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I. INTRODUCTION

Recently I had the privilege of gathering with members of the Northeastern University community to celebrate the life and work of my old friend, Professor Wallace (Wally) W. Sherwood, and to salute him for his many accomplishments during his years of service while at Northeastern, as well as in the broader legal community. Wally is a jewel who has always been too modest to talk about his career prior to his arrival at Northeastern, and it was with great pleasure that I accepted an invitation to speak at his retirement celebration.1 I have adapted the remarks I gave at that event into this personal account of the years I spent at the Roxbury Defenders Committee,2 beginning at its inception in 1971, when Wally, who was the Committee’s first Executive Director, asked me to join as Deputy Director.

Part I of this article will set forth a brief history of the Roxbury Defenders, and describe its founding and my tenure there; Part II will discuss three groundbreaking cases that the Roxbury Defenders brought on appeal to the Massachusetts Supreme Judicial Court in those early years; Part III will analyze Commonwealth v. Soares, a Supreme Judicial Court case brought by Wally Sherwood and others; Part IV will list a few of the wonderful attorneys who worked with me at the Roxbury Defenders, many of whom became distinguished members of the bar, including judges and law professors; Part V is a brief reminiscence about some of the clients, and Part VI concludes the article.

II. THE ROXBURY DEFENDERS COMMITTEE: FOUNDING AND EARLY HISTORY

In 1960 the Massachusetts Legislature established the Massachusetts Defenders Committee to represent indigent criminal defendants. Among other things, it authorized the committee to obtain public and private funding, hire professionals, and establish offices throughout the Commonwealth of Massachusetts.3 The establishment of the Massachusetts Defenders Committee occurred at a time in our legal history when courts increasingly recognized that indigency could affect a defendant’s rights to equal protection of the laws and due process.4

Although members of the Roxbury community received legal representation from the Massachusetts Defenders Committee, there was no permanent office located there until the Roxbury Defenders was established in 1971. The Roxbury Defenders was linked to the Massachusetts Defenders Committee, and our funding came from a grant from the state’s Committee for Law Enforcement and Administration of Criminal Justice, which distributed money from the federal government.5 The mission of the Roxbury Defenders was threefold: “(1) to provide vigorous and comprehensive service to the client population, (2) to provide legal services without first being appointed by the court, and (3) to provide, on a referral basis, related social services.”6 The Roxbury Defenders was supervised by a Project Community Board composed of members of neighborhood and statewide organizations such as the Boston Black United Front, the Massachusetts Black Lawyers Committee, and the Roxbury Multi-Service Center. It provided legal referrals to those who were financially ineligible to receive its services or whose legal problems were not criminal, and it maintained ties with other legal organizations

1. Professor Wallace W. Sherwood retired from Northeastern University’s School of Criminology and Criminal Justice after teaching there for thirty-five years, and was honored by the University on May 2, 2012.
2. The Roxbury Defenders Committee, more commonly referred to as the Roxbury Defenders, got its name because it was located in the Roxbury section of Boston, Massachusetts. A large proportion of the population of Roxbury is low-income and minorities. See, e.g., Poverty worsening in Hub, study says, The Boston Globe, November 9, 2011.
4. See, e.g., Griffin v. Illinois, 351 U.S. 12, 18 (1956) (where criminal defendant allowed to appeal conviction as of right, state’s denying indigent defendant copy of trial transcript violated right to due process and equal protection of laws). The Griffin case is discussed infra p.9-10.
5. The funding for the Committee for Law Enforcement and Administration of Criminal Justice came from Title I, Part C. of the Omnibus Crime Control and Safe Streets Act of 1970 (Pub. L. No.91-644, 84 stat. 1880). I note that there may have been other sources of funding for the work of the Roxbury Defenders.
6. These goals were set forth in a 1973 grant application made to the state’s Committee for Law Enforcement and Administration of Criminal Justice.

such as the Massachusetts Law Reform Institute, the Lawyers Committee for Civil Rights, and the Boston Legal Aid Project. It also maintained ties to social referral agencies to help its clients with housing, education, employment, and rehabilitative programs.

