was “immediately branded a disgrace by the militant antislavery forces, who resolved to drive him from his probate judgeship.”\textsuperscript{22} A campaign gathered more than 100 petitions with over 12,000 signatures demanding his removal.\textsuperscript{23}

Shortly after Burns’s rendition, the antislavery American Party, more popularly known as the Know-Nothings, became the majority in the legislature,\textsuperscript{24} prompting Henry Wilson, who would later serve as a United States senator and 18th vice-president of the United States, to comment that it was “the most radical antislavery State legislature ever chosen in America.”\textsuperscript{25} Henry J. Gardner, a former conservative Whig, ran for governor as a member of the Know-Nothings and was elected.\textsuperscript{26}

In 1855, the legislature sought to remove Loring from his office of judge of probate by address — a method that required a majority vote of each house in the legislature and the consent of the executive council and the governor.\textsuperscript{27} The legislature claimed that Loring had lost the public confidence by breaching the Personal Liberty Law of 1843 that prohibited certain Massachusetts officials, including judges, from aiding in the enforcement of the Fugitive Slave Act of 1793.\textsuperscript{28} The assertion conveniently ignored that the Personal Liberty Law had not been amended to apply to the Fugitive Slave Act of 1850. Loring responded that the Fugitive Slave Act of 1850 was the law of the land, deemed constitutional by the SJC, commissioners had no discretion under it and the job of a magistrate was not to make the law but to administer the laws “as they are committed to them.”\textsuperscript{29} Governor Gardner refused to consent to the address and Loring remained in office.\textsuperscript{30}

Undaunted, on May 21, 1855, the legislature passed, over Governor Gardner’s veto, another Personal Liberty Law that declared it illegal for any state official to act as a federal slave law commissioner.\textsuperscript{31} The law further provided that any Massachusetts judge who also held the position of United States commissioner should “be deemed to have violated good behavior, to have given reason for loss of public confidence, and furnished sufficient ground either for impeachment or for removal by address.”\textsuperscript{32} Loring refused to resign his office of judge of probate or as United States commissioner and argued that certain sections of the Personal Liberty Law were unconstitutional.\textsuperscript{33} In 1857, the legislature again voted an address for Loring’s removal, but Governor Gardner again refused to assent.\textsuperscript{34}

In 1857, members of the Know-Nothing Party, fed up with the “conservative and Whiggish tendency of its administration of state affairs under Governor Gardner” voted Republican.\textsuperscript{35} Nathaniel P. Banks, a Republican, was elected governor and the Republican Party, whose majority was antislavery, took command of the legislature.\textsuperscript{36} By 1858, Loring’s obstinate refusal to resign, together with the constant drumbeat of criticism, “had aroused a strong popular feeling” and it was clear that the “great political excitement of the [legislative] session would centre about the address to the governor for the removal of Judge Loring.”\textsuperscript{37} That same year, a third address was introduced.\textsuperscript{38}

Governor Banks, who had national political ambitions, was eager to find a less drastic method of removing Loring from office because he feared being perceived as too zealous an abolitionist.\textsuperscript{39} He and conservative Republican leaders encouraged, as an alternative to the address to remove Loring, a plan to consolidate the offices of judge of probate and judge of insolvency.\textsuperscript{40} This plan proposed abolishing both courts and creating a new court with the functions of both;\textsuperscript{41} thus unseating all judges, not just Loring. Supporters of this consolidation bill argued that it would improve the administration of justice.\textsuperscript{42} However, it was largely acknowledged that the consolidation bill had been introduced purposefully to prevent any action against Loring of a “radical character” and that if Governor Gardner would have assented to remove Loring, “the Consolidation bill would probably never have been heard of …”\textsuperscript{43}

Loring’s adversaries pressed on and the address was passed before

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17. Stevens, supra note 6, at 146.
18. Id.
20. Muldoon, supra note 2, at 118; Stevens, supra note 6, at 143, 145; Von Frank, supra note 8, at 212-13.
22. Dimond, supra note 19, at 5.
23. Finkelman, supra note 21, at 103.
25. Id. at 239.
26. Id. at 236-38.
27. The legislature was not required to assign reasons for a removal by address. Commonwealth v. Harriman, 134 Mass. 314, 329 (1883); see also Mass. Const. part II, c. 3, art. 1.
28. St. 1843, c. 69, § 1.
30. Dimond, supra note 19, at 7.
31. St. 1855, c. 489, § 13.
32. Id. § 14.
34. Id. Pearson attributes Gardner’s refusal to his “conservatism.”
35. Id. at 69.
36. Id. at 68-69.
37. Id. at 72.
38. Dimond, supra note 19, at 8.
39. Id.; Pearson, supra note 33, at 80.
40. Pearson, supra note 33, at 80.
41. S. Doc. No. 25, at 3 (Mass. 1858).
42. Dimond, supra note 19, at 13. The joint special committee asked to consider the proposal was “of the opinion that the efficiency of that branch of public service, which concerns itself with the settlement of estates in the court of probate and of insolvency, will be promoted by the appointment of judges who shall exercise the functions which now pertain to the offices of judge of probate and judge of insolvency.” S. Doc. No. 25, at 1 (Mass. 1858).
the consolidation bill. The removal passed the house 127 to 101 and the senate 24 to 14. The executive council voted in favor by a majority of 6 to 2 and Governor Banks gave his assent. "In spite of all that he had done to prevent the removal of Loring by address, [Governor Banks] now took his stand at the head of the winning side with the grace and alacrity that sought to convey the impression that he had never stood anywhere else." In 1858, after four years of effort, Loring was removed from the office of judge of probate for Suffolk County.

Meanwhile, the consolidation bill had proceeded far into the legislative process. On March 26, 1858, the bill was enacted and all the judges of probate and insolvency were unseated and the functions of the two courts merged.

Thus, the impetus for the consolidation bill was the removal of Loring as a judge, but its passage also had an unintended consequence: a profound and significant effect on popular thinking about judges and courts that would eventually facilitate the creation of the superior court in 1859. The reorganization of the probate courts and the courts of insolvency accustomed the commonwealth to changes in a court system that was characterized by inefficiencies, overlapping jurisdiction and cumbersome structure.

The problems started at the top. The SJC, the only court established by the Massachusetts Constitution of 1780, was not only an appellate court, but also the principal trial court for the commonwealth. Its five justices would travel throughout the commonwealth to hold jury trials in civil and criminal cases and to decide questions of law from various courts. Trials, except for capital offenses, were heard at jury terms, as they were called, held by a single justice in every county except Dukes County. Capital offenses, over which the court had exclusive original jurisdiction, had to be tried before the full bench and a jury. The court would discharge its appellate responsibilities at law terms, as they were called, of the full bench held in eight of the state's 14 counties; law terms in Boston, at which the court's statewide appellate business could be heard, had not yet been established. Capital cases arising in counties with established law terms were tried there, but in counties without established law terms, the court had to convene the full bench specially.

At all terms, the only cases that could be heard were those arising in the county where the term was held. In addition, no business was conducted during the intervals, known as vacations, between the end of one term and the beginning of the next. All of this worked to make the court system slow, inefficient and expensive.

The organization of the other trial courts was also flawed. The court of common pleas consisted of seven judges, who sat individually on circuit at fixed terms in all counties except Suffolk. Most jurisdiction of the court of common pleas was concurrent with the SJC, including foreclosure of mortgages, real estate easements, partition petitions and actions at law in which the damages demanded exceeded $300. The court of common pleas had limited exclusive jurisdiction over complaints for flowing land and actions at law in which the damages demanded were between $100 and $300. Further, there was no court of common pleas in Suffolk County; instead the Superior Court of Suffolk County handled civil matters. Unlike the court of common pleas, the Superior Court of Suffolk County had exclusive jurisdiction over actions at law up to $3000.

The Municipal Court of the City of Boston handled criminal matters in Suffolk County.

Such was the court structure at the beginning of 1859. No one could predict that this structure would be drastically changed by the end of the year. The initiative for this change came from Senator Benjamin F. Butler, a prominent lawyer of his day. He would later serve as a major general in the Civil War and as governor of Massachusetts. He bragged that he reformed the judiciary “so far as it could constitutionally be done, the Supreme Judicial Court being placed out of reach of reform by the provisions of the Constitution.”

On January 17, 1859, on the motion of Senator Butler, the senate:

Ordered that a Joint Special Committee … be appointed to inquire what legislation is necessary to prevent delay in the administration of justice and to enable the speedy trial of causes between party and party, to cause the early settlement of questions of law whether civil or criminal, and to obtain … reports of such decisions as soon as possible.

On February 25, 1859, the joint special committee released its report and an act establishing the superior court. In its report, the committee surveyed the current organization of the courts, noting that until 1840 any party was entitled as of right to two jury trials on questions of fact in important civil and criminal cases. The first trial was in the court of common pleas and then either party could appeal for another trial in the SJC. The report noted that the division of business between the SJC and the court of common pleas

44. Pearson, supra note 33, at 81 (characterizing race between the two committees to get their respective bills passed); see also Eben F. Stone, Sketch of John Allibon Andrews, 27 Historical Collections of the Essex Institute 1, 5-7 (1890).
45. Dimond, supra note 19, at 8.
46. Id.
47. Pearson, supra note 33, at 83.
48. St. 1858, c. 93, § 1.
49. Dimond, supra note 19, at 16.
50. Id. at 17.
51. The Centennial of the Superior Court, 44 Massachusetts Law Quarterly 38, 38 (1859).
52. Dimond, supra note 19, at 19.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id. at 20.
59. Id.
60. Id.
61. Id. at 21.
62. Id.
63. Id. at 27-28.
66. See H.R. Doc. No. 120 at 1, 19 (Mass. 1859).
67. Id. at 2. This right was eliminated in 1839 for criminal cases and in 1840 for civil cases. Michael F. Hindus, Social Law Library, The Records of the Massachusetts Superior Court and Its Predecessors: An Inventory and Guide 15 (1978).
bore no relationship to the importance of the matter litigated, but was arbitrary, inefficient and costly, not only to the litigants, but also to the tax-paying public. 69

To give these broad conclusions some specific punch, the committee set out examples of delay in both criminal and civil cases. The committee first chronicled the case of a cow sold for $50 in 1848.70

After the plaintiff filed suit in 1849 for the unpaid $50, the defendant tendered $37.50, claiming that the cow had three teats instead of the promised four.71 Not satisfied, the plaintiff pressed for the remaining $12.50, and prevailed in the first trial in February 1851.72

The defendant took exceptions and the case lumbered on, enduring several continuances.73 Eventually, the SJC ordered a second trial in the court of common pleas, which occurred in December 1854, and at which the defendant prevailed.74 The plaintiff then took exceptions that the SJC did not rule on until March 1857.75 Finally, an execution issued for the defendant’s costs in the sum of $327.85 — an amount that the plaintiff could not pay because his circumstances had changed materially in the seven and a half years it had taken to litigate the case.76

The committee also provided numerous examples of the delays in criminal trials, including that of a William Joice who was held 14 months for murder before he was sentenced, and that of John Hares, a witness against William Joice, who was held over 14 months because he could not produce the required bail.77 The bill noted it is necessary for the protection of innocence and the punishment of guilt that the trial should be had before the witnesses have died, or have forgotten the facts, from the lapse of time. But in the case of witnesses unable to procure bail, these delays operate as a direct and flagrant violation of personal rights. They drag out weary months in prison, guiltless of all crime, awaiting the tardy movements of our courts.78

The committee lamented that the SJC had no time to hear and to determine questions of law because the court spent so much time riding circuit conducting trials, and that the expenses of litigation were “enormous.”79 The committee emphatically stated that “[f]ew parties can endure the expense and annoyance from protracted legal proceedings” and that “[j]ustice with us has come to be so slow of foot that whoever will, may escape it.”80 The fault, the committee concluded, lay with the way the courts were organized; specifically, the organization must be “inherently defective.”81

The bill proposed the establishment of the superior court to replace the court of common pleas, the Superior Court of Suffolk County and the Municipal Court of the City of Boston. The superior court, comprising 11 judges, would have substantially all trial jurisdiction possessed by these three courts and the SJC.82 The SJC would, thus, mainly hear questions of law as a court of appeals.

Immediately, newspapers responded to the committee’s proposal to reorganize the courts. The Boston Post, on March 4, 1859, stated that “the business of the Courts has been sadly behind the demands of litigants, and crowded dockets have kept cases of small amounts off for years.”83 The Boston Daily Traveller on February 28, 1859, commented that “the law’s delay” has been a proverbial phrase for hundreds of years. In this country, and particularly in this Commonwealth, the evil is really alarming. We understand that no man can hope for the final determination of the simplest matter, where it is the interest of the other side to procrastinate, under several years ...84

The paper went on to say that “the dockets here are more clogged up than ever before, and the efficiency of the system is very much at fault.”85

Most saw the bill to establish a new superior court as an important act that could secure speedier disposition of cases.86 Frustration with the pace of litigation was not limited to jury trials — delays in appellate review or law terms were also criticized.87 There were similar complaints about how expensive it was to litigate a matter or to resort to the courts. The Springfield Weekly Republican stated:

One objection to the present courts had been their expensiveness compared with the trifling importance of the great bulk of the cases that come before them. A first class judge, two juries, clerk, sheriffs and all their subordinate machinery are now frequently occupied, days and weeks, in trying the simplest questions of law and fact, each of which involves a sum smaller than the daily expenses of the court.88

Other newspapers were dubious that court reorganization or a new slate of judges would result in any great improvement.89 While not stated in the report, some suspected that the motives for the establishment of the new court came from dissatisfaction among members of the bar about the quality of the judges on the court of common pleas.90

After much debate and many amendments, the bill passed the
House on April 2, 1859, and the Senate on April 4, 1859. Governor Banks signed the bill the next day and it became effective on July 2, 1859. The new statute established the superior court, comprising a chief justice and nine associate justices. The superior court succeeded to the jurisdiction of the three abolished courts, the court of common pleas, the Superior Court of Suffolk County and the Municipal Court of the City of Boston. Most of the SJC’s jurisdiction remained the same. The superior court and the SJC were given concurrent original jurisdiction in all actions at law; however, the jurisdictional amount to access the SJC was raised to $4000 for actions in Suffolk County and $1000 elsewhere. In addition, capital cases were transferred to the superior court with the requirement that three judges and a jury try those cases.

A key change with respect to the SJC was that a law term was established at Boston and criminal appellate cases from all counties were to be heard there in addition to all civil appellate matters from every county except Worcester, Hampshire, Hampden and Berkshire, which were to continue to have separate law terms. Jury terms of the SJC were retained but reduced in number.

Finally, the bill provided for the payment of “liberal salaries” to the new judges because it was noted that “[t]heir labors are to be arduous.” Popular opinion seemed to support the notion that to attract high quality judges they must be compensated accordingly. One newspaper stated, “If we need first-rate men anywhere, it is on the bench; but to secure such men we must pay them their price.” The salaries set were $3700 dollars for the chief justice and $3500 dollars for each of the associate justices.

And so the superior court was created — the result of a chain of events impelled by forces both popular and political that reflected the values and sentiments of the times. What began as public outrage over Anthony Burns led to an effort to remove Loring from his position as a judge of probate, which, in turn, led to a consolidation of the probate courts with the courts of insolvency. This reorganization focused attention on the inadequacies of the existing court structure and the legislature’s power to effect change. The mounting frustration with the court system’s inefficiencies and the slow pace of litigation then became the driving force for the act that produced the superior court.

The new court wasted no time in announcing its intention to address the perceived deficiencies in court operations. Empowered to make rules for conducting its business, the court took immediate steps to accelerate trials and adopted two rules. The first rule limited closing argument to one hour per side. The second required attorneys to stand while examining witnesses and limited examination to one attorney per party. This latter rule caused much consternation among the members of the bar because the previous practice permitted them to sit while questioning witnesses so they could take notes as the witnesses testified. As there were no stenographers or court reporters, the rule made it necessary to employ two attorneys — one to examine the witness and the other to take notes of the testimony.

Those important modifications to existing practice began a process that has continued over the past 150 years, as the court has implemented many other changes designed to ensure high quality decisions in a timely fashion. Created to provide more expeditious and cost-effective justice, the court has repeatedly developed procedures and processes in order to meet those goals in the face of litigation of increased complexity and volume. Through self-examination, reflection and additional changes, the court will continue to fulfill the mission for which it was created as it encounters the variety of new and different challenges the future will undoubtedly provide.

91. Dimond, supra note 19, at 52.
92. St. 1859, c. 196; see also Dimond, supra note 19, at 52.
93. Dimond, supra note 19, at 53.
94. Id.
95. Id.
96. St. 1859, c. 196, § 21. The superior court’s jurisdiction over capital offenses was taken away three and one-half months later and not given back until 1891.
97. Dimond, supra note 19, at 53-54.
98. Id. at 54.
100. The New Court Bill, supra note 84.
101. Dimond, supra note 19, at 54.
103. Id. See also Torrey, supra note 90, at 144.
104. Torrey, supra note 90, at 144; The First Rules of the New Superior Court, Boston Daily Courier, July 8, 1859.
105. Torrey, supra note 90, at 144-45.

see St. 1859, c. 282; St. 1891, c. 379.
I. BEGINNING OF DISCOVERY IN MASSACHUSETTS

Bleak House, a blistering satire of England's Court of Chancery, and one of Charles Dickens's most popular novels, was published in installments in 1852 and 1853, during the era that saw the birth of the Massachusetts superior court in 1859. Bleak House chronicles the case of Jarndyce and Jarndyce, which survived imperviously for decades and for multiple generations of litigants, and which consumed unconscionable amounts of money. In Dickens's words, "The little plaintiff or defendant, who was promised a new rocking-horse byJarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse and trotted away into the other world." Dickens's scorn was expressed in terms of weather conditions especially meaningful to his London readers. The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery. Dickens's views about the English justice system were not confined to the equity court. Earlier he had pilloried the law courts, in his 1837 novel, The Pickwick Papers. And when it came to the English courts, law and equity both, Dickens knew whereof he spoke: he had served as a clerk in a solicitor's office and as a shorthand reporter in the law courts. He had also been a Chancery litigant in a suit to enforce his copyright in earlier novels.

The negativeness about the English justice system captured by Dickens was also evident in other common-law countries, including the United States, and was accompanied by a vigorous movement for reform. One subject of particular concern to the reformers was the evidence-exclusion rules in the law courts that inhibited or even prevented a party from proving the party's case. The prime example was a prohibition of testimony from a party, the rationale being that a party, if permitted to testify in the party's case, inevitably would commit perjury. Not only would a wrong have been committed; the court's integrity would have been compromised by its knowing acquiescence in the commission of the wrong. Also prohibited from testifying were persons with a financial interest in the outcome of the case and persons with a criminal record. These were all rules of competence: they were an absolute bar, and could not be circumvented by waiver or any other device. Not only was a party barred from testifying; a party could not call an adverse party as a witness. The effect of these rules was the exclusion of evidence that might be central to the case, and the resort by the parties to indirect, more expensive and less persuasive proofs — not infrequently of facts that were not really controverted. The traditional remedy for this dilemma was a separate bill of discovery in the equity court, an arcane and expensive procedure that consigned the parties to the mud and fog of Dickens's High Court of Chancery.

In 1849 in Massachusetts, a commission was appointed to report on, and recommend changes in, the rules of practice of the

* The author thanks his partner, Damon Seligson, Esq., for his invaluable help and the Hon. Allan van Gestel, Superior Court (ret.) and Francis Fox, Esq., of Bingham, McCutchen, for their wisdom and advice. The author also thanks Brian Harkins of the Social Law Library for his patience and guidance.


3. Dickens, supra note 1, at 5.

4. Dickens, supra note 1, at 2.


8. The Bill of Discovery Under Reformed Procedure, 44 Harv. L. Rev. 633, 633 (1931); Frank W. Grinnell, Discovery in Massachusetts, 16 Harv. L. Rev. 110, 112 (1902).

9. See George K. Black, Interrogatories as Pre-Trial Discovery in Massachusetts, 33 Mass. L. Quarterly 9, 9 (1948); Frank W. Grinnell, Discovery in Massachusetts, 16 Harv. L. Rev. 193, 206 (1903); Grinnell, supra note 8, at 112; Report of The Judicial Council of Massachusetts to the Governor, 11 Mass. L. Quarterly 1, 41 (1925).

10. Grinnell, supra note 9, at 207-08.


12. Id.

13. Id.

14. Id.
Massachusetts courts. The members of the commission were highly regarded lawyers: one became a justice of the United States Supreme Court; another became Chief Justice of the Massachusetts Supreme Judicial Court ("SJC"); the third was a leader of the Essex County bar. Among the subjects dealt with by the commission’s report were the competence-based exclusionary rules of evidence. As to the rules prohibiting testimony from a person with a financial interest in the outcome, or from a person with a criminal record, the commission recommended reversal. The concerns that prompted those rules, the commission concluded, should be treated as matters of credibility, not competence. As to the rule prohibiting testimony by a party to the action, “Having dismissed that question by saying they did not think it for the interests of justice or of the public morals that parties should testify,” the commission recommended no change. The commission acknowledged the shortcomings of bills of discovery, describing them as “expensive, dilatory, hampered by many technical rules and … in our practice as useless as any remedy can be.” The commission’s answer to the dilemma posed by the prohibition of party testimony was to authorize written interrogatories from one party to another party, effectively making the complex and expensive equitable bill of discovery available in the law courts in a much simplified, less expensive form. The recommendations of the commission were adopted by the legislature and became part of the Practice Act of 1851 ("Practice Act").