My good fortune of being involved with the Roxbury Defenders at its inception was due to Wally. He and I had met in 1969. Each of us had been chosen to participate in the Reginald Heber Smith Community Lawyer Fellowship Program to work in poverty law.7 The fellowships were much sought after and the program placed new law school graduates in offices around the country. Wally and I came to know each other when we attended the same month-long training for the new “Reggie” fellows at Haverford College, located just outside of Philadelphia. The purpose of the fellowship, as reflected in our original contract letters, was clear—we were to be agents of social change:

Fellows are assigned to programs where it is thought that they will have the best opportunity to learn from other attorneys and exercise their own abilities, and where they will be given the fullest opportunity to participate in test litigation, group representation, and other law reform efforts.8

In short, we “Reggies” were supposed to make a difference for the poor and disenfranchised. The training helped us understand that even the most mundane of cases contained within it larger legal issues affecting justice for the poor, and imparted ideas concerning strategies for affecting change.

After the training I was placed at a neighborhood legal services agency in New York, Community Action Legal Services.9 I began in September 1969 after I took (and passed) the New York bar examination. After my fellowship ended in July 1970, I returned to Massachusetts, passed the Massachusetts bar examination, and began working at the Harvard Center for Law and Education. Almost immediately I was contacted by Wally and invited to join in a new project he had just been hired to direct. It was an offer I could not refuse. It also marked the beginning of a friendship that has continued for more than 40 years.

When Wally and I began to work together to create the Roxbury Defenders in 1971, we were both just twenty-seven years old and rookie lawyers, really more like “kids.” Certainly, we were unaware that we were about to begin our post-graduate education in subjects law schools do not teach, such as “fighting with the judiciary 101,” “trial by fire,” and “the sweet science and art of judicial persuasion.”

The first thing we had to do was to create an organization. We did not have a staff, a building, a library, or even one typewriter. All we had was an idea—a concept—and some funding. But we dug right in and, before we knew it, we were up and running. We hired ten lawyers, all very young and equally inexperienced. Our office moved three times in the first two years. We moved the furniture ourselves, did the janitorial work and, for a time, we packed up the typewriters and put them in our cars at the end of each workday.

We had a large caseload, some 1,500 cases each year.10 We took walk-ins and court appointments, and represented clients in bench and jury trials both in the district and superior courts, and from time to time, in the appellate courts. We represented people charged with all sorts of crimes, including serious felonies—sometimes they were tough cases ending with prison sentences. But we quickly learned the ropes and became effective advocates for our clients.

7. Reginald Heber Smith was an early advocate of providing legal services to the poor, becoming the head of a newly formed Boston Legal Aid Society in 1914, at age twenty-five, and writing a book, Justice and the Poor, in 1919. See Earl Johnson, Jr., Justice and Reform: The Formative Years of the American Legal Services Program, 7 (1974 Russell Sage Foundation). According to the author, Smith’s ideas were the philosophical underpinning of the entire legal aid movement. Id. at 10-11. Until the 1950s, when the British established a government-funded legal aid program, there was much apathy and even outright hostility toward providing legal aid to the poor on the part of local bar associations where it is thought to provide the imputed opportunity to set up such programs. Id. at 9. American bar organizations became concerned that the government would follow the British lead; only then did they begin to establish private legal aid societies. Id.

In 1964, as part of the War on Poverty, the Office of Economic Opportunity (OEO) was created. Id. at 40. The OEO set up a National Legal Services Program in 1965 that began funding local legal aid agencies beginning in January 1966. Id. at 69, 71. By 1967 the leaders of the program and others believed that the one of the most potent vehicles for helping the poor was law reform, because it would prevent individuals from being victimized by their poverty. Id. at 167-72. The problem was that local legal aid societies resisted such efforts. Id. at 172-73. The Legal Services staff used many strategies to pressure local agencies to push for law reform. Id. at 173-78. Relevant here is the strategy of raising the quality of lawyers who were hired by legal aid societies. Id. at 178. To recruit high caliber lawyers, the program established the Reginald Heber Smith Community Lawyer Fellowship in 1967. Id.

8. “The Fellows’ mission was to undertake activities calculated to have a broad effect on the problems of poverty instead of taking a regular caseload of routine legal problems affecting only the individual client.” Johnson, Jr., supra note 8, at 179-80.

9. The contract between the University of Pennsylvania and Community Action Legal Services in New York stated that fellows were not “simply to supply lawyers to help alleviate daily case-load problems.”