The written interrogatories authorized by the Practice Act were the beginning in Massachusetts of what ultimately became the discovery that we know today. They were a procedure in which Massachusetts was considered to be a "pioneer." It is worth noting that the purpose of interrogatories, from the outset, was to obtain admissible evidence of facts known to the interrogator. The purpose was not to seek out information, otherwise unknown, that might lead to the discovery of admissible evidence.

II. EVOLUTION OF DISCOVERY PRIOR TO 1974

In authorizing interrogatories, the Practice Act provided simply that “[i]n all civil actions, the plaintiff may … file … interrogatories for the discovery of facts and documents material to the support or defense of the suit.” That language left ample room for judicial interpretation. In the 1854 case of Wilson v. Webber, the SJC held that the Practice Act enabled a party to interrogate only about that party’s case, not about the adversary’s case:

[The statute] authorizes the plaintiff and the defendant, within a prescribed period of time, to file interrogatories “for the discovery of facts and documents material to the support or defence of the suit” … [T]hat is, the plaintiff may interrogate upon any matter material to the support of his case, and the defendant upon those material to his defence … . Each party is to be confined to those matters which are material to sustain the case which he sets up by his pleadings; he is to be allowed to obtain, by interrogating his adversary, proofs of his own case, but not those which establish the case set up against him.

In effect, the limitations that were part of the old equitable bill of discovery were engraven by the court on the new device of interrogatories in actions at law.

The rationale for limiting interrogatories to the claim or defense of the interrogator was the same, somewhat cynical (some might say realistic) view of human nature that underlay the rule prohibiting party testimony. As Vice-Chancellor Sir James Wigram was quoted,

Experience has shown — or (at least) courts of justice in this country act upon the principle — that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend.

The limitation of discovery to the interrogator’s affirmative case was continued until 1909, when the interrogatories statute was amended to provide for discovery of all facts and documents admissible in evidence at the trial. In Looney v. Saltonstall, the court dealt once again with the scope of permissible discovery by interrogatories. On statutory construction grounds, the court held that interrogatories must be confined to the interrogator’s case, notwithstanding the recent statutory amendment directly to the contrary.

The earlier statute confined the right of each party to inquiries aimed at the discovery of facts and documents material to the support of the contentions set up by his own pleadings. The amendment remove[d] this definite restriction, and permit[ed] interrogatories as wide in scope as the issues presented for trial, subject, however, to the single limitation, “except as hereinafter provided.” The court concluded that the “except as hereinafter provided” clause referred to section 63 of Revised Laws chapter 173, which provided that no party shall be compelled to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case. As the court had reasoned in the Wilson case, the “except

15. Grinnell, supra note 8, at 111-12.
16. Id. at 112, n. 1. The commissioners were Benjamin R. Curtis, Reuben A. Chapman and Nathaniel J. Lord.
17. Black, supra note 9, at 9.
18. Id.
19. Grinnell, supra note 8, at 112.
20. Id. at 111.
22. St. 1851, c. 233, §§ 98-111.
as” clause was considered to bar interrogation into the interrogated party’s case, the result being that the scope of interrogatories was confined to the interrogator’s case, as it had been before. In 1913, a year after the decision in Looney, the legislature repealed the existing statutes concerning interrogatories and enacted an entirely new statutory scheme that unequivocally established a party’s right to interrogate as to all issues in the case. The limitation on the scope of interrogatories had been premised on the concern that a party who knew the adversary’s case “inevitably” (Vice-Chancellor Wigram’s word) would commit perjury or subornation of perjury to meet it. The downside (“mischiefs”) of that limitation were the difficulties that a party would encounter at trial when confronted for the first time with surprise evidence. The choice by the courts between those two evils had been to sanction surprise in order to avoid perjury. The contrary view was that discovery does not “inevitably” produce perjury (which, in any event, is no less likely from the interrogated party than from the interrogator), and that justice is more readily served by making all relevant evidence available. Whatever the merits of that dispute, the issue was settled in Massachusetts by the 1913 statute authorizing interrogatories directed to both sides of the case. Other issues concerning the scope of discovery remained, but the issue whether discovery could extend to the other party’s case had been resolved. That result was reaffirmed by former SJC rule 3:15, effective April 1, 1966, and rule 26(b)(1) of the Massachusetts Rules of Civil Procedure, effective July 1, 1974. Both rules provide that discovery may be had “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ….”

In 1856 (only five years after the Practice Act), the legislature removed the prohibition against testimony by a party. That prohibition had been the reason for the statutory creation of interrogatories. Notwithstanding the new regime permitting party testimony, the statute creating interrogatories remained unchanged. Interrogatories in Massachusetts had taken on a life of their own. As the bar became accustomed to the new system of interrogatories, abuse of the system crept in. In 1925, the judicial council reported to the governor that it “is the practice today of some members of the Bar to file an unconscionable number of interrogatories in the first instance….” As many as 200 to 300 interrogatories are not uncommon, and in one instance 2,258 have been filed in the first instance. In 1929, the interrogatories statute was amended by providing that “[n]o party shall file as of right more than thirty interrogatories ….”

Discovery practice in Massachusetts remained relatively unchanged from the 1929 capping of interrogatories at 30 until the introduction of depositions by SJC General Rule 15 (ultimately rule 3:15) in 1966. The elements of discovery during the pre-1966 period were: (i) interrogatories limited to 30, seeking discovery from an adverse party of facts and documents admissible in evidence, not to include the names of the interrogated party’s witnesses; (ii) inspection and copying of documents referred to in a pleading or particulars of another party and relied on by that party; and (iii) a demand for the admission of material facts or of the execution of any material document which the party making the demand intended to use at trial.

Compared to the types of discovery that were to follow under rule 3:15 and the later Massachusetts Rules of Civil Procedure, discovery prior to 1966 was a minor factor in the life of a Massachusetts trial lawyer. Interrogatories were of little help. The adversary’s answers to interrogatories were framed artfully by the adversary’s lawyer and, at most, simply conceded facts that would be admitted by the adversary’s testimony at trial. The other types of pre-1966 discovery were no more helpful. A trial lawyer in that era prepared for trial by interviewing the client and whoever else was available and willing to be interviewed, by studying relevant documents and by exploring whatever other extrajudicial sources of information there might be that intelligence, ingenuity and effort could uncover. The trial lawyer of that day arrived in court with a single file, perhaps two or three folders tied up in a red weld. Now, in a substantial case, the lawyer arrives in court with cartons full of deposition transcripts, exhibits and other discovery-produced documents, coupled with indexed notebooks to guide the lawyer, the associates and the paralegals through the maze of paper in the cartons. For the more technology-minded, there is electronic evidence-display equipment to augment the litigation caravan. The lawyer of the former era won or lost the case in the courtroom, depending on the merits of the case, the lawyer’s pretrial preparation and the lawyer’s courtroom skills, in particular the skills of cross-examination. The litigator of today seldom tries a case. Plaintiffs choose not to pursue meritorious cases because the cost of winning — primarily the cost of discovery — may exceed the likely recovery. Defendants choose to settle nonmeritorious cases because, once again, the cost of winning — primarily the cost of discovery — may exceed the price at which the case will settle.

III. THE MASSACHUSETTS RULES OF CIVIL PROCEDURE

In 1938, the United States Supreme Court adopted the Federal Rules of Civil Procedure, a massive restructuring of the rules of civil procedure for the federal trial courts based on the principle, among others, that justice is best served by making all relevant facts known to all the parties. In light of the new federal rules, the question arose whether a similar change should be made in the Massachusetts court system. That question raised both a substantive issue — whether virtually unlimited discovery was desirable — and a procedural issue — whether rules of court procedure were the

35. Id.
36. St. 1913, c. 815, §§ 1-9; see Black, supra note 9, at 12-14.
38. See St. 1856, c. 188.
40. Id.; Grinnell, supra note 8, at 112.
41. Report of The Judicial Council of Massachusetts to the Governor, supra note 9, at 42.
42. St. 1929, c. 301, § 1 (now codified at Mass. Gen. Laws ch. 231, § 61 (2008)).
province of the court or of the legislature. The most contentious part of the change that was proposed was the inclusion of oral depositions — a procedure entirely new to Massachusetts practice — as a means of discovery. Several efforts were made unsuccessfully in consecutive sessions of the legislature to introduce oral depositions into Massachusetts practice. 47 Ultimately, in 1966, the SJC cut the Gordian knot by adopting what became rule 3:15, which effectively incorporated the 1938 federal rules for oral depositions into Massachusetts practice. 47 Rule 3:15 ushered in a major transformation in Massachusetts trial practice. The new rule authorized the oral deposition of any person, whether or not a party, for the purpose of discovery or for use as evidence or for both purposes. 48 The scope of deposition examination was “[relevance] to the subject matter involved in the pending proceeding … whether it relates to the claim or defense of the examining party or to the claim or defense of any other party.” 49 The test of relevance was not admissibility but whether the information sought was “reasonably calculated to lead to the discovery of admissible evidence.” 50 Several features of the new rule were of particular importance. First, the persons who could be deposed were not limited to parties, as were the persons to whom interrogatories could be addressed. Any likely or possible witness (or anyone unlikely to be a witness) could be deposed. Further, the scope of deposition inquiry was not limited to the issues raised by the pleadings but extended to the full “subject matter” of the dispute. That definition could extend discovery to all aspects of the events in the case, leading to new claims, unpled, and perhaps unknown, at the outset of the case. Most importantly, the test of deposition relevance was not whether the information sought would be admissible in evidence, as was required for interrogatories, but whether the information sought was “reasonably calculated to lead to the discovery of admissible evidence.” 51

With the promulgation of rule 3:15, it was hoped that a new frontier had been crossed in the quest for an improved system of justice. 52 The liberalized discovery procedures were designed to “make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” 53 The terrain on the far side of the new frontier, however, was a different world for traditional trial lawyers. An adversarial system, in which lawyers hoarded their ammunition until the most opportune moment, was becoming, in part at least, a cooperative system in which information was freely shared. Lawyers would have to develop new techniques to cope with the vastly expanded scope of discovery. New problems would arise, not the least of which were the costs associated with the expanded scope of discovery and the potential for discovery abuse.

Following the adoption of rule 3:15, a study was undertaken designed to harmonize Massachusetts court procedures with the new federal rules. 54 This study was a major undertaking, because it entailed not only the creation of a comprehensive set of rules and authorizing legislation, but also the revocation of a host of statutes spanning centuries that dealt with a variety of court procedures. 55 The end result of this study was the Massachusetts Rules of Civil Procedure, promulgated by the SJC, effective July 1, 1974. 56

In both format and substance, the Massachusetts rules were patterned closely on the new federal rules. Concerning discovery, Massachusetts’s rule 26(a), like federal rules 30 through 36, identified six discovery methods: depositions; interrogatories; production of documents or things; entry upon land or other property; physical and mental examination and requests for admission. 57 For each of those methods, the scope of discovery was the same: “[relevance] to the subject matter involved in the pending action ….” 58 Some of those discovery methods long predated 1974 (and 1966, when rule 3:15 was promulgated). Interrogatories, production of documents and demands for admission were procedures that had been available in Massachusetts for many decades. 59 What the Massachusetts rules changed were the uses that could be made of discovery methods. Discovery that once was limited to the parties, and to issues in the pleadings, and to admissible evidence, was now unlimited. As the SJC held in Cronin v. Strayer, 60 the Massachusetts rules defined discovery scope “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.” 59

Put simply, everything connected in any way to the dispute was now fair game for discovery.

As time has passed, changes have evolved between the federal system and the Massachusetts system. Two changes in particular are important. First, the federal rules have tightened the definition of discovery scope. In 2000, an amendment to federal rule 26(b)(1) redefined discovery scope to be relevance to “any party’s claim or defense,” with the proviso that “[f]or good cause the court may order discovery of any matter relevant to the subject matter involved in the action.” 62 Thus, in the federal system, the scope of discovery now is relevance to existing claims or defenses. Only by special order of the court, and for good cause, may the scope become relevant to the

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47. See Field, supra note 23, at 303; Schwartz, supra note 46, at 436; Zobel, supra note 43, at 120-21.
52. Schwartz, supra note 46, at 435.
61. Id. at 534 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)) (internal citations omitted).
“subject matter involved in the action.” No such change has been made in the Massachusetts rules, where the definition of discovery scope continues to be relevance “to the subject matter involved in the action” — the language that was construed in the Cronin decision to encompass “any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.” The federal system has narrowed the definition of discovery scope to make discovery more focused and less subject to “fishing expedition” abuse. Not so in the Massachusetts system.

Another significant difference between the two systems is the “disclosure” procedure, added to the federal system in 1993 — a procedure entirely unknown to Massachusetts practice. Federal rule 26(a)(1) in its current form provides that, without awaiting a discovery request, every party must disclose to the other parties the identity of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support that party’s claims or defenses. The same disclosure obligation extends to documents, electronically stored information, computations of damages, liability insurance coverage and reports of expert witnesses. “A major purpose of the [disclosure] revisions [was] to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information ….” In recognition that the “all cards face up” mandate of the disclosure requirement strained the ethos of the adversarial system, the Advisory Committee’s notes for the 1993 revisions recited that

All those persons [having discoverable information] were to be disclosed whether or not their testimony [would] be supportive of the position of the disclosing party [and that as] officers of the court, counsel [were] expected to disclose the identity of those persons who … if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.

There is a body of opinion among the trial bar that disclosure, apart from its uncomfortable fit in the adversary process, does not accomplish its intended purpose. Supposedly disclosure eliminates or reduces the paperwork involved in requesting information by the existing means of discovery. Instead of reducing paperwork, however, disclosure may simply add a new tier of paperwork on top of discovery that proceeds forward much as it would without disclosure. Disclosure is premised on the assumption that disclosing counsel will identify all persons, documents and other relevant information. But in doing so, disclosing counsel exercises judgment in deciding which persons, documents and other information to identify. Those judgments inevitably reflect strategic and tactical planning by counsel. Opposing counsel is not obliged to accept exercises of judgment by the adversary and will frame discovery according to the strategy and tactics that he or she devises. In that event, the end result of disclosure is merely an increase in the delay, busy work and cost of litigation.

IV. Overview

The expansion of discovery beginning with the federal rules in 1938 — and, in Massachusetts, with rule 3:15 in 1966 — has achieved significant improvements in the justice system. Whatever information may exist to support a claim or defense is now available to diligent counsel through discovery devices. If there is a “smoking gun” somewhere deep in the files of a party, modern discovery will uncover it. No longer are trials a “game of blind man’s bluff, [When conducted by competent counsel, they more nearly qualify as] a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”

Those improvements, however, have come with a cost, measured not only in money but also in wasted time, delay and diminished use of the court system. Some lawyers proceed on the principle that all available discovery should be pursued to the fullest extent — either because they believe that what can be done should be done, or because they are fearful of a malpractice claim by the client if the case turns out badly. When the scope of discovery is as broad as it is in Massachusetts (“any issue that is or may be in the case”), discovery by an aggressive lawyer can encompass every email, invoice, memorandum and scrap of paper bearing on the dealings between the parties, whether or not relating to anything giving rise to the lawsuit. Lawyers who are less aggressive but still cautious, when confronted with case-planning decisions, may opt for over-discovery instead of under-discovery, just to be on the safe side. The economic model of large law firms, which bases advancement to partnership on attaining billable-hours goals, produces volumes of discovery paper reflecting the energy, ambition and inventiveness of young lawyers. There are other, non-cost, but no less adverse consequences of discovery excess. The discovery-driven cost of litigation increasingly has induced potential litigants — in business-related disputes especially — to choose alternative means of dispute resolution in preference to the superior court. When that choice is made, the parties lose the benefit of an excellent trial court, for cost reasons but not because the court system itself is costly. (Since the courts are state-subsidized, the cost to the client of a court proceeding — absent discovery cost — should be less than, or at least comparable to, the cost of an alternative system.) The public also is a loser, because the alternative dispute-resolution systems do not produce reasoned, authoritative case law that will guide decision-makers and advisers in law-based planning.

Whatever the cause or causes, discovery abuse (more correctly, discovery excess) and its attendant costs, monetary and otherwise, are a fact. Surveys of trial lawyers — most recently a 2008 survey of the members of the American College of Trial Lawyers ("ACTL") — show that the cost of litigation has become excessive, the principle reason being the cost of discovery. As the report of ACTL’s

64. Cronin, 392 Mass. at 534.
65. Federal Civil Judicial Procedure and Rules, supra note 63, at 166 (advisory committee notes concerning the 2000 revisions of Fed. R. Civ. P. 26(b)(1)).
68. Id.
survey recited, “although the civil justice system is not broken, it is in serious need of repair.” What is needed to repair the civil justice system is greater involvement by the court in the discovery process. There should be an early conference between the court and counsel focused on the nature and extent of discovery appropriate to the case, the product of that conference to be a discovery schedule tailored to the case and guarding against discovery excess. Adherence to that schedule can be assured by periodic reporting to the court. That level of judicial control is best accomplished by a system that assigns a single judge to a case from start to finish. The single-judge-throughout system was strongly supported in the 2008 survey by ACTL. Coming closer to home, that same strong support for one judge from start to finish was expressed in a survey of lawyers who had represented parties in the business litigation session of the superior court. Although favored by trial lawyers, the one-judge-throughout system does not suit the superior court, because the judges of that court — other than those in the business litigation session — move from session to session and from county to county. The rotation system is grounded in the culture of the court, which values diversity of experience in the training and ongoing service of trial judges. The challenge therefore becomes how to accommodate the need for continuing and close judicial monitoring of cases, to guard against discovery excess, while at the same time preserving the qualities of the “generalist” trial judge. Given the brain power and talents of the court, that challenge can be met. Nonetheless, the magnitude of the discovery-excess problem makes the challenge a very substantial one indeed.

72. Id. at 2.

SUMMARY JUDGMENT:  
THE HISTORY, DEVELOPMENT AND APPLICATION OF RULE 56 SINCE ITS PROMULGATION IN 1974  
By John M. Greaney and Lynn S. Muster

Rule 56 of the Massachusetts Rules of Civil Procedure sets out, in straightforward language, the standard for summary judgment: summary judgment is appropriate when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as matter of law.¹ This article will discuss the historical significance of rule 56 at its inception in 1974, its development thereafter, and its application in current legal practice. Several conclusions will be reached, among them that rule 56 is a practical method of disposing of a sizeable number of cases where no genuine factual issue exists, and that the appellate courts must exercise special care to ensure that grants of summary judgment are proper in order to preserve the constitutional right to trial by jury.

I. HISTORICAL SIGNIFICANCE AND DEVELOPMENT

Prior to 1974, with rare exception, Massachusetts lacked an efficient procedural device for “terminating litigation between close of pleadings and trial.”² Despite their shortcomings, the statutes that provided a vehicle for disposition of cases prior to trial stated the general principles that later were embodied in rule 56. Specifically, the statutes provided that, in order to avoid the delay and expense of trial, a case should be disposed of summarily if there was no genuine issue of fact.³ Our rule 56, which tracks the federal rule,⁴ was adopted to continue where the statutes left off, disposing of non-meritorious claims and leaving trials for the resolution of bona fide factual issues.

Rule 56 was initially approached with caution, understandably, because summary judgment “disposes of a party’s entire case, without a trial,”⁵ and can yield a final judgment on the merits.⁶ When correctly applied, rule 56 does not deprive anyone of a trial in cases where a factual issue is demonstrated,⁷ and thus “does no violence” to the right to a jury trial.⁸

The first comments on rule 56 from the Supreme Judicial Court (“SJC”) came shortly after the rule’s promulgation, in the case of Community National Bank v. Dawes.⁹ There the court said:

We view Rule 56 as a welcome, progressive addition to judicial procedure in this Commonwealth. “It creates an excellent device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved.”¹⁰

10. Id. at 553 (quoting 3 W.W. Barron & A. Holtzoff, Federal Practice and Procedure (Rules ed.) § 1231, at 96 (Wright rev. ed. 1958)).
Dawes cautioned, however, that rule 56 was not meant to condone “trial by affidavit,” and that summary judgment motions should be denied whenever there existed “the slightest doubt” about a factual dispute. In the early formative years, summary judgment may not have been fully understood by the bar or the trial courts. An article published in 1980 reported that “as of that year the number of appeals to the Appeals Court and Supreme Judicial Court from orders granting summary judgment that were reversed outnumbered those that were affirmed.” In its nascent, summary judgment was allowed infrequently, and, when allowed, frequently was reversed on appeal.