10. Cynthia Bellamy, RDC attorneys handle 1500 cases each year, The Bay State Banner, June 21, 1973, at 1, 18.
There was plenty of work to be done, which spilled over to Saturdays and Sundays. We had a tradition that, at the end of the day on Friday, we would have a “post mortem” where we would share information about what we had learned that week about the cases, judges, police, and community, sometimes role-playing the judges and other lawyers. We celebrated our victories and commiserated our defeats. It was exciting and fun. While we were learning every day, we also were being zealous advocates for a community that had not always received quality representation.

In order to create awareness of the Roxbury Defenders in the community, and to inform the listeners of their legal rights, we produced a one-hour weekly program on radio station WILD called “Legal Line.”

In 1972, the Roxbury Defenders Committee filed suit in the Superior Court last week charging that Roxbury District Court judges were taking retaliatory action against the committee’s lawyers for appealing decisions to higher courts. The committee alleges that once an attorney representing an indigent defendant appeals a client’s sentence, the court allegedly bars the lawyer from representing indigents there later on.

The suit, filed by attorney Roderick L. Ireland of the Roxbury District Court judges were taking retaliatory action against the committee's lawyers for appealing decisions to higher courts. The committee alleges that once an attorney representing an indigent defendant appeals a client’s sentence, the court allegedly bars the lawyer from representing indigents there later on.

The reported question relevant here, was whether the Commonwealth was constitutionally required to provide transcripts of proceedings to indigent defendants who were charged with felony offenses. In support of our position, we relied on two United States Supreme Court cases, Griffin v. Illinois and Roberts v. LaVallee. In Griffin, the Supreme Court stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” and held that, where an Illinois statute permitted appellate review of criminal convictions as a matter of right and Illinois conceded that transcripts were required for an adequate appellate review, the state had to provide indigent criminal defendants with transcripts of the trial.

III. Three Supreme Judicial Court Cases

Several cases that the Roxbury Defenders brought to the Supreme Judicial Court (hereinafter, “the SJC”) on appeal changed the laws of Massachusetts. I will discuss three cases that were handled by our office during my tenure there, of which I remain very proud. I begin by noting that we were still in our twenties when we argued these cases before the SJC. From personal experience I can tell you that you seldom see young lawyers at the SJC—most of the time the lawyers arguing before us are much older and are the most seasoned veterans.

**Commonwealth v. Britt**

Commonwealth v. Britt was decided by the SJC in 1972, only one year after the Roxbury Defenders was formed. Britt involved two companion cases. The defendants, Joel Taylor, whom I represented, and Samuel Britt, whom Wally represented, were indigent. They both were arraigned on felony charges “in the Municipal Court of the Roxbury District … ” At the outset of Taylor’s probable cause hearing, I moved for a transcript of the proceedings, which the judge denied. Then I moved for permission to use my own tape recorder to record the testimony of witnesses; the judge also denied that motion. At Britt’s probable cause hearing, Wally moved to have the proceedings transcribed free of charge; that, too, was denied.

Ultimately, probable cause was found at Taylor’s and Britt’s hearings, and they were subsequently indicted by grand juries. The Superior Court judge denied our motions to dismiss the indictments but reported the questions to the SJC. Wally Sherwood argued the reported questions before the SJC.

The reported question relevant here, was whether the Commonwealth was constitutionally required to provide transcripts of proceedings to indigent defendants who were charged with felony offenses. In support of our position, we relied on two United States Supreme Court cases, Griffin v. Illinois and Roberts v. LaVallee. In Griffin, the Supreme Court stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” and held that, where an Illinois statute permitted appellate review of criminal convictions as a matter of right and Illinois conceded that transcripts were required for an adequate appellate review, the state had to provide indigent criminal defendants with transcripts of the trial.

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11. WILD was the local radio station at 1090 AM that was known at the time as the voice of the black community. It broadcast a mix of popular soul and gospel music, news, and talk. The station operated only from sunrise to sunset.
12. Roxbury Defenders Suit Charges Judges Retaliate After Appeals, The Boston Sunday Globe, December 17, 1972, at 77. This matter was brought to a Single Justice of the Supreme Judicial Court pursuant to its superintendent powers. Mass. Gen. Laws ch. 211, § 3. My memory is not clear as to what happened at the hearing before the single justice. However, the practice eventually ended. An order issued …
14. Id. at 325 & n.1.
15. Id. at 325-26.
16. Id. at 326.
17. Id. at 327.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id. at 326.
23. Id.
24. Id.
27. Griffin, 351 U.S. at 19.
28. Id. at 13-14, 16. Under the statute, transcripts were provided free of charge for indigent defendants who were sentenced to death, and a different law provided free transcripts for indigent defendants alleging constitutional errors. Id.
provided that transcripts of preliminary hearings "would be furnished 'on payment of ... fees ...'". The Supreme Court held that a statute which conditions the receipt of a transcript on payment of a fee denied indigent defendants equal protection under the law.