In 1986, the United States Supreme Court decided a trilogy of cases — Celotex Corp. v. Catrett, Anderson v. Liberty Lobby, Inc., and Matsushita Electric Industrial Co. v. Zenith Radio Corp. — that essentially redefined the federal standards for granting summary judgment. If accepted in Massachusetts, this trilogy clearly would affect the disposition of summary judgment motions. Some criticized the trilogy, asserting that the effect of the decisions was to deprive a litigant of his or her day in court, or that the trial, as attorneys knew it, would vanish. Others stated that the effect of the trilogy was to improperly invite judges to evaluate evidence and credibility at the summary judgment stage when they only ought to be deciding whether the evidence in the case was sufficient to permit the claims pleaded to go to the jury. But in practice, the trilogy brought order where there had been inconsistency by clarifying ambiguities in federal rule 56.

The principal effect of the three decisions appears to have been:

- the adoption of a standard establishing that when, after adequate opportunity for discovery, a party moving for summary judgment is able to demonstrate that its opponent has insufficient evidence of any fact that is essential to its opponent’s case and of which its opponent could have the burden of proof at trial, the moving party is entitled to summary judgment as a matter of law.

Why did the Supreme Court redefine summary judgment? The Court may have determined that there was a need to bring under control the ever-increasing caseloads in the federal courts. Or, perhaps, the Court recognized that rule 56 creates a procedure whereby the parties must lay out their case without engaging in sophistry so that a judge may decide whether anything in the case genuinely merits the resources and time of trial. The trilogy also conveyed a message to the lower federal courts that they should not be so “wary” about allowing summary judgment.

The SJC took notice of the trilogy, but observed that it was not bound to apply the new standards in interpreting and applying Massachusetts’s rule 56, and it emphasized that it had reserved decision on whether to do so. After time and reflection, the SJC eventually absorbed the principles established in the three Supreme Court cases in our rule 56 black letter. The SJC did so in the following way. In 1991, the court revisited Dawes, and its standard, in Kourouvacilis v. General Motors Corp. In Kourouvacilis, the court expressly adopted the Celotex Corp. standard that “made it easier to shift the burden of producing support for the nonmovant’s legal position, effectively requiring the plaintiff to come forward, on motion of the defendant, with the plaintiff’s entire case in advance of trial.”

Matsushita Electric Industrial Co., the earliest in the trilogy of cases, was cited for its proposition regarding the nonmoving party’s burden in one Appeals Court case prior to Kourouvacilis. After Kourouvacilis, it rarely has been cited with respect to summary judgment. Anderson, however, had been cited in several cases prior to the release of Kourouvacilis, primarily as support for related rule 56 propositions. Just weeks after the release of Kourouvacilis, however, summary judgment could even be considered, even if, at trial, the moving party had no burden at all. And Celotex Corp. made clear that the moving party must point to the evidence it will use at trial. Id. at 324. Professor Miller commented, “As a strategic matter, this requirement presents the possibility that a defendant will use the motion to force the plaintiff to reveal her trial strategy, even if the defendant is aware that the motion is unlikely to convince the court to grant summary judgment.”

Moriarty, supra note 8, at 14.


Greaney & Hartwell, supra note 5, at 36.

Moriarty, supra note 8, at 21.


11. Id. at 555 (quoting Charles E. Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 502-05 (1950)).

12. At least one commentator has gone so far as to state that, prior to 1986, “there was a certain amount of judicial hostility toward summary judgment.” Francis B. Dibble Jr., Defendant’s Perspective, in Federal Civil Litigation in the First Circuit 1-18 (Robert B. Collings et. al., eds., MCLE, Inc. rev. ed. 2008).


14. Even as late as 1992, 18 years after the promulgation of rule 56, practitioners reported continuing problems obtaining summary judgment because some judges found it easier or “deceptively time-saving” to deny even well-supported motions. Id.


17. 475 U.S. 574 (1986).

18. Briefly describing the rules set out by each case in the trilogy, the Supreme Court held that the nonmoving party who has the burden of proof must demonstrate by substantial evidence that a trial is warranted. Matsushita Elec. Indus. Co., 475 U.S. 586-87. The nonmoving party, thus, can defeat the summary judgment motion only if the inferences necessary for a judgment in its favor “remain reasonable when examining the entire record—not just the facts that favor the nonmoving party’s theory.” Miller, supra note 6, at 13. The Anderson case stated that the standard of proof by which a party possessing the burden of proof would be measured at trial is the burden that applies at the summary judgment stage. Anderson, 477 U.S. at 250-52. And Celotex Corp. expanded considerably the situations when summary judgment could be granted. Celotex Corp., 477 U.S. at 323-24. Specifically, the holding changed the then-settled doctrine that the moving party must shift the burden of production before
the SJC cited Anderson as primary and sole support for its proposition comparing the summary judgment burden with the trial burden, in Flesner v. Technical Communications Corp. The court did not explicitly adopt or even discuss the facts of Anderson in Flesner, as it had in Kourouvacilis with respect to Celotes Corp., but the holding of Anderson was implicitly accepted.

In 1997, summary judgment procedures were incorporated into domestic relations practice. There have been few appeals from the grant of rule 56 motions in domestic relations cases. In J.F. v. J.F., it was held that summary judgment improperly had been allowed. The Appeals Court noted that nothing in rule 56 precludes its use in child custody modification actions, but warned that judges should proceed with “great caution” in such cases because both the question whether there has been a material change in circumstances, and if so, the question whether modification is necessary in the best interests of the children, often “involve the resolution of disputed issues of material fact or the weighing of evidence.”

Another significant change in the Massachusetts summary judgment landscape occurred in 1998 when the Superior Court Department enacted rule 9A(b)(5), the so-called “anti-ferreting” rule, modeled after local rule 56.1 of the United States District Court for the District of Massachusetts. Rule 9A(b)(5) requires that the various documents submitted in support of a motion for summary judgment be accompanied by concise statements from each of the parties “regarding the absence or existence of genuine issues of material fact, as well as the legal elements of the claims as to which summary judgment is sought.” Failure to controvert facts in the moving party’s statement results in the facts being deemed admitted — so the incentive always has been high for filing an opposition in compliance with the rule. The rule was designed to assist judges in the “all-too-typical situation in which parties throw a foot-high mass of undifferentiated material at the judge, who must then determine whether the record contains any material facts in dispute.”

The superior court’s rule-making authority to require these submissions was challenged as beyond the scope of rule 56. The challenge was rejected in Dziamba v. Warner & Stackpole LLP, where the Appeals Court held that rule 9A(b)(5) was an appropriate exercise of the superior court’s case management discretion and that the superior court was justified in its “pragmatic and reasonable” response to the mass of paper often presented by the moving party.

II. Application of Rule 56 to Various Cases and Theories

Rule 56(c) states that summary judgment “shall” be rendered forthwith if there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. Even though the rule appears on its face to be mandatory, there is authority that the motion judge has some discretion to deny the motion “because a particular issue or an entire action should not be foreclosed at that early stage.”

Denial of summary judgment has been deemed the final word at the trial court level — orders denying motions for summary judgment and partial summary judgment are not reviewable on appeal without special certification, which is rarely granted. Within these guidelines, summary judgment has had a profound impact on our civil practice. It is more appropriate in some types of cases than in others, and even when it is not dispositive, it “can be and is being used effectively to narrow the issues and reduce the areas of controversy before trial.” Summary judgment more properly has been applied in certain types of cases based on the particularities of the claim and methods of proof, as the following examples illustrate.

A. Summary Judgment Favored

Since the promulgation of rule 56, there have been three classes of cases that are special candidates for summary judgment: discrimination cases; cases involving disputed expert testimony; and defamation cases. Contract cases also have been within the core of the rule for prompt disposal.

1. Discrimination Cases

Discrimination cases are logical summary judgment candidates because the first two stages of proof involve shifting burdens. Thus, if a party cannot meet its burden as matter of law, summary judgment can be allowed for the opposing party. In stage one of a discrimination case, if a plaintiff cannot establish a prima facie case of discrimination, summary judgment has been allowed for the defendant. When a plaintiff does establish a prima facie case, the burden shifts to the defendant, in stage two, to rebut the inference of discrimination by producing evidence of a legitimate nondiscriminatory reason — without which, summary judgment has been allowed for the plaintiff. And when a defendant produces evidence of a legitimate nondiscriminatory reason, a plaintiff, in stage three,
can produce evidence that the reason articulated is a mere pretext.\textsuperscript{49} The battleground in this last stage typically raises factual questions. If the burden-shifting protocol reaches this third stage, summary judgment is likely inappropriate because of rule 56’s prohibition against judicial resolution of disputed facts.\textsuperscript{50}

2. Disputed Expert Testimony

In the mid- and late-1990s, the Supreme Court, by means of another trilogy — \textit{Kumho Tire Co. v. Carmichael},\textsuperscript{51} \textit{General Electric Co. v. Joiner},\textsuperscript{52} and \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{53} — established new rules for the admissibility of expert testimony. In \textit{Daubert}, the Supreme Court revised the “general acceptance” test for expert testimony of \textit{Frye v. United States}.\textsuperscript{54} While the \textit{Frye} test has always been relevant, \textit{Daubert} noted that there were occasions when \textit{Frye} would exclude from admissibility useful testimony because a scientific theory or process simply was too new to the field to have gained general acceptance.\textsuperscript{55} The \textit{Daubert} principles (as embodied in rule 702 of the Federal Rules of Evidence) imposed on judges the responsibility for assessing “whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue.”\textsuperscript{56} \textit{Frye’s} general acceptance test was a relevant factor in determining the admissibility of scientific expert testimony, but it no longer was the sole test.\textsuperscript{57} (Proof, however, that the \textit{Frye} test had been met was powerful, and, in the ordinary case, would most likely lead to the admissibility of the proffered evidence.\textsuperscript{58}) The question whether the particular technique or method had been tested was also deemed relevant, as was peer review, publication, and other factors thought by the trial court to be significant to scientific reliability.\textsuperscript{59} \textit{Daubert’s} tests and measures increased the complexity of summary judgment motions because a more extensive and time-consuming analysis by the motion judge was required – although there is no indication that the Supreme Court gave consideration to the possible transaction costs of all of the hearings on expert testimony that \textit{Daubert’s} protocol might require.\textsuperscript{60}

Massachusetts adopted the essence of \textit{Daubert} the following year in \textit{Commonwealth v. Lanigan},\textsuperscript{61} a case involving expert testimony on the probability of a random DNA match.\textsuperscript{62} The \textit{Lanigan} court acknowledged, as did \textit{Daubert}, that the reliability or validity of a scientific theory or process may be demonstrated without establishing general acceptance, and emphasized that unanimity of opinion among relevant scientists, which was never essential under \textit{Frye}, would not be required in the rapidly developing field of DNA.\textsuperscript{63}

The other two cases in the Supreme Court expert testimony trilogy, \textit{General Electric Co. v. Joiner},\textsuperscript{64} and \textit{Kumho Tire Co. v. Carmichael},\textsuperscript{65} were adopted in \textit{Canavan’s Case},\textsuperscript{66} a case holding that the trial judge’s admission of a physician’s opinion in a diagnosis would be examined on appeal under an abuse of discretion standard.\textsuperscript{67} In the earlier case of \textit{Commonwealth v. Vao Sok},\textsuperscript{68} the SJC had held that review of a \textit{Lanigan} decision would be de novo.\textsuperscript{69} In light of \textit{Joiner}, and the “commitment” in \textit{Lanigan} generally to follow \textit{Daubert}, the court recognized that the abuse of discretion standard would allow trial judges enough leeway to conduct fact-intensive analyses while preserving for the appellate court review of lower court decisions for legal consistency and factual sufficiency.\textsuperscript{70}

What made (and makes) the expert testimony cases particularly appropriate for summary judgment is that a claim’s survivability is not dependent on disputed facts, but on a judge’s assessment of the plaintiff’s expert evidence. It is not the conclusions that are the primary focus of the inquiry, but the principles and methods used by the expert to reach those conclusions. For example, in \textit{Hicks v. Brox Industries, Inc.},\textsuperscript{71} the Appeals Court approved with commendation the superior court judge’s recognition of his “gatekeeper” role in a \textit{Daubert-Lanigan} analysis.\textsuperscript{72} In \textit{Hicks}, the court held that summary judgment properly was allowed for the defendant because the plaintiff’s expert’s opinion in his first affidavit was “inadmissible conjecture,” and in his second, “invalid and unreliable.”\textsuperscript{73}

3. Defamation Cases

Summary judgment always has been favored in defamation cases because the stake is “free debate. … The threat of being put to the defense of a law suit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.”\textsuperscript{74} Defamation cases also are ripe for summary judgment disposition

\begin{thebibliography}{99}
\bibitem{note-51} 526 U.S. 137 (1999).
\bibitem{note-52} 522 U.S. 136 (1997).
\bibitem{note-54} 293 F. 1013 (D.C. Cir. 1923), overruled by Daubert, 509 U.S. at 593-95.
\bibitem{note-55} Daubert, 509 U.S. at 593.
\bibitem{note-56} Id. at 592-93.
\bibitem{note-57} Id. at 594.
\bibitem{note-58} Id.
\bibitem{note-59} Id. at 593-94.
\bibitem{note-61} 419 Mass. 15 (1994).
\bibitem{note-62} Id. at 16.
\bibitem{note-63} Id. at 26-27.
\bibitem{note-64} 522 U.S. 136. \textit{Joiner} held that the standard ordinarily applicable to review of evidentiary rulings, i.e., the abuse of discretion standard, is the proper standard of review of a district court judge’s decision to admit or exclude expert scientific evidence. \textit{Id.} at 141-43.
\bibitem{note-65} 526 U.S. 137. \textit{Kumho Tire Co.} held that the gatekeeping obligation of trial judges applies not only to scientific expert testimony, but to all expert testimony. \textit{Id.} at 147-49.
\bibitem{note-66} 432 Mass. 304 (2000).
\bibitem{note-67} Id. at 312.
\bibitem{note-68} 425 Mass. 787 (1997).
\bibitem{note-69} Id. at 797.
\bibitem{note-70} \textit{See Canavan’s Case}, 432 Mass. at 312.
\bibitem{note-72} Id. at 106-08.
\bibitem{note-73} Id.
\end{thebibliography}
because they present "threshold issues justiciable as matters of law." Specifically, whether a communication is capable of conveying a defamatory meaning is a question of law. So also is the question whether the plaintiff is a public figure, which determines the degree of fault the plaintiff must prove. There is logic, however, to the notion that where actual malice is in issue, namely, cases where a determination must be made of state of mind, summary judgment is disfavored. Nevertheless, summary judgment has proved a useful tool when a plaintiff fails to present sufficient evidence of actual malice.

4. Contract Cases

As might be intuitively surmised, the climate for summary judgment in contract cases is particularly favorable when the document in issue is unambiguous and thereby appropriate for interpretation as matter of law. Even when parties claim ambiguity, courts have reminded them that the preliminary question whether ambiguity exists is itself a question of law. In conformity with other types of cases though, where the contract contains terms that are ambiguous, uncertain or capable of more than one meaning, the intent of the parties governs, and, as is typical of state of mind issues, a trial is warranted.

B. Summary Judgment Disfavored

Types of cases that are less favorable to disposition by summary judgment are those that turn on credibility or state of mind questions, negligence cases requiring a reasonableness analysis and constitutional questions. Summary judgment, however, still may be useful in these cases if the moving party can demonstrate that the nonmoving party will not be able to meet its burden of proof at trial.

1. State of Mind Cases

When motive, intent or state of mind is at issue, summary judgment has often been deemed inappropriate. A person's intent is a question of fact 'to be determined from his declarations, conduct and motive, and all the attending circumstances.' Federal courts also have concluded that summary judgment is inappropriate in cases involving state of mind. State of mind, however, must be a real issue in the case, and, in those cases involving state of mind, if no reasonable fact finder could conclude that state of mind is controverted, summary judgment has been allowed.

2. Chapter 93A Cases

Summary judgment rarely has been allowed in actions brought under General Laws chapter 93A because the question whether a given act or practice is unfair or deceptive depends on the facts of the case and “frequently on a determination of the defendant’s knowledge and intent.” In fact, the SJC has declined to adopt a “static” definition of either “unfair” or “deceptive,” resulting in


79. See, e.g., Lane, 438 Mass. at 484-85; ELM Med. Lab., Inc., 403 Mass. at 786-87.


83. United States District Court Judge William Young has argued that judges must be careful not to overreach in allowing summary judgment:

Often a court will encounter a situation where it could resolve the
a necessarily fact-specific analysis whether the allegedly deceptive practice “reasonably” could be found to have caused a person to act differently from how he or she otherwise would have acted.91 The question of double or treble damages depends on whether the defendant acted in bad faith and also constitutes a factual issue.92 Whether a response to a chapter 93A demand letter is reasonable normally presents a question of fact. In some cases, as the court noted in Bobick v. United States Fidelity & Guaranty Trust,93 a chapter 93A case can be resolved “in circumstances when undisputed material facts … demonstrate that the plaintiff has ‘no reasonable expectation of proving an essential element of his case.’”94 These cases are the exception and not the norm.

3. Negligence Cases

Summary judgment has not often been used in negligence actions because the application of the reasonable person standard is the province of the fact finder.95 Similarly, it is ordinarily the jury’s function to decide the question whether a danger is open and obvious.96 In an inadequate security case, summary judgment properly was granted to the defendant where there was no evidence of control over, or knowledge of, what the plaintiff alleged was a dangerous knife display.97 Summary judgment also has been allowed when the record demonstrated that a defendant owed no duty to the plaintiff,98 the latter inquiry being a question of law. Moreover, summary judgment has been allowed in cases where no rational view of the evidence would warrant a finding of negligence.99 For example, in a duty to warn case, the plaintiff acknowledged that he was aware of the product’s dangers and, thus, in effect conceded that there was no duty to warn.100

The doctrine of “loss of chance” was established as a medical malpractice theory in Matsuyama v. Birnbaum.101 To recover under this theory, a plaintiff must prove that a physician’s negligence causally diminished the plaintiff’s (or the decedent’s) likelihood of achieving a more favorable outcome.102 It is too early to tell whether summary judgment will be a useful method of disposing of this type of case short of trial. This is not unusual because new causes of action or theories often create doubt as to the appropriateness of summary judgment until such time as the case law has fleshed out the contours of the theory.

4. Constitutional Cases

Summary judgment typically has been denied in constitutional cases because courts usually require a fuller record.103 Furthermore, “the very nature of the claims involved often presents factual issues that require summary judgment to be denied.”104 Nevertheless, constitutional questions can be candidates for summary judgment when a high burden of proof has to be met. For example, regulations promulgated pursuant to statutory authority are presumptively constitutional,105 and for invalidity, the proof must show that regulation is illegal, arbitrary or capricious.106 When plaintiffs attacking a regulation cannot produce material evidence to meet this burden, summary judgment has been allowed.107

Summary judgment also has been allowed when a constitutional violation is alleged but, as matter of law, cannot be shown.108 For example, in Causes v. Commissioner of Correction,109 the court held that an analysis of an alleged federal due process violation begins with an “inquiry whether an [allegedly] flawed disciplinary hearing infringed upon or implicated a liberty interest.”110 In that case, summary judgment properly was allowed for the defendant because the plaintiffs did not demonstrate any liberty interest implicated by the hearing.111 Summary judgment is appropriate to declare a statute constitutional against nonsubstantive attack.112

In zoning cases, the test of constitutionality is whether a challenged bylaw or ordinance is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”113 Due process requires that a zoning bylaw bear

94. Id. at 659 (holding offer reasonable as matter of law because it was not substantially less than what jury later awarded) (quoting Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991)). Bobick, however, resolved the reasonableness issue based on Mass. Gen. Laws ch. 176D, §3 (2008). Id.
102. Id. at 17.
104. Id. See, e.g., Conley v. Massachusetts Bay Transp. Auth., 405 Mass. 168, 175-77 (1989) (true issue of material fact existed as to whether MBTA violated plaintiff’s First Amendment right not to be member of union); Aronson v. Commonwealth, 401 Mass. 244, 253, (1987) (true issue of material fact remained as to whether tax violated commerce clause).
110. Id. at 423.
111. Id. at 424.
a rational relation to a legitimate zoning purpose. Rational relation creates a test that is ordinarily easy to satisfy and, as might be expected, several cases involving attacks against zoning bylaws or ordinances have been resolved in favor of the municipality by means of rule 56.

III. Conclusions: Evolution Not Revolution

Summary judgment in Massachusetts has evolved in a deliberate fashion, even though when rule 56 was first adopted, some thought the rule would result in a revolution in our civil practice. From what has been said here, and the pattern of evolution, we can draw certain conclusions.

1. The conservative approach of the SJC in the early stages of rule 56 (no summary judgment if “the slightest doubt” existed) reflects a normal judicial response to a new and quite different procedure (and, perhaps, a touch of Federalism as well). Caution, moreover, has been tempered by experience, and summary judgment is now an accepted, and robust, part of our civil practice.

2. Simultaneously, as the rule evolved, judges reconsidered their initial skeptical attitudes and now apply rule 56 as an active component of case management. As one commentator put it: judges now “widely view summary judgment as an integral part of civil procedure, to be employed in the overall program of giving justice.”

3. The anti-ferreting rule in the superior court (and its analogs in other trial courts) has proved to be a most effective tool in reducing the apprehension of judges who used to be faced with a volume of submissions that required considerable time and effort to locate possible triable issues.

4. Summary judgment has become a vehicle uniquely adaptable to new, complex forms of action that became more frequent in Massachusetts civil practice after the adoption of rule 56. Examples of this phenomenon are discrimination cases, which involve a shifting series of burdens between plaintiff and defendant and which often have shown to be uniquely suitable for summary judgment when the necessary proof at a critical stage is lacking.

5. Despite the encomiums bestowed on summary judgment, it is important that trial judges prepare careful and detailed memoranda in disposing of summary judgment, most particularly when summary judgment is granted. Reasoned decisions explain to the nonprevailing party the basis for the ultimate ruling on the rule 56 motion. Such decisions also allow an appellate court examining a grant of summary judgment properly to decide the case on a comprehensive record and to abate criticism that summary judgment is being used improvidently to clear dockets and to deprive litigants of their day in court. Professor Arthur R. Miller has put this point well in the following terms:

The just resolution of claims at the earliest possible stage doubtlessly saves valuable judicial and litigant resources; admittedly, summary judgment is a powerful weapon in the procedural arsenal that can help achieve this goal. But given the paramount importance of litigants’ rights to a day in court and jury trial, courts pursuing these efficiency objectives must remain vigilant to the rationales for and the possible deleterious effects of expanded use of the practice. These high stakes counsel in favor of appellate courts’ insistence that trial courts accompany grants of summary judgment with explicit, detailed, and reasoned analyses to facilitate careful appellate review.

References:

116. Vairo, supra note 22, at 1.
117. Miller, supra note 6, at 22.
I. Development of the Law of Discovery Prior to Adoption of the 1979 Rules

A. Development of discovery for the defense

1. Discovery rights of accused persons in 1969

Ten years before the adoption of the rules in 1979, a defendant in a criminal case had no right to discovery of statements that he had allegedly made to the police,2 no right to see grand jury minutes3 and no right to know the names and addresses of commonwealth witnesses, except those who had testified before the grand jury in capital cases.4 It is true that most defendants in the superior court knew what evidence the commonwealth would introduce at trial because they had already had a bench trial or probable cause hearing in the district court. The prosecution, however, could directly indict and deprive the defendant of a hearing in the district court, if it wished.

Prior to adoption of the rules, the defense could summons hospital records of victims and police reports containing statements of commonwealth witnesses, since there is normally nothing privileged about these records.5 Moreover, the privilege for confidential informants does not exist once an informant becomes a witness at trial.6 But a defendant had no right to know the identity of commonwealth witnesses, except those who had testified before the grand jury in capital cases.4

I. Development of Discovery in Criminal Cases

By David Skeels

INTRODUCTION

Forty years ago, neither the prosecution nor the defense in a criminal case had any right to discovery of the witnesses or evidence that the other side intended to call or introduce at trial. Today both sides have a mandatory right to this information. The Massachusetts Rules of Criminal Procedure, which were adopted 30 years ago in 1979, contained in rule 14 an important section on discovery which was a response to developments in the law of discovery that had occurred in the 1970s. The practical application of this rule over the next 25 years resulted in the 2004 revision of rule 14, which codified many of the procedures that had developed during that time, and made mandatory the disclosure of prospective witnesses by both sides.

The first part of this article will discuss the developments in the law of discovery which occurred in the decade before the adoption of the rules of criminal procedure. The second part will address the discovery provisions of the 1979 rules, how they were applied in actual practice, and the extent to which the 2004 revision of rule 14 codified the practice that had grown up under the 1979 rules. The final section will then consider the constitutional principles which have governed the development of rule 14. The rule was an attempt to provide both the prosecution and defense with discovery without violating any of the provisions of the state or federal constitutions.

By David Skeels

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5. Under Mass. Gen. Laws ch. 233, § 1 (2008), a notary public or justice of the peace may issue a summons requested by a defendant without prior judicial approval to summons into court documents that may be needed at a hearing or trial. Prior judicial approval is only needed when documents are summoned to a trial. Commonwealth v. Mitchell, 444 Mass. 786, 791 n. 12 (2005). Under Mass. R. Crim. P. 17(a), only a judge has authority to issue a summons prior to trial, Commonwealth v. Lamprom, 441 Mass. 265, 270 (2004), and a party moving to subpoena documents prior to trial must make a showing of good cause before a judge. Id. at 269. The “requirement that a judge must be satisfied that the Lamprom standards are met before a summons issues is applicable only when the documents being sought must be produced prior to trial.” Mitchell, 444 Mass. at 792 n. 12.

A summons or subpoena duces tecum is an order to a witness to appear in court and produce a document in the witness’s possession. Bull v. Loveland, 27 Mass. (10 Pick.) 9, 14 (1830). In principle, it is no different than a summons to a witness to appear in court and give testimony. Id. A witness will be compelled to produce the document if the witness has no legal excuse for withholding it, and whether the witness has a legal excuse is for the court and not the witness to determine. Id.

Under Mass. Gen. Laws ch. 233, §§ 79, 79J (2008), hospital and business records may be summoned into the clerk of court’s office, and if they have been properly certified there is no need for the keeper of the records to appear in court and authenticate the records. In addition, the party summoning the record may examine the record “at any time before it is produced in court.” Mass. Gen. Laws ch. 233, §§ 79, 79J (2008).
witnesses in advance of trial, and without knowing a witness’s identity a defendant could not summon the witness’s statements for trial. A forensic expert could conduct a test and appear as a witness at trial without the defendant having seen the expert’s report, which might have been delivered to the prosecution long before trial.

2. The movement for reform

During the 1960s and 1970s there was considerable pressure for reform of the law of discovery. Commentators stressed that the prosecution had inherent information-gathering advantages that the defense did not possess. One commentator stated:

Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trial is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant.

One of the main advantages that the prosecution had was that it could summon witnesses before the grand jury and whatever testimony they gave would remain secret. The grand jury could be used strictly as an investigative tool to obtain information and the information which the prosecution obtained would not be released to the defendant. Although defendants could summons witnesses for trials or probable cause hearings, their testimony occurred in open court, and a defense witness could be impeached if his testimony changed between district and superior court. Thus, it is not surprising that the first developments in the law of discovery in Massachusetts occurred in the area of grand jury testimony.

3. Exculpatory evidence, grand jury minutes and police reports

In Mooney v. Holohan, the United States Supreme Court held that the knowing use of perjured testimony by the prosecution violated due process of law, and in Brady v. Maryland, that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment … .” This led to the doctrine that if a government witness made a material misstatement of fact in the course of the trial and the prosecution was aware of this misstatement then it was the duty of the prosecutor to correct the misstatement. Thus, if a key government witness, who had been promised a lighter sentence for his testimony, testified that he had received no promises from the prosecution, it was the responsibility of the prosecution to correct this misstatement.

Whether a witness had been promised a benefit for his testimony was a factor which went to the witness’s credibility, but the credibility of a key government witness could affect the outcome of a trial; therefore, it was material and had to be disclosed to the defense. Thus, it was arguable that, if a key prosecution witness changed his testimony on a material point after testifying before the grand jury, the defense should be advised of this fact. In order to ensure that the prosecution fulfilled its duties in this regard, defendants argued that they should be allowed to examine the grand jury minutes, at least after a commonwealth witness had testified in the superior court.

In Commonwealth v. Carelia, a prosecution witness gave a vivid description of a gun at trial but admitted that she had not described the gun in any detail until after the grand jury indictment. The Supreme Judicial Court (“SJC”) held that the defense had no right to examine the grand jury minutes prior to trial but, in this case, it had shown a “particularized need” to see the minutes of the witness’s grand jury testimony after she had testified. There was a reasonable probability that this witness had changed her testimony after her appearance before the grand jury. The court added that “[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.”

The doctrine of “particularized need” meant that the defense would generally ask the trial judge to examine the grand jury minutes after a witness had testified in order to determine whether there were any discrepancies in the witness’s testimony. This meant interrupting the trial so the trial judge could read the grand jury minutes and then try to determine in the middle of a trial, while the jury was waiting, whether the defendant had a particularized need to see the grand jury minutes. This put the judge in the position of...

10. Id. at 112.
12. Id. at 87.
15. Napue, 360 U.S. at 270.
18. Id. at 140-42.
19. Id. at 141.
20. Id.
21. Id. at 140 (quoting Dennis v. United States, 384 U.S. 855, 873-74 (1966)).
assumingly vicariously and uncomfortably the role of counsel.”

If the minutes were not disclosed to the defendant they would then be marked as an appellate exhibit and referred to the appellate courts for review of the trial judge’s decision.

For reasons both of judicial economy and fairness the SJC held in Commonwealth v. Stewart that in future cases a defendant would have a right to examine the grand jury “testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial.” The testimony was to be provided to the defendant “not later than the close of his direct testimony at trial.”

Once defendants were allowed to examine grand jury minutes, it arguably followed that they should also be allowed to examine other statements that a witness had made to the police or prosecutor, to determine whether they contained any inconsistencies. Thus, in Commonwealth v. Lewinski, the SJC held that, in the future, defendants would have a right to examine the statements of prosecution witnesses in the prosecutor’s possession, and the statement was to be delivered to the defendant no later than after the witness’s testimony in court. The prosecution could still keep secret the identity of a witness until after the witness had testified, but once the witness had testified any statements in the prosecution’s possession had to be turned over to the defendant.

B. Development of Discovery for the Commonwealth

1. The privilege against self-incrimination as a bar to discovery for the prosecution

Not only was there pressure for discovery for the defense during the 1970s, but there were also calls for a similar right for the prosecution. The main objection to compelling a defendant to disclose information in his possession was the privilege against self-incrimination. In In re Emery the SJC held that a legislative committee could not require a person to testify concerning matters which might tend to incriminate him unless he was given complete immunity from prosecution.

It was not sufficient to preclude use of the witness’s statements against him at a later trial. The court held that the provision of article 12 of the Massachusetts Declaration of Rights which provides that a person may not be compelled to “accuse, or furnish evidence against himself” gave greater protection than a constitutional provision which merely protected that a person could not be compelled to accuse himself or give witness against himself. The Massachusetts provision protects a person “from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which evidence of its commission, or of his connection with it may be obtained, or made effectual for his conviction,” even though his answers could not be used as direct admissions. This provision prevented the prosecution from learning the names of witnesses known to the defendant who might be able to help prove the case against him.

Requiring a defendant to disclose his alibi witnesses prior to trial could require him to disclose to the prosecution witnesses who could place the defendant at the scene of the crime when it occurred. Without knowing what evidence the prosecution had in its possession, a defendant had no way of knowing whether information in his possession could help his case or hurt it. Thus, defendants argued that they could not make an intelligent decision whether to disclose the identity of their witnesses and present a defense until they had heard the prosecution’s case.

Nevertheless, in Williams v. Florida, the United States Supreme Court held that the Florida notice-of-alibi statute which required criminal defendants to provide the prosecution with the names and addresses of their alibi witnesses did not violate the federal constitution. The Court held that this statute did not require the defendant to incriminate himself, but merely forced him to “divulge at an earlier date information that [the accused] from the beginning planned to divulge at trial.” The Court noted, however, that Florida provided for “liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant.”

2. Reciprocal discovery as a bar to discovery for the prosecution

In Wardius v. Oregon, a unanimous Supreme Court struck down an Oregon notice-of-alibi statute which did not provide for liberal discovery for the defendant. The Court held that due process “forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.” The Oregon statute was unconstitutional because it had “no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.”

An alibi defense could be refuted either by calling witnesses to testify that the defendant was at the scene of the crime, or by calling witnesses to attack the credibility of the defendant’s alibi witnesses. Without disclosure of the witnesses whom the government intended to call on both its direct and rebuttal case, any law which required a defendant to disclose his defense was subject to federal

24. Id. at 104-05.
26. Id. at 106.
27. Id.
29. Id. at 902.
30. Id.
31. 107 Mass. 172 (1871).
32. Id. at 185.
33. Id. at 181, 182, 185-86.
34. Id. at 182.
37. Id. at 81-82.
38. Id. at 85.
39. Id. at 81. The rationale for the case was that the defendant had obtained the same information about the prosecution’s case through discovery as would have been obtained through a trial. Id. at 81, 84-85. Justice Hugo Black took exception to this rationale in his dissent. Id. at 108 (Black, J., dissenting). He argued that many cases which appear strong on paper collapse when they come to trial and the witnesses are subject to cross-examination. Id. at 109. Thus, the decision whether to present a defense which the defendant was forced to make before trial after receiving discovery could never be as informed as a decision which was made after the prosecution had presented its case in open court. Id. at 108-09. 40. 412 U.S. 470 (1973).
41. Id. at 471-72.
42. Id. at 472.
43. Id. at 475. The only discovery which Oregon provided was to allow the defendant to “view written statements made by state witnesses and by the defendant, in the hands of the police.” Id. at 475 n. 8.
constitutional objections. Thus, in Commonwealth v. Edgerly, the SJC refused to adopt a notice-of-alibi rule. The court noted that the matter was “under consideration by this court as part of the Massachusetts Proposed Rules of Criminal Procedure for District and Superior Courts.” It stated that while “[i]t is true that a notice-of-alibi order upsets the traditional view that a defendant need not reveal his defense, if any, until the prosecution has disclosed its entire case,” still “where such a defendant is granted substantial reciprocal rights and the right to considerable additional disclosure, the system is not fundamentally unfair.”

II. THE 1979 RULES AND THEIR APPLICATION

A. Discovery under the 1979 Rules

The 1979 rules of criminal procedure did contain in rule 14 a notice-of-alibi provision which allowed a judge to order the defendant to provide the names and addresses of his alibi witnesses after the prosecution had specified the “time, date, and place at which the alleged offense was committed.” If the defendant provided a list of his alibi witnesses, the prosecution was required to provide the defense with the “names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant’s presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant’s alibi witnesses.”

But the 1979 rules did not grant the defendant mandatory discovery of the names and addresses of all commonwealth witnesses. The only mandatory discovery (other than exculpatory evidence) was of grand jury minutes and any written statements of the defendant in the prosecution’s possession. Under rule 14 the defendant could file a motion for the names and addresses of commonwealth witnesses but this discovery was discretionary with the motion judge.

Furthermore, the rule provided that the prosecution could file a motion for discovery of any discoverable material “which the defendant intends to use at trial, including the names, addresses, and statements of those persons whom the defendant intends to use as witnesses at trial.”

In order to avoid any constitutional problems with reciprocal discovery, however, the rule provided that if the prosecution was granted discovery “[t]he judge shall condition his order by requiring that the Commonwealth make those materials discoverable under subdivision (a) (2) of this rule available for inspection and copying by the defendant.” The materials which were discoverable under subdivision (a) (2) of rule 14 included “any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction or control,” and “the production by the Commonwealth of the names and addresses of its prospective witnesses.”

B. The Development of Discovery under the 1979 Rules

Under the 1979 rules, a prosecutor could oppose any defense requests for discovery other than mandatory discovery. As a practical matter, few judges would order the prosecution to provide the defense with the names and addresses of the commonwealth’s witnesses if the prosecution objected. Judges naturally assumed that the prosecutor had a better understanding of the danger to potential witnesses that a particular defendant might pose than they did. But if a judge refused to grant discovery to the defense, the prosecution could not obtain discovery either. Consequently, as a general rule the prosecution only pursued this option in cases where the disclosure of a witness’s identity posed a real danger to the witness.

Although most judges would allow a prosecution motion for the identity of defense witnesses, when such a motion was allowed it had to be conditioned on an order that the prosecution disclose to the defense prospective prosecution witnesses and all the material and relevant evidence in the prosecution’s possession. Knowing these facts, most defense attorneys did not oppose prosecution requests for discovery.

In the vast majority of cases, discovery was agreed upon at the pretrial conference. The defense agreed to provide the prosecution with a list of prospective defense witnesses and evidence that the defense intended to introduce at trial, provided the prosecution first provided the defense with the identity of the prosecution witnesses and all material and relevant evidence in the prosecution’s possession as required by rule 14 (a)(2).

Defendants still continued to file motions for specific discovery after the pretrial conference to ensure that the prosecution disclosed all the evidence in its possession. Furthermore, if the prosecution failed to provide the defense with the discovery required by the rules, the defense could refuse to disclose any discovery to the prosecution until the required discovery had been received. The Wardius case had held that a defendant who had not been granted the reciprocal discovery required by the federal constitution could refuse to grant any discovery to the prosecution and still have a constitutional right.

45. Id. at 343-44.
46. Id.
47. Id. at 342.
56. If the prosecution fails to disclose evidence which has been specifically requested by the defense, the defendant is entitled to a new trial if he merely demonstrates that “a substantial basis exists for claiming prejudice from the nondisclosure.” Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992). A defendant who has not made a specific request for the evidence can obtain a new trial only if the defense shows that the “absent evidence would have played an important role in the jury’s deliberations.” Id. at 414.
to introduce his defense at trial.\textsuperscript{57} Without knowing what evidence the prosecution had in its possession, a defendant could argue that he could not make an intelligent decision whether to waive his right to remain silent and introduce a defense at trial. It was only evidence which a defendant intended to "divulge at trial," that he could be compelled to disclose under \textit{Williams v. Florida}\.\textsuperscript{58}

\section*{C. The 2004 Amendments to Rule 14}

The fact that discovery was usually agreed upon at the pretrial conference undoubtedly influenced the revision of rule 14 in 2004, which made the discovery of prospective witnesses mandatory for both sides.\textsuperscript{59} Under the amendment, both sides have a right to mandatory discovery of the names, addresses and statements of witnesses whom the opposing side intends to call at trial, and to the evidence that the opposing side intends to introduce.\textsuperscript{60} The amendment provides that the prosecution must provide the defense with mandatory discovery at or before the pretrial conference\textsuperscript{61} and afterwards the defense must provide the prosecution with the mandatory discovery to which the prosecution is entitled.\textsuperscript{62}

\section*{III. DISCOVERY UNDER THE RULES AND UNDER THE FEDERAL AND STATE CONSTITUTIONS}

Although rule 14(a)(1)(B), which grants mandatory discovery to the prosecution, is entitled "Reciprocal Discovery for the Prosecution," this is somewhat misleading. The only evidence that the prosecution may obtain from the defendant through mandatory discovery is evidence that the defendant intends to introduce at trial.\textsuperscript{63} The defendant's rights are not so limited. The defendant has a constitutional right under reciprocal discovery to disclosure of evidence which the prosecution intends to introduce at trial and has the additional right to disclosure of any evidence of an exculpatory nature which the prosecution does not intend to use at trial.\textsuperscript{64}

Under article 12 of the Massachusetts Declaration of Rights a person may not be compelled to "furnish evidence against himself" and this includes "the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained."\textsuperscript{65} If an expert employed by the defense discovers evidence that could be helpful to the prosecution, the defense is under no obligation to disclose the evidence or the identity of any witness whom the defense does not intend to use at trial.\textsuperscript{66} On the other hand, if a forensic expert or other person employed by the prosecution discovers "material" evidence which is "favorable" to the defense, then under rule 14\textsuperscript{67} and \textit{Brady v. Maryland},\textsuperscript{68} the prosecution is obligated to disclose such evidence to the defense.

Material evidence in the commonwealth's possession which it does not intend to use at trial is the type of evidence which is most likely to be "favorable" to the defense and, thus, exculpatory evidence under the federal constitution.\textsuperscript{69} Under the due process clause of the Fourteenth Amendment of the United States Constitution, a defendant is entitled to reversal of the judgment if the prosecution suppresses evidence, whether or not it has been requested by the defense, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."\textsuperscript{70} Since "a prosecutor cannot be expected to appreciate the significance of every item of evidence in his possession to the 2004 version of rule 14 stated that "automatic discovery does not extend to statements that the defense intends to use for purposes of cross-examination," but the Notes did not say that such statements could not be discovered by motion. \textit{Durham}, 446 Mass. at 221. In \textit{Commonwealth v. Morales}, 453 Mass. 40 (2009), the SJC declined an invitation to overrule \textit{Durham}, but left undecided the question whether a reciprocal discovery order would in some circumstances violate the right of confrontation or the privilege against self-incrimination. \textit{Id.} at 49-51. The problem with ordering a defendant to produce statements of commonwealth witnesses which the defendant intends to use for impeachment is that, until a witness testifies, a defendant does not know whether there will be anything in a statement that is inconsistent with the witness's trial testimony, and, thus, can be used for impeachment.

\textit{See Commonwealth v. Tucceri}, 412 Mass. 401, 405 (1992)(due process requires prosecution to disclose to defendant material and exculpatory evidence in its possession); \textit{Commonwealth v. Hanger}, 377 Mass. 503, 508 (1979)(if defendant is ordered to disclose identity of alibi witnesses, constitution requires that discovery order reciprocally require commonwealth to give defendant notice of witnesses it intends to use to dispute alibi; see also \textit{Mass. R. Crim. P. 14(a)(1)(A)(ii)(i)}[any facts of exculpatory nature must be disclosed as automatic discovery].


\textit{Commonwealth v. Durham}, 446 Mass. 212 (2006), held that under the discretionary provisions of the prior version of Mass. R. Crim. P. 14(a), 378 Mass. 842, 874-75 (1979), a judge could allow a prosecution motion for discovery of the statements of prosecution witnesses which the defendant intended to use for impeachment. \textit{Id.} at 213, 214, 221. To what extent this holding will be applied to interpretation of the 2004 version of rule 14 is unclear. The court in \textit{Durham} observed that the revised Reporter's Notes to the 2004 version of rule 14 stated that "automatic discovery does not extend to statements that the defense intends to use for purposes of cross-examination," but the Notes did not say that such statements could not be discovered by motion. \textit{Durham}, 446 Mass. at 221. In \textit{Commonwealth v. Morales}, 453 Mass. 40 (2009), the SJC declined an invitation to overrule \textit{Durham}, but left undecided the question whether a reciprocal discovery order would in some circumstances violate the right of confrontation or the privilege against self-incrimination. \textit{Id.} at 49-51. The problem with ordering a defendant to produce statements of commonwealth witnesses which the defendant intends to use for impeachment is that, until a witness testifies, a defendant does not know whether there will be anything in a statement that is inconsistent with the witness's trial testimony, and, thus, can be used for impeachment.

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to any possible defense which might be asserted by the defendant,”71 a wise prosecutor will disclose relevant evidence in his or her possession, whether or not he or she intends to make use of the evidence or can foresee how the defendant might use the evidence.72

It is true that some of the information in the commonwealth’s possession may be privileged, but whether the privilege exists and should prevent disclosure of the evidence is a question for a court to decide. If, for example, a person whom the prosecution does not intend to call as a witness is a confidential informant, but disclosure of the informant’s identity is “relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way.”73 This decision is to be made by the court based on the facts of the particular case.74

CONCLUSION

During the 1970s, as a result of the recognition of a defendant’s right to obtain exculpatory evidence, criminal defendants were granted discovery of the statements which commonwealth witnesses had previously given to the prosecutor or the police on the theory that the defense should be allowed to examine these statements for any inconsistencies with the witness’s trial testimony. At the same time, in the decade before the adoption of the 1979 rules, prosecutors pressed for disclosure of the identity of defense witnesses in alibi cases. In Wardius v. Oregon, however, the United States Supreme Court held that a notice-of-alibi rule would only be constitutional if the prosecution disclosed the identity of any prosecution witnesses who would be used to rebut the defense.

These developments led to the discovery provisions of rule 14. Under this rule a judge could authorize the prosecutor to obtain the names and addresses of defense witnesses and any evidence which the defense intended to introduce, provided the prosecutor was ordered to disclose his prospective witnesses and any material and relevant evidence in its possession. Since the prosecution and defense generally agreed to exchange the identity of prospective witnesses under rule 14, both sides were given a right to mandatory discovery of prospective witnesses and any evidence they intended to introduce at trial under the 2004 revision of the rule.

But reciprocal discovery is only one of three important constitutional principles involved in discovery, and the prosecutor’s obligations are not fulfilled simply by providing the defendant with evidence the prosecutor intends to introduce at trial. The prosecution also has a duty to provide the defense with exculpatory evidence in its possession. Furthermore, in order to avoid conflict with the privilege against self-incrimination, the defense can only be required to disclose evidence which it intends to use at trial. From the beginning, these three constitutional guarantees have governed the development of discovery in criminal cases in Massachusetts. The rights of the accused have been recognized and enforced in the 30-year experiment with rule 14. Without such recognition and enforcement, the experiment could not have been successful.

72. Kyles, 514 U.S. at 439.
INSTITUTIONAL REMEDIAL LITIGATION
IN THE SUPERIOR COURT:
A TALE OF TWO CITIES AND ONE JUDGE

By John C. Cratsley*

INTRODUCTION

A recent development in the 150-year history of the superior court has been litigation in which its justices have been asked to resolve disputes about the management of public institutions. While certain elements, like timely resolution of pending cases, can be traced to the creation of the superior court in 1859, lawsuits asking trial judges to exercise equitable and remedial powers over agencies of the executive branch—what has come to be called institutional remedial litigation—is not apparent in our beginnings.1 In this article, I will examine two cases in which one superior court justice issued significant remedial orders affecting both city and state governments. In doing so, there are at least three relevant considerations: (1) the factual setting of each case, why was it filed, by whom and seeking what relief; (2) the procedural manner in which the judge handled the case, from determining liability to implementing a remedy; and (3) the legal basis, i.e., the stated rationale of the judge for choosing to issue remedial orders to another branch of government.

The debate about institutional remedial litigation is by now familiar.2 In the history of the Massachusetts superior court it has involved similar competing considerations: the responsibility of the trial judge, upon adequate proof, to address constitutional or statutory violations that have an impact on public health and safety weighed against the legitimacy of judicial remedial orders affecting other branches of government as well as the capacity of the trial court to oversee remedial orders. The precise issues presented to the judge in each such lawsuit include: (1) defining the constitutional and statutory rights involved; (2) determining if any of these rights were actually violated by the government defendants; and (3) devising a remedy sufficiently clear to achieve compliance with the law.

Critics of judicial remedial orders cite the most fundamental reasons for judicial restraint, including the view that in representative government we ask our elected officials to make policy and our judges to enforce it case by case.3 Furthermore, they argue that most of the defendants in these types of cases will, in fact, act in good faith and follow the law once it is declared by a court.4 One additional fear is that of establishing government by unelected judges rather than elected representatives making political decisions. The concern is that once judges try to remedy a violation of a specific right, they exceed the boundaries of their role by injecting policy to improve the institution of government.5 Professors Ross Sandler and David Schoenbrod describe this as the “judicial slide from enforcing rights to making policy in pursuit of aspirational goals.”6 The contrary argument, however, is that history teaches us that government defendants often do not or cannot alter their behavior or practices even if ordered to do so by a judge. As Professor Susan Poser notes, “[l]arge organizations are extremely resistant to change.”7 This resistance, of course, makes it challenging for the trial judge to amend and even

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1. “On the larger scene, we may point to the extensive experience of the past quarter century with so-called ‘institutional remedial litigation’ … starting with the desegregation of public schools.” Perez v. Boston Hous. Auth., 379 Mass. 703, 730 (1980).


3. See Poser, supra note 2, at 1315 (citing Sandler & Schoenbrod, supra note 2, at 152-53).

4. See id. at 1317 (discussing arguments of Professors Sandler and Schoenbrod).

5. Id. at 1320.

6. Id. (quoting Sandler & Schoenbrod, supra note 2, at 102).

7. Id. at 1324 n. 43 (citing Herbert Kaufman, The Limits of Organizational Change 8 (The University of Alabama Press 1995) (1971) (arguing that the barriers to change are “acknowledged collective benefits of stability, calculated opposition to change, and inability to change.”); W. Richard Scott, Organizations: Rational, Natural, and Open Systems 64 (Prentice-Hall 1992) (1981) (noting that “necessity of survival can override the morality of
enhance existing remedial court orders, including appointment of special masters, receivers and court-approved monitors.

The two most significant cases of institutional remedial litigation in the history of the Massachusetts superior court are, without doubt, Perez v. Boston Housing Authority and Quincy v. Metropolitan District Commission. Each was handled by the same judge, the late Paul Garrity, and, as this article will suggest, each provides a fascinating contrast in judicial style and behavior by the same man. Each case was initiated and defended by able attorneys on both sides, each case involved allegations of significant violations of state or federal law by a large governmental agency, and each resulted in fundamental institutional change. Yet each unfolded in an entirely different manner. These differences reflect both the strengths and limitations of the judicial branch when counsel seek remedial orders affecting the conduct of the executive and legislative branches of government. Lessons from these two cases remain with us whenever plaintiffs in a superior court lawsuit suggest the remedy of a special master or receiver to manage a state or city agency.

I. Perez v. Boston Housing Authority

Prior to the filing of the Perez case in early 1975, there had been two earlier attempts by tenants in Boston public housing projects to sue the Boston Housing Authority ("BHA"), one in state court and one in federal court. The first case, West Broadway Task Force, Inc. v. Commissioner of the Department of Community Affairs, was filed in superior court in 1970. The dismissal of the case by the trial court was affirmed by the Supreme Judicial Court ("SJC"). In its decision, the SJC discussed the involvement of the judiciary in governmental affairs. "[T]his case … rather resembles those more commonplace situations in which courts have regularly resisted the temptation to substitute their initiative or judgment for that of the agencies charged, as the … agencies are here charged, with primary responsibility for discretionary choices.”

The second case, brought in 1974 in the United States district court by the tenants of public housing operated by the BHA, was also dismissed. The judge’s order dismissing the case ended with an equally firm statement about the judiciary avoiding interference in governmental matters better suited for the political branches. Judge Frank H. Freedman wrote:

One can only sympathize with the plight of the tenants residing in Boston’s low-income housing projects. The projects are mismanaged and in a poor state of repair. Yet the federal courts cannot pretend to be the cure-all for America’s housing ills. Federal courts lack the expertise, the staff, and the Congressional mandate to do the job. On the other hand, the Housing Court for the City of Boston, which has been established by state legislation, which [sic] is better suited to solve the enormous housing problems encountered by the tenants of Boston. Yet in the last analysis, long range answers can best be provided by the “political branches” of government. It is they who have the resources, the duty, and the power to make significant changes in the field of housing.  

Then, on February 7, 1975, Armando Perez and eight other tenants, represented by Greater Boston Legal Services, filed suit in the Boston Housing Court alleging that their living conditions violated the state sanitary code. Paul Garrity was the judge of the Boston Housing Court who handled the case and, after several hearings, he issued a sweeping preliminary injunction on March 28, 1975. His detailed findings included: (1) that the BHA was responsible for countless violations of the applicable sanitary codes; (2) that the board, managers, and staff of the BHA were incapable of remediating the violations or replacing the substandard housing units; (3) that relocation of certain tenants living in the most substandard units was immediately required; and (4) that the supervising state agency, the Department of Community Affairs ("DCA"), was required to fund the repairs and relocation.

Raising one of the most difficult issues in the field of institutional remedial litigation—the legitimacy of court orders requiring other branches of government to expend monies in particular ways—Attorney General Francis X. Bellotti appealed Garrity’s order requiring the DCA to spend funds for repairs and relocation. By July of 1975, the SJC reversed that part of Garrity’s preliminary injunction. In Perez v. Boston Housing Authority, Justice Edward Hennessey, speaking for the full court, declared that the commonwealth cannot be forced by the judicial branch to expend funds in a particular way, but lamented that hundreds, if not thousands, of BHA tenants were living in substandard conditions.

Continuing his measured approach to the problems at the BHA, Judge Garrity issued four interim orders between March and July 1975 directed at improving conditions for tenants. As the responses came in, the judge consistently found them to be inadequate. As a result, the attorneys for the tenants made their first motion for a receivership. Judge Garrity initially rejected that step as unnecessary, but appointed a special master, Robert Whittlesey. Between May of 1975 and September of 1976, the special master made 25 interim orders, and, on July 1, 1976, he filed a five-volume report critical of the BHA’s compliance with the orders.


19. Id. at 498.

20. Id. at 128.

21. Id. at 128-29, 135.
the special master’s report and terminate Judge Garrity’s and the special master’s involvement in the case. In response, the tenants again filed for the appointment of a receiver. In another set of findings entered at the end of August 1976, Judge Garrity detailed “misfeasance and nonfeasance” by the BHA officials which “constituted severe mismanagement.”

In October of 1976, the case went with Judge Garrity when he was appointed to the superior court. After lengthy negotiations involving counsel for the parties and the court, a consent decree became effective in June of 1977 that kept Special Master Whitley on the job, established the tenants as a class and ordered periodic progress reports, but again rejected the creation of a receivership. But by December of 1978, after another year and a half of the special master sending Judge Garrity notices of noncompliance by the BHA, the plaintiffs made a new motion to vacate the consent decree and for the third time sought to have a receiver appointed.

Judge Garrity held what is certainly the longest receivership hearing in Massachusetts judicial history, lasting 35 days from March through May of 1979. On July 25, he ruled that, after years of using more moderate remedies, a receivership was the only mechanism to end the BHA’s noncompliance with the requirements of the state sanitary code. He vacated the existing consent decree and stated that he would now appoint a receiver over the activities of the BHA board and administration. Among Garrity’s findings, essential to the use of the receivership remedy, were: (1) that the BHA board was incapable of effective leadership necessary to achieve compliance with state law because it was unable or unwilling to discharge its responsibilities; (2) that “[t]he Board’s incompetence and indifference” led to its failure to carry out its commitments under the consent decree, resulting in “unprecedented deterioration” and “widespread violations” of the sanitary code in its public housing units, and (3) that this “gross mismanagement” and “unabated malfeasance” required the “extraordinary action” of the appointment of a receiver. These detailed findings would prove unassailable on appeal.

Garrity’s receivership decision was appealed by the BHA to the SJC. On February 4, 1980, the SJC accepted his findings and affirmed his order in a sweeping decision confirming the authority of a trial court judge, upon appropriate findings and in the exercise of the court’s general equity powers, to employ the remedy of a receivership. First, the SJC affirmed Garrity’s findings of liability, concluding that he had correctly determined that the BHA had failed to maintain its properties in compliance with minimum standards of health and safety. Second, the SJC determined, as had Judge Garrity, that other equitable remedies had proven “intractable,” noting the history of his other interim steps. Third, following a discussion of the difficult issues involved in institutional remedial litigation, the SJC confirmed the amenability of public officials to affirmative injunctions, including receiverships, despite the arguments of the BHA that such judicial intervention inhibits governmental discretion and is inherently difficult to enforce. The court went on to note that institutional remedial litigation had occurred throughout state and federal courts and, commenting on the separation of powers issue, stated that it is the proper function of the judicial branch to provide remedies for proven violations of law.

On February 5, 1980, the day after the SJC’s opinion, Judge Garrity appointed Lewis H. “Harry” Spence as receiver with full authority to operate the BHA and control its funds. His Order of Appointment of Receiver contained 14 pages detailing the process of appointment and the responsibilities and powers of the receiver.

Spence’s duties as receiver lasted from 1980 until 1984 when, due to the marked improvement in the management of the BHA and in the conditions in its public housing units, the receivership ended and a “restorative phase” under superior court supervision began which lasted until 1987. How the receivership operated and why it was so successful is surely for another writer; what is essential in the history of the superior court is the deliberate manner by which Judge Garrity, after pages of reports and hours of hearings, implemented this receivership remedy, doing so only after his authority was fully affirmed by the SJC.

II. CITY OF QUINCY V. METROPOLITAN DISTRICT COMMISSION

In 1982, William Golden, the City Solicitor of Quincy, became disgusted with the amount of human waste washing up onto Wollaston Beach and persuaded the Mayor of Quincy to file suit to alleviate the repulsive conditions in Boston Harbor. On December 17, 1982, attorneys Golden and Peter Koff filed Quincy v. Metropolitan District Commission in the Norfolk Superior Court. The complaint alleged that the Metropolitan District Commission (“MDC”) violated its federal and state discharge permits as well as state law that prohibited the discharge of raw sewage into open waterways.

Typical of the challenges faced in bringing lawsuits against government agencies, the plaintiff’s attorneys tried but could not persuade either the United States Environmental Protection Agency (“EPA”) or then Governor Michael Dukakis to join in the litigation. In fact, Governor Dukakis urged Golden to refrain from filing suit because his own administration was making efforts to clean up Boston Harbor. The plaintiff’s attorneys waited to file the complaint until Judge Garrity rotated into Norfolk Superior Court since they knew he had already appointed a receiver to manage the BHA to
remedy a different set of sanitary violations.\(^{36}\)

In June of 1983, after three additional defendants were added (the director of the Division of Water Pollution Control, the commissioner of the Massachusetts Department of Environmental Quality Engineering (“DEQE”), and the secretary of the Massachusetts Executive Office of Environmental Affairs (“EOEA”)), Judge Garrity held a preliminary injunction hearing.\(^{37}\) By the end of June, he issued his preliminary determination of liability, based on a finding of deviations from statutory and regulatory standards sufficient to warrant a conclusion of environmental damage and pollution that adversely affected the public health, welfare and safety of all who lived and worked around Boston Harbor. He reached these conclusions based on affidavits accompanied by oral arguments.\(^{38}\)

In May, most likely hoping to promote judicial deference to the ability of state government to resolve the Boston Harbor problem, Governor Dukakis had appointed a special committee to address the harbor issues headed by former Governor Frank Sargent.\(^{39}\) Judge Garrity, moving ahead on his own schedule, and over the opposition of the attorney general, scheduled the remedy hearing for July 6, 1983. Two days later, with no time wasted, Judge Garrity appointed Professor Charles Haar of Harvard Law School as special master to address the Boston Harbor problems.\(^{40}\)

The arguments at the July 6 remedy hearing reflected precisely the issues presented in all institutional remedial litigation. Assistant Attorney General Michael Sloman argued: (1) that it was inappropriate for the court to intervene because the judge had only limited and sometimes incorrect information to act upon; (2) that there was no need for judicial intervention because Governor Dukakis and other governmental agencies already had plans for improving Boston Harbor; (3) that only the political process was capable of developing the consensus necessary for a comprehensive plan as well as the appropriation of money needed to clean up the harbor; and (4) that the powers of the proposed special master could be unlimited and unresponsive to the political process.\(^{41}\) None of these arguments moved Judge Garrity.

Having made his earlier findings on liability regarding the ongoing violations of law and the resulting harm to public health, welfare and safety, Judge Garrity made additional findings about the necessity of the remedy he chose: the appointment of a special master. In his decision, he noted: (1) that the “history of political consensus building … [for the Boston Harbor] is bleak;” (2) that the necessary “federal, state, and local municipal cooperation” to address the harbor problems needs to be accomplished faster than possible through a voluntary approach in order to address the urgent health, safety and welfare issues; and (3) that the political branches were not acting fast enough given the violations of law and their impact.\(^{42}\) As one author of the history of the Boston Harbor cleanup noted, Judge Garrity’s reasons for appointing a special master involved his conclusions, first, that the cleanup of the harbor was not scientifically complex, but was legally, governmentally and politically complex; and second, that given the existing factual evidence, a more efficient judicial approach was necessary that avoided time-consuming evidentiary hearings.\(^{43}\)

By August of 1983, Special Master Haar issued his 196-page report containing detailed findings of fact followed by 23 recommended remedial actions.\(^{44}\) His findings of fact included that raw sewage was discharged into Boston Harbor, that the existing treatment plant was inadequate and that staffing in the responsible state agencies was insufficient.\(^{45}\) As to the appropriateness of a judicial remedy, Professor Haar concluded that the superior court was not overstepping its judicial authority nor impinging on the prerogatives of state government.\(^{46}\)

Professor Haar wrote in his report that without judicial intervention the problems in the harbor would continue and, thus, judicial remedies were “appropriate” and “necessary.”\(^{47}\) His most significant recommendation—the creation of “an independent, autonomous, self-sustaining financial authority” to clean up and manage Boston Harbor, what eventually became the Massachusetts Water Resources Authority (“MWRA”)—set the stage for an unprecedented struggle between Judge Garrity, the governor and the legislature.\(^{48}\)

Those who have written about the harbor cleanup state that Haar’s report received virtually unanimous endorsement.\(^{49}\) On the other hand, expressing governmental reservations about judicial management of one of its agencies, the attorney general’s office would not agree to a consent decree that incorporated Professor Haar’s recommendations. As an alternative, Assistant Attorney General Sloman proposed continuing court jurisdiction for six months to allow the state agencies to evaluate their compliance with the master’s remedies.\(^{50}\) In response, Judge Garrity issued a compromise “Procedural Order” on September 12, 1983, calling for a compliance hearing to be held in one year.\(^{51}\) Professor Haar and Judge Garrity endorsed this approach hoping for a political consensus on what came to be called “the ultimate remedy,” the creation by the legislature of the MWRA.\(^{52}\) At the compliance hearing held on October 9, 1984, Haar reported some compliance but that the harbor was no cleaner.\(^{53}\)

At this point, with separate bills for an MWRA pending, one filed by Governor Dukakis and one filed in the house of representatives, Judge Garrity chose a judicial approach that has been

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36. Id. at 101 (citing Seth Rolbein, Boston’s Floating Crap Game, Boston Magazine, May 1987, at 204).
37. Id.
38. Id. at 102-03.
39. Id. at 103 (citing Andrew Blake, Dukakis Names Sargent to Lead Harbor Cleanup, Boston Globe, May 27, 1983 at 1).
40. Id. at 103-04.
41. Id. at 103, 108.
43. Id. (citing Anthony Wolff, Boston’s Toilet: The True Story, Audubon 28 (March 1989) (interview with Judge Garrity)).
44. Id. at 105-06 (citing Charles Haar & Steven Horowitz, Report of the Special Master 114 (Aug. 9, 1983)).
45. Id. at 106.
46. Id. at 107 (citing Haar & Horowitz, supra note 44, at 125).
47. See id. (citing Haar & Horowitz, supra note 44, at 125).
49. Id. (citing Steven T. Seward, The Boston Harbor Dispute in Of Judges, Politics and Flounders (Charles M. Haar, ed. 1986)).
50. Id. at 108-09.
52. Id. at 111.
53. Id.
questioned to this day. Speaking directly to the press, rather than in a court hearing, he threatened to use his judicial authority to halt MDC sewer hookups and put the MDC into receivership by November 15, 1984, unless the MWRA legislation was enacted. Next he stated, again in the press, that he would start the receivership trial by November 29 unless the legislation was passed. There are no court records reflecting these orders.

Good to his word, on November 29, 1984, again without holding a hearing, Judge Garrity issued a preliminary injunction ordering a moratorium on all commercial sewer hookups by the MDC and ordering the receivership trial to start in a week. Responding to an appeal of this order by the attorney general, Justice Joseph Nolan, sitting as a single justice of the SJC, overturned the sewer hookup moratorium. Judge Garrity started the receivership trial on December 6. Coincidentally, and puzzling many, Judge Garrity participated in a series of press events that some view today as designed to pressure the legislature and the governor into action. On December 7, again in the press and not in open court, he threatened to impose a new ban on commercial sewer hookups. On December 8, the infamous “Sludge Judge” photograph appeared in the Boston Globe depicting Judge Garrity in his robe with arms folded in defiance standing next to Boston Harbor with the city skyline in the background. Next he issued another threat in the press that if there was no vote in the legislature by December 20, he would place the MDC in receivership.

The slow movement of the MWRA legislation is not important in detail, but only to explain Judge Garrity’s frustration and possibly his behavior. When he made his final threat about ordering a receivership on December 20, the legislation was actually in a conference committee and, to the relief of all, it was signed by Governor Dukakis and enacted into law on December 19. What is remarkable about this case is just how dramatically different the judge’s approach was from that in Perez and why this occurred. While this article’s conclusion makes several broad observations about institutional remedial litigation, one cannot end the present discussion without asking whether the distinct contrast in the two cases is the result of one judge’s personality, the unique factual circumstances or the fact that Quincy v. Metropolitan District Commission pitted a committed judge against the legislature and governor. In the final analysis, is the Quincy case the paradigm of Sandler and Schoenbrod’s “judicial slide” from enforcing rights to making public policy?

**CONCLUSION**

Regardless of how you evaluate Judge Garrity’s conduct in these two institutional remedial litigation cases, there are always certain consistent challenges to the trial judge in such matters. First is the clarity of the alleged violations of law. While plaintiff’s counsel always initiates such a case with pleadings highlighting the alleged violations, the trial judge must make the initial decision determining whether the claims merit judicial relief. At the same time, the trial judge should pay attention to larger issues like separation of powers and the primary responsibility of the governmental agencies involved. If proof of alleged violations meets the legal standard for a preliminary injunction, these larger questions can be resolved by citing the responsibility of the judicial branch to address violations of law that affect public health and safety. This was apparently easy for Judge Garrity who had little trouble in both the Perez and Quincy cases deciding that the pleadings, affidavits and documents established sufficient evidence of violations of law to warrant a preliminary injunction.

Fundamental separation of powers issues play a far greater role in the second difficult judicial decision—the choice of a remedy. Here, the range of alternatives, plus the issues of judicial competence, risk to judicial legitimacy and weight to give existing governmental responses, are very real considerations for the trial judge.

The third great challenge for the trial judge is the risk of allowing his investment in fact-finding and remedy-creation to blind his judgment to the political realities involved in the eventual solution. As Professor Abram Chayes so aptly wrote in his seminal article on institutional litigation, “Can the disinterestedness of the judge be sustained, for example, when he is more visibly a part of the political process?”

This is where observers suggest Judge Garrity lost his judicial way in the Quincy case. When contrasted with his deliberate approach in Perez from appointing a special master to eventually appointing a receiver for the BHA, and doing so only after his authority had been confirmed by the SJC, Judge Garrity’s increased use of the media in Quincy in the final months of the race for legislative enactment of the MWRA is questionable. Was this the choice of a judge far too invested in seeing a political solution achieved? Judge Garrity defended himself in December 1984 by saying he took these steps only because he had already decided to resign from the bench. Nevertheless, his appearance of acting outside the traditional judicial role may have cautioned Massachusetts trial judges for years to come. In fact, a review of institutional remedial litigation in the superior court after 1984, which involves mostly prison litigation about overcrowding and sanitary conditions, indicates that decisions in these cases were made only after hearings and a view to

54. Id. at 117-22.
55. Id.
56. Id. at 119.
57. Id. at 120 (citing Judy Foreman, Court Bans Tie-Ins to MDC Sewers, Sets Receivership Trial, BOSTON GLOBE, Nov. 30, 1984, at 1).
58. Id. at 121 (citing Laurence Collins, Attorney General’s Office to Ask Court to Lift Ban on MDC Sewer Hookup, BOSTON GLOBE, Dec. 1, 1984 at 1; Judy Foreman, sewer tie-in ban is lifted, BOSTON GLOBE, Dec. 6, 1984, at 1).
59. Id. (citing Judy Foreman, Garrity Vows a New Ban on Tie-Ins to Sewer System, BOSTON GLOBE, Dec. 8, 1984, at 21).
60. Id. (referencing “The Subject is Boston Harbor,” photograph, BOSTON GLOBE, Dec. 11, 1984, at 1).
61. Id. at 123 (citing Andrew Blake, Ultimatum Given on Harbor Bill, BOSTON GLOBE, Dec. 15, 1984, at 1).
62. Id. at 124.
63. “A court is not entirely without guidance in making such judgments. Standards usually abound: federal and state standards for analogous institutions, facilities, or services; model codes promulgated by professional associations, direct comparisons with practices in other jurisdictions; and innumerable ‘expert’ opinions.” Diver, supra note 2, at 61.
64. An interesting “typology of judicial approaches to the remedial process” is found in Sturm, supra note 2, at 848-61, in which she discusses “The Deferrer,” “The Director,” “The Broker,” and “The Catalyst.”
65. Chayes, supra note 2, at 1309.
66. Dolin, supra note 35, at 123.
evaluate the nature and extent of the plaintiffs’ claims. Then in cases where liability was found, further hearings were held to determine a remedy tailored to address the wrong but with the least impact on the legitimate responsibilities of the correctional authorities. Professor Colin Diver best explained this cautious approach when he wrote “the very source of the judge’s political power is, ultimately, its limitation. A judge’s actions must conform to that narrow band of conduct considered appropriate for so antimajoritarian an institution.”

What can be learned from these two significant institutional remedial litigation cases in the Massachusetts superior court? Three observations, I suggest. First, significant institutional change can be accomplished by the judicial branch through remedial orders requiring compliance with public health and safety laws. This was certainly the outcome of both Perez and Quincy. Second, careful factfinding is essential for a trial judge to determine both liability and remedy. The Perez case remains the prime example of this approach. Third, the risk of judicial over involvement to see a long-term solution achieved is very real. When it occurs, as it did in the Quincy case, the resulting public and political criticism of the judiciary can harm the legitimacy of the very branch of government committed to addressing the inaction of government. For, as the SJC so eloquently said in Perez, “But if it is a function of the judicial branch to provide remedies for violations of law, including violations committed by the executive branch, then an injunction with that intent does not derogate from the separation [of powers] principle.”

Whether these types of cases will recur in the future of the superior court is open to question. More responsive government, limited resources for legal services and other advocacy groups, and general principles of judicial restraint may slow the frequency of these lawsuits. But when this type of litigation is filed, wise and thoughtful trial judges ought to heed the lessons of Perez and Quincy when asked to exercise their remedial powers.

68. See Kelly v. Hodgson, Civil Action No. 98-3083 (Suffolk (Mass.) Super. Ct. Oct. 1, 1998) (Memorandum of Decision and Order on Plaintiff’s Motion for Preliminary Injunction) (deferring imposition of preliminary injunction barring overcrowding until defendant-sheriff had time to open and manage new modular unit and denying, without prejudice, plaintiff’s request to appoint special master).
69. Diver, supra note 2, at 104.
ESSAYS AND REFLECTIONS

Picturing the Rule of Law: Public Exhibits for the Superior Court’s 150th Anniversary

INTRODUCTION

It is one thing for an institution to serve society through notable achievements over a period of 150 years. But the responsibility does not end there. It is essential to gather and preserve this rich history and teach its lessons to present and future generations, even to those among us who tend to focus on the here and now. The rule of law means government by neutral application and interpretation of laws rather than ad hoc pronouncements of men and women calculated to further their individual interests or those of their allies or associates. The superior court’s 150th anniversary has provided the court with the opportunity to help define the rule of law through a close historical examination of the issues in cases that were initiated in the superior court.

DESCRIPTION OF THE STATEWIDE CELEBRATION

Each component of the anniversary celebration is intended to raise and preserve the public’s awareness of the rule of law. The symposium at the Boston Public Library on September 22, 2009, recounted the court’s historical cases and focused on its future challenges. That evening, United States Supreme Court Associate Justice Stephen Breyer delivered an address to judges, court staff and attorneys on the independence of the trial courts. The publication of the remembrances of 50 judges both humanizes and memorializes a collegial court of real individuals. Readers of the Massachusetts Law Review commemorating the 150th anniversary possess a volume worthy of shelving and sharing. The video recordings of avuncular advice to the bar from dozens of superior court judges can be found online at no cost, courtesy of Massachusetts Continuing Legal Education, Inc., which joins in the educational outreach. The video recordings, which involved school children, were planned by local committees and addressed local interests regarding the superior court and the rule of law. Panel exhibits are intended to expose the public to the rule of law for many years to come.

THE PANEL EXHIBITS

An important component of the superior court’s 150th anniversary is the public education project in jury pool rooms which features panel exhibits devoted to the court’s rich history and significant achievements. In Suffolk County alone, more than 32,000 prospective jurors each year serve as our “captive audience” before being dispatched to court sessions. With a minimum 10-year life expectancy for panels, more than 1 million citizens statewide will be enriched by this project. The composition and design of these exhibits has been a challenge. In the early stages, we were taken aback to learn that most people spend only five to ten seconds viewing an exhibit panel and perhaps even less time in the absence of pleasing illustrations. Moreover, it has proven difficult to abide by the common wisdom of museum curators that viewers are unlikely to proceed beyond 150 words on a single panel. We undertook the panel exhibit project with full knowledge that only private financial resources could be tapped to support the design, illustration, fabrication and installation of the panels. We were fortunate to receive both a grant from the Massachusetts Bar Foundation and contributions from active and retired judges.

After a number of false starts spanning several months, we settled on a chronological sequence of important events as well as cases originating in the superior court where the viewer moves from panel to panel following a time sequence from 1854 to the present. Our resolve is to educate without regard to whether the lesson illustrates our court’s finest hours. As to subject matter, we showed restraint in the detailing of rulings in recent criminal cases, which should be explained by the trial judge in the courtroom rather than in the jury pool room.

THE CASE STUDIES

The exhibits begin with the 1854 case against Anthony Burns, which became the catalyst for the system-wide court reorganization from which the superior court emerged in 1859 as the commonwealth’s sole trial court of general jurisdiction. By ordering the return of Anthony Burns, a fugitive slave, to his owner in Virginia, Probate Judge Edward Greely Loring, acting in his role as a federal commissioner, enforced the Fugitive Slave Act of 1850, which had been declared constitutional by the Supreme Judicial Court (“SJC”). For following a valid, but unjust and extremely unpopular law in abolitionist Boston, the judge became the target of outcry to oust him from the bench. The Massachusetts legislature twice passed a bill of address requiring Loring’s removal, but Governor Henry J. Gardner declined to sign them. Loring was ultimately removed from office by a third bill of address in 1858, which was signed by Governor Nathaniel Banks. At the same time, consolidation legislation was

6. Dimond, supra note 3, at 6-8.
7. Id. at 8, 13.
passed, which also had the effect of removing Judge Loring and his brethren on the probate court. Within one year, the courts were reorganized and the superior court was created as the state’s first trial court of general jurisdiction.

Judge Loring’s dilemma confronts every judge to the present, with what to do when the application of a valid law would lead the judge to an unjust or even catastrophic result. For instance, superior court judges are sometimes faced with the prospect of imposing a substantial mandatory minimum sentence when the justice of the situation calls for a lesser-committed sentence or one of no incarceration. Judge Loring had no discretion to consider his personal views about slavery or the merits of Anthony Burns as a person. Likewise, superior court judges, when imposing a mandatory minimum term, have no discretion to consider the personal merits or the criminal history of the person before them.

An exhibit teaches that, in 1860, Francis U. Clough and William H. Jenkins, two Worcester barbers, became the first African-Americans to serve on a Massachusetts jury, making them also the first African-Americans to serve on a jury in the United States. The June 1860 edition of The Liberator newspaper hailed this event “as an encouraging sign of the times.”

There is an exhibit about the celebrated 1893 murder trial of Lizzie A. Borden. In accordance with the existing law, three judges of the superior court presided over the trial, which involved the hatchet murder of the defendant’s father and stepmother. The jury of 12 men deliberated only 90 minutes before acquitting the defendant. They chivalrously doubted a woman could commit such dastardly crimes. Some historians have offered the hypothesis that the Lizzie Borden jury thought it likely that only foreign immigrants were capable of such atrocious acts.

Moving into the 20th century, a panel exhibit teaches that in 1902, the superior court, in enforcing a five-dollar fine, upheld the authority of the Cambridge Board of Health to make smallpox vaccinations mandatory for the public health and safety. The superior court decision was affirmed by both the SJC and the United States Supreme Court. Over the years, the superior court has exercised its equity powers to protect the public health and safety as evidenced by orders to clean up or remediate toxic waste sites or to restrain a person from harming another.

The 1912 “Bread and Roses” jury trial, lasting two months in the superior court sitting in Salem, resulted in the acquittal of two union organizers, Joseph Ettor and Arthur Giovanniatti, and a mill worker charged with being accessories to the murder of an immigrant worker shot in a skirmish between strikers and police in Lawrence. The verdict has been seen as a courageous decision by a local county jury that acquitted because of a paucity of evidence.

In the 1920s, Charles Ponzi perpetrated the $15 million swindling scheme of a type that ever since carries his name. People were persuaded to purchase international postal coupons with the promise of 50 percent interest in 45 days. Ponzi was convicted in federal court under the promise of 50 percent interest in 45 days. Ponzi was convicted in federal court and received a five-year sentence, he was acquitted in the superior court of some charges, and later, in 1925, while proceeding pro se, he was convicted in the superior court as “a common and notorious thief” and received a seven-to-nine-year state prison sentence. Ponzi schemes still exist as contemporary experience (the Madoff scam) demonstrates and no doubt will continue to exist in all generations.

Exhibits in Suffolk and Norfolk counties concentrate on Nicola Sacco and Bartolomeo Vanzetti, who...
were tried and convicted of first-degree murder in connection with the April 15, 1920, robbery of the Slater-Morrill Shoe Company in South Braintree, in which a payroll clerk and a security guard were shot and killed.25 There was enormous international attention, and critics accused the prosecutor and the superior court judge of allowing anti-Italian, anti-immigrant and anti-anarchist sentiment to prejudice the jury.26 The defendants were electrocuted on August 23, 1927.27 Governor Michael S. Dukakis, in an act of executive clemency, issued a pardon in 1977 with a proclamation that declared “that any stigma and disgrace should be forever removed from the names of ‘Sacco and Vanzetti.’”28 The beautiful Sacco and Vanzetti Courtroom at the Norfolk superior courthouse has been maintained in its original form. It is always a significant moment for the judge or lawyer when making a first appearance in that historic courtroom. This judge was honored to make his last appearance before his formal retirement in the Sacco and Vanzetti Courtroom.

A fire at the Cocoanut Grove nightclub in Boston killed 492 people on November 28, 1942.29 Approximately 1000 people tried to escape the fire and were confronted with boarded windows as well as doors that were either welded closed or else opened inwardly.30 Barnett Welansky, the nightclub owner, was tried for, and convicted of, involuntary manslaughter and sentenced to the state prison for 12 to 15 years.31 The recent tragic fire in a Rhode Island nightclub32 shows that history has a way of repeating itself.

An exhibit teaches that Edward O. Gourdin was appointed as the first African-American judge to the superior court by Governor Foster Furcolo in 1958.33 While a student at Harvard, Judge Gourdin set a world record in the broad jump in 1921, he was a silver medalist in track in the summer Olympics in Paris in 1924 and he commanded the all-black 372nd Regiment in World War II.34 In 1959, Governor Furcolo appointed Jennie Loitman Barron as the first female judge on the superior court.35 She was an outspoken advocate for women’s rights and played a leading role in introducing legislation allowing women to serve as jurors, a right granted in 1950.36

In 1964, Judge Francis J. Quirico presided over the “Small Loans” case, Commonwealth v. Beneficial Finance Co.,37 the longest case in the superior court’s history, involving 70 indictments charging loan companies and their officers with bribing public officials.38 With a severance of charges, two trials ensued resulting in convictions of four corporate entities and eight individual defendants.39 The trial transcript exceeded 7500 pages and the judge’s rulings exceeded 1400 pages.40 Judge Quirico went on to serve the commonwealth for an illustrious tenure on the SJC, followed by several post-retirement years as a recall justice on the Appeals Court.

An important panel exhibit teaches constitutional principles involved in jury selection. In the 1979 case of Commonwealth v. Soares,41 four black men were tried and convicted of the murder of a white man.42 The government had challenged 12 of the 13 African-Americans in the panel of prospective jurors.43 Under the then-existing procedure, attorneys were allowed to challenge a certain number of jurors without giving any reason.44 The SJC ruled that the state constitution, and more particularly, article 12 of the Massachusetts Declaration of Rights, forbade the use of challenges to exclude jurors on the basis of race, gender, color, creed or national origin.45 The ruling in

261 Mass. 12 (1927).
26. See generally Watson, supra note 25.
27. Id. at 345-46.
28. Id. at 365.
30. Id. at 16, 18, 20.
31. Id. at 46-50.
32. Id. at viii.
34. Abeel, supra note 33.
36. Id.; see also Jennie Loitman Barron, Jury Service for Women (Committee on the Legal Status of Women National League of Women Voters, December 1924).
37. 360 Mass. 188 (1971).
38. Id. at 200-01.
39. Id.
40. Id. at 201.
42. Id. at 473.
43. Id.
44. Id. at 473 n.6; see also Commonwealth v. Jordan, 439 Mass. 47, 61 n.16 (2003).
Soares required the challenging attorney to give an explanation for a challenge where there appeared to be a “pattern” of challenging members of a protected group. Over the next couple of decades, that ruling has been strengthened and now the exercise of but one challenge may constitute a “pattern.” The SJC has yet to rule on whether a challenge based on age or sexual orientation is valid.

In City of Quincy v. Metropolitan District Commission, the City of Quincy filed suit against the Metropolitan District Commission (“MDC”) alleging that it was permitting raw sewage to enter Boston Harbor. Superior Court Judge Paul Garrity fashioned a judicial remedy, the appointment of a special master, which essentially took executive power away from the state. When the legislature did not act to cure the problem, the judge moved towards putting the MDC in receivership. This prompted the legislature to enact the Massachusetts Water Resources Authority Act to clean up the harbor.

The exhibit panel shows the well-known photo of a robed Judge Garrity standing at the shore of the harbor. He was well respected for his courageous decisions taking on the executive and legislative branches. In the wake of the Boston Harbor case, Judge Garrity came to be known as the “sludge judge.” The litigation illustrates one of the very rare times when the court’s actions straddled the separation of powers. Judge Garrity acted similarly in compelling the Boston Housing Authority to provide housing that met at least minimum occupancy standards.

Another panel focuses on the 1983 “Big Dan’s” rape trial in New Bedford. Six men had been charged with raping a woman on a pool table while patrons in attendance cheered them on. Judge William Young, who later became a United States district court judge, presided over two trials at the same time with four defendants tried in the morning and two in the afternoon. The two trials, Commonwealth v. Cordeiro, and Commonwealth v. Vieira, were before two juries, who essentially heard the same witnesses. The juries returned guilty verdicts as to four defendants and not guilty verdicts as to two. The Big Dan’s case was the first Massachusetts case to be televised “gavel to gavel” nationally. Since that time we have experienced such coverage in several cases.

Our final panel exhibit focuses on the 2004 superior court case of The Trustees of Boston College v. The Big East Conference, brought in the court’s recently established business litigation session. There, Judge Allan van Gestel ruled on cross-motions for summary judgment that Boston College was not responsible for a $5 million withdrawal penalty for leaving football’s Big East Conference and joining the Atlantic Coast Conference. The case involved the judicial construction of language affecting compliance of procedures for amending the Big East’s constitution to allow an increase of the withdrawal penalty from $1 million to $5 million dollars and the lengthening of the withdrawal notice period from 12 to 27 months. The judge determined that the amendment was void because the Big East had not followed the required procedure for amending its constitution.

There was no appeal. The business litigation session was established in 2002 with Judge van Gestel serving as its first presiding justice.

Exhibits in the Suffolk County jury assembly room also include a showcase displaying letters from jurors about their experience along with information on the “Judicial Response System” and the “One Day, One Trial” jury system.

**CONCLUSION**

These exciting events and projects have required the planning and implementation skill of many people, all of whom have worked tirelessly on a volunteer basis. Several of the county programs played to overflow audiences where some spectators viewed the events on video in separate rooms. The interest manifested by the bar, elected officials, court staff, schools and the community at large evidences the success of these public education efforts. The challenge is to proceed beyond people’s short-term memory with written works, online programs and durable exhibits. Our concern is that the rule of law must not only be understood by the public, it must be preserved and appreciated as an integral part of government for the long term.

Paul Chernoff
Justice (ret.) of the Superior Court, currently serving on recall

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46. Id. at 490-91.
52. Id. at 117-21.
57. Id.
60. Greeley, supra note 56.
61. Id.
63. Id. at *25.
64. Id. at *4-12.
65. Id. at *22.
If you appeared in cases in the superior court in the 1960s, you were struck by the intimacy of the place. The superior court numbered only about 40 judges — around half of what it has today — and many of its members had served decades on the bench. The compulsory retirement at 70 years of age did not exist and, therefore, judicial turnover was less frequent and many of its members — the vast majority of whom were white males — served well into their 70s and even 80s. Although the concept of sitting “in circuit” was honored, many of the superior court judges — by virtue of seniority or force of personality — maintained fiefdoms in particular jurisdictions. The clerks seemed particularly powerful within their courts, having served in a session for many years with considerable discretion delegated to them by the presiding judge. In sum, it was a smaller universe and, in all likelihood, a trial attorney knew pretty well the strengths and idiosyncrasies of the judge before whom he appeared and vice-versa. Similarly, relationships were nurtured by attorneys with the clerks in a session and in the clerks’ offices, manifested during the holiday season by the custom — since banned—of delivering liquid gifts to the clerks’ offices. As a consequence of this intimacy, the first lesson for the young trial attorney was to establish your familiarity and collegial relationships with that world. There was little or no anonymity and it was essential that you got to know—and hopefully be liked by — the court’s players. The value of a bit of friendly advice, a continuance, if requested, and mutual respect were heavily promoted. On the other hand, a failure to respect those relationships carried real risks. A word to the wise was “to get along, you go along.”

The greatest “teaching moments” for the young trial lawyer were in the motion session in Suffolk County. No course in “Trial Advocacy” could ever teach the art as well as sitting in the motion session while waiting for your matter to be reached, watching skillful and articulate attorneys battle over some legal issue in a forum dominated by one of the more experienced and often outspoken superior court judges. Few of the arguments lasted more than 10 minutes so the presentations had to be crisp and to the point, as the judge typically engaged the attorneys with pointed questions, often ruling from the bench. It was usually high drama with a sizeable crowd of attorneys in attendance. Everyone — from the newest member of the bar to the veteran — had to stand up and present. And for many it was often an almost daily experience to appear in the Suffolk motion session. A young attorney — arguing a discovery matter or seeking some part of injunctive relief — had to learn to speak clearly and quickly, accept the court’s implicit suggestions to cut a compromise with your adversary, and then wait to address the court on another—often totally unrelated — matter an hour later. It was this experience that made attorneys develop an ease and comfort level in the courtroom and familiarity with a variety of judges. It also fostered civil relationships among the attorneys. If you were interacting with fellow attorneys on a regular basis, you quickly learned that having decent relationships with your adversaries made life a bit easier. Lawyers had to be accommodating to one another because the next day might put the “shoe on the other foot.” Here, too, was their introduction to all the important “gatekeepers” — Clerk Frank Brophy at the “First Call” and Assistant Clerk Frank Terrill in the session — and the importance of the hierarchies within the court system. Historians of the superior court will note that “discovery” as we know it today came late to the court.¹ Interrogatories and requests for documents arrived first, and later came depositions; however, unlike today, young lawyers did not see those tools as ends in themselves, but rather as a means to actually find out more about the other side’s case. The notion of using discovery as a way to bankrupt your opponent (or client) had not yet been part of the training of young associates. For example, little attention was paid to “Definitions” in requests for documents, which in today’s requests can go on for pages.² Whether or not the “Definitions” section of the discovery requests has ever had any meaningful impact on any litigated matter (and it is doubtful one ever has), today’s associates are trained to look at the pretrial discovery campaign as the battle itself, instead of the prelude to the battle. I believe this is largely the result of two factors. First, today’s associates simply do not have adequate opportunities to participate in trials (nor do many of their supervisors) and, therefore, the strategy and execution of discovery becomes a substitute engagement for the trial that probably will not occur. Second, today’s discovery rules are so broadly interpreted and the means of gathering “relevant” information so vast (witness “E-discovery”) that it is a fertile area for creative tactics — no matter whether it advances the disposition of the case or does not. It is not an overstatement that broad interpretation of today’s discovery rules threatens the economic viability of most civil litigation. More sensible standards prevailed in the past.

Because the opportunities for young attorneys to develop their courtroom skills have diminished, most law firms try to find substitutes that will make up for the lack of day-to-day courtroom experience. Programs offered by MCLE, taught by experienced judges, are good sources of the “nuts and bolts” of trial advocacy. Some firms offer associates the opportunity to do an internship at a district attorney’s office where they will prosecute cases before six-person juries. Pro bono programs also provide young attorneys with provides uniform definitions for discovery requests, appears to address this problem. See Mass. Superior Court, Standing Order 1-09 (Written Discovery) §1, available at http://www.mass.gov/courts/courtsandjudges/courts/superior-court/standing-order-1-09.pdf.

1. See generally Gael Mahony, Discovery Then and Now, 92 Mass. L. Rev. 129 (2009).
2. The superior court’s recently promulgated Standing Order 1-09, which
In September 2000, then Chief Justice Suzanne Delvecchio issued a “Notice to the Bar: Business Litigation Session Suffolk Superior Court” establishing the session. The session was made permanent on February 12, 2003, pursuant to Administrative Directive No. 03-1: Superior Court Business Litigation Session Extension and Expanded Venue. That directive was rescinded on January 19, 2009, with the publication of Administrative Directive No. 09-1: Superior Court Business Litigation Sessions.

In response to voices from the business community, the superior court established a session to handle the kinds of business disputes (requests for injunctions, enforcement of non-compete agreements, and the like) that simply cannot wait for the operation of the normal superior court calendar. Coupled with the need for prompt action is the need to have a judge who has experience in dealing with complex business litigation. A key to the success of the business session was adopting a practice that is the norm in the United States District Court in which one judge handles a case from beginning to end. The business session was ably served for several years by now-retired Associate Justice Alan van Gestel, and he has now been ably succeeded by Associate Justice Margaret Hinkle, with the support of Associate Justices Stephen Neel and Judith Fabricant.

The superior court has also been compliant with directions from Chief Justice Barbara Rouse to establish and enforce time standards for all civil and criminal cases. Recognizing, as the so-called Morlan Committee observed in its important study of the Massachusetts court system, that delays in the processing of cases were causing a major dissatisfaction amongst the trial bar and the public at large — the superior court in each county now submits monthly reports to its chief justice and the chief justice for administration on several statistics and measurements that monitor the progress of cases within the court. Those criteria measure progress towards particular articulated goals, including the number of pending cases within time standards, the number of cases which were closed within a certain time period, and the average number of “firm trial dates” for pending cases. Gone are the days when a call by a trial attorney to a friendly assistant clerk could move a firm trial date to a later date. This new policy, not universally applauded by some members of the bar who worry that they no longer control the court’s calendar, is a response to the view that unnecessary delay in the processing of cases undermines the quality of justice being administered.

It is highly unlikely that the superior court judges who sat 30 years ago would ever have permitted this kind of intrusion on their prerogatives to run their session the way they wanted to run it. After all, they believed they administered “justice” — which cannot be measured by data. The economics of scale and the costs of the court system, however, now require a firm management hand in the processing of cases in order to satisfy the public’s demand for speedier resolution of cases.

Trial schedules have changed. The 10 a.m. to 1 p.m. and 2 p.m. to 4 p.m. schedule has now been replaced in most superior court sessions by 9 a.m. to 1 p.m. This change probably reduces the actual trial time each day so cases go on longer. This change has also substantially reduced the stress and exhaustion on the trial lawyer (and the trial judge) who now has all afternoon to prepare for the next day’s events. It is probably a good change, but it does tend to reduce the drama — so well depicted by Paul Newman in The Verdict — of the panicked trial lawyer trying to piece together the evidence for the next day into the wee hours of the morning.

One thing that has not changed over the past 40 years is that Massachusetts is indeed fortunate now — as it has been for decades — to have a trial court of general jurisdiction as capable as the superior court. The breadth of matters that come before the superior court — in both criminal and civil cases — gives the justices an expertise in a range of subject matter which makes them true generalists. Although working conditions have improved with the construction of several new courthouses, superior court judges continue to labor without adequate administrative assistance, creature comforts, and, most importantly, the financial remuneration which matches their contributions to the well-being of our citizenry. Nevertheless, they “soldier on” and we are all their beneficiaries.

Michael B. Keating

3. In September 2000, then Chief Justice Suzanne Delvecchio issued a “Notice to the Bar: Business Litigation Session Suffolk Superior Court” establishing the session. The session was made permanent on February 12, 2003, pursuant to Administrative Directive No. 03-1: Superior Court Business Litigation Session Extension and Expanded Venue. That directive was rescinded on January 19, 2009, with the publication of Administrative Directive No. 09-1: Superior Court Business Litigation Sessions.


A Brief History of African-Americans on the Superior Court

One can only imagine what it was like to be a black lawyer in Massachusetts in the first half of the 20th century, after scaling the peaks all lawyers must negotiate — admission to and graduation from law school, followed by admission to the bar — to then seek employment, only to encounter the bleak mountain of racial prejudice, all the more daunting in the home of the “Sons of Liberty.” In a candid videotape interview in The Long Road to Justice exhibition, Edward W. Brooke provides a window into the nature of the challenges. After graduating in 1948 from Boston University Law School, where he was a member of its law review, Brooke, who was later elected Attorney General of the Commonwealth and became the first African-American elected to the United States Senate since Reconstruction, could not find a job. The big Boston law firms, still lily white, weren’t interested in him. The only offer of employment he received was from a firm that would not allow him to meet with clients: he would have to remain out of sight, in a back room, doing research. He turned them down.1

In such an atmosphere, the aspirations of black lawyers to appointment to the superior court, the commonwealth’s court of general jurisdiction, must have seemed the tissue of fantasy. While Governor Benjamin Butler’s appointment of George Lewis Ruffin as Justice of the Charlestown Municipal Court in 1883 had given Massachusetts the distinction of being the first state in the nation to appoint an African-American to a judgeship, 65 years expired before the appointment of the second, G. Bruce Robinson, in 1948, to serve as a part-time special justice in the Boston Juvenile Court.2 At that pace, black lawyers could, at best, hope for the first appointment to the superior court, the commonwealth’s trial court of record, requiring mastery of the rules of civil and criminal procedure, the law of evidence and the selection and management of juries, to come somewhere in the first half of the 21st century. There were frequent vacancies in the lower, special courts, which were not courts of record, but, other than Robinson’s appointment to a part-time position, there was no reason to expect an African-American lawyer to be appointed to any full-time Massachusetts judgeship in the foreseeable future, let alone the superior court.

For most lawyers, regardless of color, the judicial appointment process, prior to 1970, was a harsh, intensely political business. Judges in Massachusetts were, and still are, appointed by the governor, subject to confirmation by a majority of the executive council, and the positions have always been coveted. In those days, before the establishment of a judicial nominating commission in 1970, governors relied largely upon personal relationships or political deal-making to decide who would receive a robe.3 With a small African-American community unable to muster the necessary political leverage to negotiate judicial appointments, black lawyers in Massachusetts, no matter how prominent or gifted, were routinely denied the opportunity to serve on the superior court or any other court as full-time judges, until the latter half of the 20th century.

The experience of the great African-American trial lawyer, William Henry Lewis, provides a painful illustration of the injustice. Lewis, a graduate of Amherst College and Harvard Law School, as well as the first black All-American football player, was appointed by President Theodore Roosevelt in 1903 as the first black assistant United States attorney in American history. Assigned to the Boston office, his first prosecution was United States v. James Michael Curley for defrauding the Civil Service Commission, a trial which he won handily. The jury took 90 minutes to return a guilty verdict and Lewis’s career as a trial lawyer was launched. In 1911, Lewis was appointed by President William Howard Taft as an assistant attorney general in the United States Department of Justice, becoming the first black sub-cabinet officer in American history. Plagued by racial prejudice throughout his tenure in Washington, however, Lewis resigned in the spring of 1913 and returned to Boston to enter the private practice of law. After learning that the lame-duck governor, Eugene Foss, like Lewis a Republican, had a vacancy to fill on the superior court before Foss’s term expired, Lewis set out to secure the appointment. He traveled to New Haven and met privately with former President Taft. Taft agreed to write a letter to Foss recommending Lewis for the vacancy; however, the letter, which warned Foss that he would have to decide “breathing the atmosphere of Boston and Eastern Massachusetts … whether the time has come to take a step which would be a radical one,” provided only lukewarm support. Lewis later met with Foss and was hopeful to the end, but Foss never made the appointment. According to Edith Porton, Lewis’s former secretary, “Mr. Lewis never got over it.”4

By the second half of the 20th century, however, with the civil rights movement gathering steam, the fortunes of African-Americans in the Massachusetts judiciary, as well as other parts of the country, gradually began to improve. In 1952, Governor Paul Dever

* Printed with the permission of the Supreme Judicial Court Historical Society and Judge Julian T. Houston from Reflections of the Justices, a collection of essays commemorating the 150th anniversary of the Massachusetts Superior Court.
appointed Edward O. Gourdin to serve as a special justice in the Roxbury District Court. The appointment was surprising, not only because it departed from the pattern of ignoring African-American lawyers for judgeships following the historic appointment of Ruffin, but also because Gourdin was a Republican, and Dever was a Democrat. The two had served in the United States Attorney's Office in Boston in the 1930s, where Gourdin continued to be employed until World War II and presumably they had at least been acquainted.

Under any circumstances, Gourdin was a man whose reputation preceded him. A graduate of Harvard College and Harvard Law School, he had achieved fame as an athlete, breaking the world's record in the broad jump while still an undergraduate and winning the silver medal in the 1924 Olympic Games in Paris, shortly after graduating from law school. Indeed, his appointment to the Roxbury judgeship led some black lawyers to conclude that such positions were available only to those African-Americans who had demonstrated extraordinary achievement and exceptional superiority to white candidates.

In any event, Gourdin's stay on the Roxbury court was relatively brief. In 1958, Governor Foster Furcolo, also a Democrat, appointed him to become the first African-American to sit on the superior court, the "great trial court of Massachusetts." The significance of the appointment was not lost on anyone. Gourdin was sworn in by Governor Furcolo on the steps of the State House, before a smiling Chief Justice Raymond Wilkins of the Supreme Judicial Court and Thurgood Marshall, Chief Counsel to the NAACP, later to become the first African-American to serve on the Supreme Court of the United States. The superior court was now able to claim at its century mark the following year one African-American justice on its bench. Sadly, Gourdin's tenure was ended prematurely by his death in 1966, but the precedent for the racial integration of the superior court had been established.5

Following Gourdin's death, Governor John Volpe quickly sent the name of Joseph Mitchell to the executive council to fill the vacancy. Mitchell, an African-American lawyer from an old Roxbury family, a graduate of Bates College and Harvard University School of Law, was at the time serving as counsel to Volpe's secretary of administration and finance.6 He was confirmed by the council and appointed in 1966 as the second African-American to sit on the superior court; however, in the seven years that followed, he was its only African-American member. This period included major rioting in black communities across the country; the assassinations of Martin Luther King, Jr., and Malcolm X; repeated attempts by African-Americans and the state Department of Education to integrate the Boston public schools; the election of Thomas I. Atkins, former executive secretary of the Boston branch of the NAACP, as the first black at-large member of the Boston City Council; his later appointment by Governor Francis Sargent in 1971, as secretary of communities and development, the first African-American cabinet officer in Massachusetts history;7 and, in 1970, the establishment by Sargent of a judicial nominating commission to interview and recommend qualified candidates for judicial office. In 1973, Governor Francis Sargent appointed David S. Nelson, from another old Roxbury family, then Chief of the Consumer Protection Division of the Office of the Attorney General of Massachusetts, to the superior court, as the third African-American associate justice in the court's history.8

It was not until the judicial nominating commission during the lame duck term of Governor Michael Dukakis proposed the names of Hon. Harry Elam, Chief Justice of the Boston Municipal Court, and Hon. Rudolph Pierce, a United States magistrate, both well known in the Roxbury community, that the appointment of African-American lawyers to the superior court began to gather momentum.9 Both were confirmed by the executive council in 1978. When Edward J. King, who had defeated Dukakis in the 1978 Democratic primary, succeeded Dukakis as governor, King appointed James McDaniel, a black former Suffolk County prosecutor, in 1982. When Dukakis returned the favor, defeating King in the 1984 Democratic primary and becoming governor for a second term, he appointed three additional African-American superior court judges, including the first African-American woman, Barbara L. Dortch-Okara. In all, Governor Dukakis appointed five African-Americans to the superior court during his terms of office: Elam and Pierce in 1978; R. Malcolm Graham in 1986; Dortch-Okara in 1989; and Julian T. Houston in 1990, the largest number of appointments of African-Americans to the superior court by any Massachusetts governor since its establishment in 1859. Succeeding governors have added the names of five additional African-Americans to the rolls of the superior court: Charles T. Spurlock in 1992; Herman J. Smith in 1995; Tina S. Page in 1999; Joseph M. Walker III in 2000; and Geraldine S. Hines in 2002.10

Other than Gourdin and Mitchell, every African-American appointed to the superior court has first submitted a formal written application to a judicial nominating commission, which has reviewed it, investigated the applicant's character and conducted a personal interview, prior to pronouncing the applicant qualified to serve on the court. Gone are the days, one would hope, when appointments to the court were the result of back room deals or racial prejudice. For African-American lawyers who aspire to service on "the great trial court of the Commonwealth," 150 years after its founding, a new day, at last, has dawned.

Julian T. Houston
Justice (ret.) of the Superior Court
White Doves*

My father's tie pin sits in a small velvet-lined handmade wooden
and glass box on the desk in my lobby. I glance at it intermittently
throughout the day. My father fled Nazi storm troopers. He came
to Fall River, Massachusetts, where he found work in a textile mill.
Several decades before my father's arrival, my maternal grandfather
escaped from pogroms in Russia and came to the very same shore,
where he found work as a peddler. When he managed to accumu-
late enough funds, he sent money for passage to his wife and three
children. Several decades after my father's arrival, my husband left
the apartheid regime of the Republic of South Africa and came to
Boston, where he found work with a weekly newspaper. These im-
migrants all arrived in this commonwealth with great hope and with
great faith in our system of justice — hope and faith that proved to
be well-placed.

As a justice of the superior court, I have had the privilege to
preside over numerous naturalization ceremonies because equality
and freedom continue to attract people to this state from around the
world. During a naturalization proceeding, the Immigration and
Naturalization Service moves the court to enter orders making the
applicants citizens of the United States of America. No one ever
objects. Unlike most of the rulings made by a superior court justice,
the orders entered during a naturalization ceremony make all the
parties very happy. For me, as the wife, daughter and granddaughter
of naturalized citizens, it is a particular joy to welcome my new fel-
low Americans.

Not all of the naturalization ceremonies over which a superi-
or court justice presides are held in a superior court courthouse.
Often, I have had the wonderful experience of convening court out-
side, aboard the USS Massachusetts in the port of Fall River. On
those occasions, before the court adjourned, 50 white doves were
released.

At my request, superior court interpreters translated the phrase
“My Fellow Americans, Welcome” into 19 different languages, in-
cluding Cambodian, Portuguese and Farsi. These phonetic trans-
lations enable me to begin my remarks with a welcome in the
language of each of the immigrants present. Although my pronun-
ciation undoubtedly bears only slight resemblance to the language
I am attempting to speak, the effort clearly is appreciated. Using a
snippet of various foreign languages reinforces the point made in
my remarks that becoming a United States citizen does not require
forgetting the traditions, heritage and culture of other lands as new
American traditions are acquired. I also stress that we all share re-
sponsibility to work for the cause of liberty, justice and equal op-
portunity.

Once in a while, a curious attorney, who may be in my lobby, in-
quires about the little box's provenance. I explain that my father was
trained to be a civil law judge and received the tie pin, which depicts
the scales of justice, along with his doctorate in law from Heidelberg
University. The dichotomy between the ideal of justice and equality
under the law symbolized by the scales and the reality of the utter
lack of justice that prevailed when this tie pin was presented truly
boggles the mind. Having these miniature scales in my lobby acts as
a constant reminder that my task is to do justice and that the trap-
pings of justice are no guarantee of the presence of justice.

E. Susan Garsh
Justice of the Superior Court

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and Judge E. Susan Garsh from Reflections of the Justices, a collection of essays
commemorating the 150th anniversary of the Massachusetts Superior Court.
BOOK REVIEW
The Superior Court in Fiction

For 150 years, the superior court has hosted high drama. Some occurred in trials everyone has heard of, like the trials of Lizzie Borden in New Bedford, of Nicola Sacco and Bartolomeo Vanzetti in Dedham, and of the Brinks robbers in Boston. Most, though, occurred in trials, both civil and criminal, of less celebrity, like the trial of Barnett Welansky after the disastrous Cocoanut Grove fire in 1942 or of Charles Ponzi, who gave his name to a business practice of proven durability, or, more recently, of Donna Harris-Lewis, the widow of Celtics basketball player Reggie Lewis, and the physicians who treated him before his death.

Some of the drama is captured in entertaining and highly readable chronicles. Films like The Boston Strangler (1968), in which Tony Curtis played Albert DeSalvo, and The Accused (1988), in which Jodie Foster won an academy award for her portrayal of the rape victim at Big Dan’s bar in New Bedford, capture more.

But the courtroom’s climactic tensions energize the imagination, so it is not surprising that the court has had a leading role in at least one play and in a number of popular novels. The play is Winterset, which focuses on a search for the real killer of the Quincy guard and paymaster Sacco and Vanzetti were convicted of murdering. Written by Maxwell Anderson, Winterset received the first New York Drama Critics’ Circle Award in 1935. The following year, it was made into a film starring, among others, Burgess Meredith.

Real cases are also at the heart of at least three of the novels. Upton Sinclair’s Boston focuses in detail on the Sacco and Vanzetti case, and does so with a fury that characterized much of Sinclair’s other work. A Cinderella Affidavit, by Mike Fredrickson, a lawyer and long-time general counsel to the Board of Bar Overseers, is based on events surrounding the fatal shooting of Boston police officer Sherman Griffiths during a mid-winter drug raid. The title refers to the fraudulent affidavit used to secure the search warrant that Sherman Griffiths during a mid-winter drug raid. The title refers to the fraudulent affidavit used to secure the search warrant Griffiths and others were executing when he was shot and killed. And a tragic accident at a Boston hospital during childbirth provided at least the starting point for The Verdict — trial lawyer Barry Reed’s highly successful novel about a medical malpractice case. In 1982, the book became a Sidney Lumet film of the same name starring Paul Newman, Charlotte Rampling and Jack Warden.

Whether based on reality or wholly imagined, the novels paint vivid portraits of the court, the courthouse people, and the stories that lead to climactic courtroom resolutions. In the novels, as in life, the “musings, brooding, symbolic and ponderable” courtroom is the place where tension builds and conflict resolves. To Upton Sinclair, the exterior of the “Dedham Courthouse with its high white dome, with a ring of port-holes like an ocean liner” had an air of grandeur. Inside, however, the courtroom was different:

Almost in the center of court-room was the steel “cage,” shaped like a piano box with fancy grillwork, open in front, a psychological device for overcoming the legal presumption that a [person] is innocent until he is proved guilty. The jurors gaze at him locked in throughout the trial, and by the time they are ready to vote they know him as a creature who belongs in a cage.

Others had different observations. When she entered courtroom 506 in the high-rise Boston courthouse, for example, Mike Fredrickson’s prosecutor was struck “by its diminutive scale.”

Given the momentous stakes of a murder trial, and the rocking, sometimes ferocious drama that accompanied it, she was always taken aback by the puny stage on which the shabby pageantry of American justice was played out. It reminded her of that replica of the Mayflower — so absurdly tiny and claustrophobic it was almost impossible to imagine it bobbing its way across the turbulent Atlantic, packed with so many people and so much hope and terror and history. Courtroom 506 seemed just like that.

In The Deal, Sabin Willett’s fictional courtroom 8b in the same building was, to say the least, highly shopworn.

The bench was of oak, dark, musty, a relic of a 1930s project and long since passed any pretense of elegance, a joyless, faded brown. On the floor was corked-patterned linoleum, innocent of wax and thick with grime. Light penetrated the dusty windowpanes feebly, even

16. Sinclair, supra note 11, at 408.
17. Id. at 399. The “dock” was the more familiar name for the “cage” Sinclair described. Use of the dock persisted until it was prohibited, at least as a practical matter, in Commonwealth v. Moore, 379 Mass. 106, 107-11 (1979). See also Young v. Callahan, 700 F.2d 32 (1st Cir.1983).
in the hot days of late summer, when the sky outside through the metal frames was sultry and remorseless. The heat penetrated better than the light. And even where the windows stood open, the air penetrated least of all.\textsuperscript{19} For Barry Reed, the exterior was little better. When he looked at the corridor outside a courtroom in the same building, he saw “a mangy place, with dirty tiles and cigarette butts spilling from dusty bins; even the unpolished brass on the elevator had a greenish tinge of decay.”\textsuperscript{20}

Many or not, the building was profoundly important. As Jeremiah P. “Jerry” Kennedy, the lawyer who starred in several George Higgins novels, explained, “[t]he Boston Municipal Court is in there. That is where I make the rent and Gretchen’s salary. So is Suffolk Superior, where I make the suit money and the cash for a Grand Prix and Heather’s tuition.”\textsuperscript{21}

Into the courtrooms came the lawyers and the witnesses. For the lawyers, the courtroom was “a world in itself. A whole new world. The lawyers are like the players. They come into court wearing fancy suits and old suits. It doesn’t matter. They look like Spencer Tracy or Adolf Menjou. It doesn’t matter. They can even stick a finger in their nose and you think that this is a real zhlub. Then he opens his mouth and the most beautiful things come out. Out comes Oliver Wendell Holmes. Beauties. Great lawyers in tattered suits! It makes you want to cry. Then they have the great theatrical lawyers. The actors. They strut up and down in front of the jury, showing their cuff links and watching their own reflection in the eyes of the audience. Not a crease in their clothing ....

The very best are the lawyers who do their homework. The guys who come into court with the case down cold. Beginning to end. Can’t be fooled. You know, you never really surprise a good lawyer. He never asks a question if he doesn’t already know the answer. He comes prepared. This is the guy who kills you every time.”\textsuperscript{22}

Like real lawyers, they asked questions that killed them,\textsuperscript{23} they played tricks on witnesses to diminish credibility,\textsuperscript{24} sweated as they saw the surprise witness enter the courtroom,\textsuperscript{25} and they sought continuances or invented reasons to suspend the proceedings. Jerry Kennedy was really good at early suspensions.

“There was one stretch, back last spring, when I had eight wakes in six weeks, three of them in one. Seemed like every time I started a case, I was asking the judge to recess early so I could hit a wake in the western part of the state. ‘Mister Kennedy,’ Judge Horace Gammon said to me one day, he was sitting down the Cape, ‘do you know any live people? People on the ground? Or are all the people that you know under it? It’s downright depressing, having you here, mentioning all these dead people. I’m beginning to wonder if it’s not dangerous to know you. It seems to lead to death.’”\textsuperscript{26} But in the imaginary world, the absolute master at the continuance game was Felix Parisi, a thinly disguised stand-in for the real master:

Parisii had become so sought after by petty criminals that his cachet depended in large measure on his utter unavailability. When a case involving Felix Parisi was called to trial, invariably an associate raced into the courthouse to advise the judge that Attorney Parisi was on trial in Essex Superior Court or the Hampden Superior Court or the Peabody District Court or any court but that court. Attorney Parisi was always “on trial” somewhere else. He was good for a year of continuances, usually.\textsuperscript{27}

At the right time, though, the lawyers were there, they were ready, and they were very good, often delivering at the end of the trial a summation that struck exactly the right note. Consider Frank Galvin’s description of Deborah Rulh, his client in \textit{The Verdict}, who was in a persistent vegetative state as a result of malpractice:

““What was Deborah Rulh’s life worth? What was the price tag? She was a cook, housemaid, buyer of food and supplies, seamstress, janitor, gardener, nurse, business manager, chauffeur, baby-sitter; a mender of hearts, of wounded knees; bowled a little on Tuesday nights, played a little weekend tennis, romped in the Vermont woods, climbed the Appalachian trail.”\textsuperscript{28} And, like all of us, the lawyers stepped back every so often to think about the rich tradition they had inherited:

There is that short interval before the bailiff tolls his intonations that is almost sacred. The cynicism and the doubts are suspended in the moment. It happens in every courtroom in the United States, from Macon, Georgia, to Santa Fe, New Mexico. It goes back to Runnymede field, to Thomas More, to Ballarmine, Brandeis, to Holmes, Cardozo. And as a lawyer sits there in that brief instant before the judge in his black robe of impartiality ascends the bench, suddenly he is proud of his profession, proud of the American system of justice. The moment is not forgotten easily.\textsuperscript{29}

Unlike the lawyers, the witnesses and the parties were strangers in a foreign land, many in need of guidance, which the lawyers supplied.

“First, we should not all arrive together at the courthouse,” Concannon [the defense lawyer in \textit{The Verdict}] counseled. “We should come in separate taxicabs, and

22. Reed, supra note 14, at 35-36.
23. See id. at 254.
24. See id. at 221.
25. See id. at 232.
27. Willett, supra note 19, at 96.
28. Reed, supra note 14, at 271.
29. Reed, supra note 20, at 245-46.
we should arrive at staggered intervals. I don’t want potential jurors to see an armada. Also, there should be absolutely no laughter while the trial is in progress. This is serious business, and we are taking it seriously. Don’t even discuss it on the outside. When you’re in an elevator or at lunch, you can be overheard. One flip remark can destroy the case.”

Other witnesses, though, did what came naturally, like Mary Splaine, bookkeeper of the shoe company, who had run to the window and looked out. Mary was one of the victims of that process of suggestion which prosecuting officials understand well. She had looked at Sacco so many times that she saw him as the bandit; she sat and looked at him once more and described him in minute detail, height, weight, square shoulders, high forehead, hair brushed back and between two and two and a half inches long; “dark hair, dark eyebrows, thin cheeks and clean-shaven face of a peculiar greenish-white.” No one could have asked a better identification — until you considered the opportunity which Mary had had to see the bandit …. She was in a second-story window, eighty feet from the car, and she saw the bandit for the length of time it took the car to travel thirty-five feet at eighteen miles per hour — one or two seconds, amidst the wildest excitement and shooting. Sometimes, the interval between a question and the witness’s answer is a moment of high tension. That moment is captured nicely in Inocence, a recent novel by lawyer David Hosp that twists and turns to an entirely unexpected conclusion, as lawyer Scott Finn asks a witness named Salazar:

“[o]ne final question …Did you shoot Madeline Steele?”

The courtroom was silent. Everyone knew the answer that was coming, and yet the tension was electric. Reporters, who had been scribbling furiously into their notebooks throughout the proceedings, balanced on the edge of their seats, looking alternately among Finn and the two Salazar brothers. Finally, … Salazar sat forward in the chair and, leaning in to the microphone in front of the witness stand, he said in a clear, strong voice, “On advice of counsel, I decline to answer at this time.”

The court officers are in the courtroom as well, although, in keeping with the fictional terrain they occupy, almost all of them have become “bailiffs.” Nevertheless, we can instantly recognize their work:

“Court!” shouted the bailiff, and pounded on the floor with his “wand.” It was the court-room at Dedham, in Norfolk County…. There entered the same thin, shrunken old gentleman with white mustache and face like parchment, wearing the same voluminous black silk robe. The lawyers and spectators rose with the same show of reverence, and the bailiff pounded the floor again and repeated the ancient formula: “Hear ye! Hear ye! All persons having anything to do before the Honorable, the Justices of the Superior Court, now sitting within and for the County of Norfolk, draw near, give your attention, and you shall be heard! God save the Commonwealth of Massachusetts!”

“Bailiffs” are, in fact, so popular in the fictional courtroom that even the clerk sometimes undergoes a metamorphosis.

“To this charge,” the bailiff intones after the jury has been sworn, “the defendant has said that he is not guilty, and for his trial has put himself upon the country.” He pauses then and takes a breath, as though he had never in his whole life heard any words as preposterous as those he must say next. “Which country you are, and you are sworn to try the issue. Jurors, hearken to the evidence.”

Other times, however, the clerks do what clerks do, like pronounce the sentence, as did the clerk in Boston, using words that thankfully are never heard in the superior court today.

“It is considered and ordered by the Court that you, Nicola Sacco, suffer the punishment of death by the passage of the current of electricity through your body within the week beginning on Sunday, the tenth day of July, in the Year of our Lord One Thousand Nine Hundred Twenty-seven. This is the sentence of the law.”

And, as all lawyers know, or at least should know, the clerk can help.

A judge could make or break. He wasn’t merely the third man in the ring enforcing the rules of legal propriety. Given the right judge, one sympathetic to your cause, you could prevail. Given one not so inclined, you were in trouble. The real art of advocacy was in the selection, cultivating a clerk or the assignment judge.

At least in the fictional realm, the court reporter can help, too. In The Verdict, Miss McLaughlin, the court reporter at the climactic trial, was not necessarily constrained to record only what she heard.

The veterans and pros all knew and courted Miss McLaughlin. For it was within her power to make or break a case. She could even decide an appeal. Whatever went onto the tape of her stenographic machine was the permanent record of the courtroom proceedings. She could, they all knew, with a key word here and there, help a friend and punish an enemy. And she was a dangerous enemy.

The other courtroom figure, of course, is the judge, and he — most of them are male — usually is another obstacle for the lawyer to overcome. Sometimes he is an obstacle for everyone to overcome. Jerry Kennedy reminisced about one of those.

30. Reid, supra note 14, at 81.
31. Sinclair, supra note 11, at 383.
32. David Hosp Innocence 399 (2007).
33. Sinclair, supra note 11, at 375.
35. Sinclair, supra note 11, at 539.
36. Reid, supra note 20, at 244.
37. Reid, supra note 14, at 133.
Everyone who appeared before the guy hated him. While it is not unusual for prosecutors to dislike a particular judge, because they consider him too lenient on those convicted, and not unusual for the defense bar to dislike a judge because he gives out too much time, it is very uncommon when both sides of the criminal trial bar are unanimous in their hatred of one man. He was stupid, arbitrary, rude, insulting, unlettered in the rules of evidence, uncaring of the rules of procedure, disdainful of trifles such as decisions of the Supreme Court of the United States, and totally unpredictable.

Not good. But not surprising either, for Kennedy had a pretty modest view of the path to judicial office. “Generally speaking,” he explained, “a lawyer who becomes a judge believes the explanation is that God noticed his work, saw that it was good, and rewarded him. This is almost never true, but if you are a trial lawyer, it is a bad idea to suggest to a judge that it is false.” In fact, for Kennedy, success or failure as a trial lawyer provided no certain basis for predicting success or failure as a judge.

We have one or two judges who were lousy lawyers, but turned out to be pretty good judges (a person whose deficiency is thinking fast while standing up demonstrates occasionally some skill at thinking slowly while sitting down), and we have some lousy judges who were crackerjack trial lawyers (a person good at thinking fast on his feet can have some trouble checking his cultivated reflexes when sworn to sit down, shut up and listen).

By no means, though, was that the universal picture. Even Upton Sinclair saw another side.

Presiding over a murder trial is a complicated and exacting business. Common sense and humanity have nothing to do with the procedures; it is a matter of rules and decisions, millions of intricate and subtle details, the interwoven and organized history of trials which have been held in New England for three hundred years, and in Old England for twice as long. All this you have to have at your finger-tips, for each decision must be rendered immediately, you cannot take it under advisement and look up the precedents overnight. Your reputation depends upon your decisions being such that the highest court, reviewing your work, will sustain you. The strain is incessant, and may last for many weeks; the rules allow ten days rest to a judge after each ordeal.

Good or bad, the judge is in control and able to punish swiftly, as Frank Galvin learned when he tried to play to the jury when he made an objection to a defense lawyer’s question:

“I warn you Mr. Galvin, you are standing on the brink of contempt,” said Sweeney between clenched teeth.

“This court, not you, will make the rulings here. If you have an objection to my ruling, plead your objection. I’ll rule on it. If you feel aggrieved, you may take an exception. But do not test this Court’s patience with your temper. Now, Dr. Towler, I’m sure we all would like to hear your explanation. At least, almost all of us would.”

The availability of swift punishment means that it is often a good idea to take your lumps quietly, thereby avoiding rapid escalation of unpleasantness. James Morrisey, a defense lawyer in A Cinderella Affidavit, learned that the hard way.

“Late,” said the judge, shaking his head. Sarah saw that he was enjoying himself now. The presence of reporters in the courtroom had not escaped him. “No notice to the court or counsel. And you know a district court matter does not trump a commitment in this court. Fifty dollars, Mr. Morrisey.”

Morrisey lost it. “What?” he cried. “That’s outrageous! Listen, I remember, Judge. I remember back when you were only part-time on the bench and you used a recess from ten-thirty to one o’clock, making everybody wait, ‘cause you all were in the registry doing real estate closings. And you have the nerve to fine me for being late?”

Doyle’s eyes narrowed, the fun gone out of them. “You’re up to seventy-five dollars, Mr. Morrisey.”

The novelists have captured some familiar stories, like the one about the too intrusive judge.

“[Y]ou have no business asking that question,” said Sweeney to Galvin. Turning back to the witness stand, he said, “thank you, Dr. Crowley. You have been more than patient. You may step down.”

“Your Honor, with all due respect, I was not finished with the witness,” said Galvin. “If you are going to try my case for me, Judge, most respectfully, I’d appreciate it if you wouldn’t lose it.”

Also there is the sentencing rejoinder attributed to the late Frank J. Donahue while he was sitting in Dedham.

Andy once judged a case in which the defendant, a triggerman for the Mafia unjustly famous far beyond his actual exploits, appeared for sentencing on a plea on the sixty-seventh anniversary of his birth. He was already doing two lifes, on-and-after, which gave him a prospective parole date roughly coinciding with his ninety-second birthday; Andy gave him another one, on-and-after the first two. “Your Honor,” the defendant wailed, “I’m an old man. I can’t do that much time.” And Andy, sweeping off the bench, said: “Do the best you can.”

38. Higgins, supra note 21, at 200.
40. Id. at 5.
41. Sinclair, supra note 11, at 386.
42. Reed, supra note 14, at 200.
43. Fredrickson, supra note 12, at 32.
44. Reed, supra note 14, at 213.
45. Higgins, supra note 26, at 44. The story is popular enough that Reed used it as well. See Reed, supra note 20, at 66.
Not all were happy in their role as trial judges. As Mike Fredrickson saw it, “[t]here comes a time — after a judge has heard his four-hundredth possession-with-intent — that he begins to pine for a seat on the Appeals Court.” But, in the novelist’s hands, promotions were instantly available.

The same sandy-haired reporter who’d been at Jamaica Pond, now wearing a blue blazer, stood holding a microphone on the brick plaza outside the New Courthouse at Pemberton Square. “Thanks, Chet,” he said, “Associate State Supreme Court Justice Francis Keating today, sitting as a single justice, upheld Superior and District Court rulings holding alleged organized crime kingpin Nicholas “the Frogman” Cistaro without bail.

In the end, though, the jurors have, as they should, the critical role. Before they are impaneled, the jurors, petit and grand, do what one sees them doing every morning in every courthouse across the state.

The prospective jurors milled around uncertainly in the assembly area. Some read the morning Globe or Herald; others worked crossword puzzles, knit, or tried to chat with their newfound neighbors. Some just sat, staring vacantly. A grammar school teacher, Thalia Schapiro, leaned against the wall of the jury-pool area, a raincoat folded over one arm as she balanced a paperback in the other hand. Clumsily, she dog-eared the page and put the book in her coat pocket. She had tried to be excused from jury duty, as had others, but Barbara Chang, the presiding judge who would handle and charge the grand jury and field any legal questions they might have, was unsympathetic.

But after empanelment and after hearing the evidence, they retire to consider their verdict in the little rooms where the real courthouse business is done. Then follows, in cases large and small, a tension-filled denouement that begins with a judge’s familiar question:

“We have, Your Honor.”

“Will you pass the verdict slip to the court officer, please?”

The ritual proceeds. Now the eyes of the room follow the single slip of white paper as it makes its excruciating tour. It is handed to the court officer, passed from him to the clerk, inspected briefly, and then delivered up over the bench, where it comes to rest in the judge’s hand, the eyes of the entire room riveted on it. No facial muscle twitches as the judge peers through his glasses. No reaction. Mulcahy feels a pull in his throat and a sickness at the pit of his stomach. Back comes the verdict slip to the clerk, who turns to face the jurors.

The clerk marries the cadences of South Boston and Blackstone, his accent grating against the law’s ancient punctilio. Rapid though the delivery is, it is not rapid enough, because the exercise is now purely phonetic, with every ear in the room trained to hear one of two sounds from the woman who stands at the far end of the jury box: a palatal consonant or nasal, a “G” or an “N.”

“Madam Forelady, what say you on indictment number four seven six six one, charging the defendant with murder in the first degree?”

A “G” or an “N”: That is all the ear will register. You can’t capture the moment any better than that.

The court, in sum, is the storyteller’s delight, rich in the quarrels, the passions, the foibles, the characters, and the inevitably gripping conclusions that make the tale worth telling. At the hands of skilled novelists like Sinclair, Fredrickson, Willett, Higgins and Hosp, the accounts are compelling. Indeed, reading their novels is a pleasure second only to being there to watch in person as the real stories unfold before you.

James F. McHugh III
Justice of the Appeals Court and
former Justice of the Superior Court

46. Fredrickson, supra note 12, at 89.
47. George V. Higgins, At End of Day 382 (2000).
48. Reed, supra note 20, at 264-65.
49. See Higgins, supra note 26, at 200.
50. Willett, supra note 19, at x-xi.
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