In Massachusetts there was no statute providing transcripts for preliminary hearings, and district courts only provided stenographers in trials before juries of six or in cases in which a defendant engaged one at his own expense. The SJC recognized that the issue in the Britt case potentially would impact almost all criminal proceedings. Although the SJC acknowledged that stenographers and transcripts at these proceedings were indeed "highly desirable at all criminal trials and proceedings in all courts," it nevertheless decided that it was not feasible for every preliminary hearing to be transcribed, principally because of impracticalities such as the limited availability of stenographers and a lack of fiscal resources.

The SJC distinguished circumstances in which a state records the proceedings in the first instance and makes the transcripts available to the defendants who can afford them from the situation where the state merely allows a defendant to record the proceedings for himself, and that once a state has appropriated funds to pay stenographers, has committed itself to record the proceedings, and has made transcripts available for a price, there is an obvious denial of equal protection if distribution of transcripts is restricted to defendants with sufficient means. But where no such commitment has been made, all defendants are treated alike and there is no denial of equal protection.

At first glance, it would appear that the Britt case represented a loss for the Roxbury Defenders. However, this case was a landmark decision because it was the first step in a series of incremental shifts towards the heightened protections that criminal defendants are currently afforded at probable cause hearings. The SJC recognized the idea of probable cause proceedings as a "critical stage" of the criminal process, which would be an important underpinning of the reasoning in Myers v. Commonwealth and Corey v. Commonwealth, discussed infra. Moreover, the SJC noted the strategic importance of the "opportunity for discovery of the Commonwealth's case and for preparation to impeach the Commonwealth's witnesses if their testimony at trial is inconsistent with their testimony at the preliminary hearing," stating that, "[a] reliable record of what is discovered is ... an important aspect of that opportunity." Although electronic recording was not part of the reported question, the SJC also stated that both the Commonwealth and the defendants suggested that electronic recording devices could be available as an alternative to the use of stenographic recordings. In his dissenting opinion, Justice Reardon stated that the possibility of electronic recording devices "would obviate the practical difficulties foreseen by the majority." Today, all district court proceedings are recorded or transcribed.

**Myers v. Commonwealth and Corey v. Commonwealth**

As in Commonwealth v. Britt, the next two cases, Myers v. Commonwealth and Corey v. Commonwealth, dealt with an issue that arose in a probable cause hearing. By the time we had filed Myers and Corey, Wally had left the Roxbury Defenders to become Executive Director of the Lawyers Committee for Civil Rights Under Law. I was co-counsel in Myers, and I argued the Corey case.

In Myers, the defendant was charged with rape, assault by means of a dangerous weapon, and breaking and entering. These criminal charges were not within the District Court's concurrent jurisdiction, so a probable cause hearing was held to determine whether to bind the case over for trial in the Superior Court in accordance with Mass. Gen. Laws ch. 276, § 38.

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30. Id. at 42.
31. Commonwealth v. Britt, 362 Mass. 325, 329 (1972). At that time, to provide speedier and less costly adjudications, Massachusetts did not record proceedings or provide for jury trials in the District Court in the first instance, but provided a defendant who was not satisfied with the outcome of his trial, an unconditional right to a jury trial. Id. at 330.
32. Id. at 329.
33. Id.
34. Id. ("the Legislature has not appropriated funds for stenographers in the District Courts").
35. Id. at 331.
36. Id. at 330-31.
40. Britt, 362 Mass. at 331, citing Coleman, 399 U.S. 1, 9-10.
41. Id. at 331.
42. Id. at 332 ("Both the defendants and the Commonwealth seem to suggest that electronic recording devices may provide a viable alternative to stenographic recording."). The SJC also noted that, effective June 1, 1972, District Court Rule 46 was amended to encourage electronic recording, Id. See generally, Mass. R. Crim. P. 3 (g) (1), as appearing in 442 Mass. 1502 (2004) ("[t]he complainant's account shall be either reduced to writing or recorded.").
43. Britt, 362 Mass. at 333-34.
At the time, although a judge had to determine whether a crime had been committed and whether there was probable cause to believe the prisoner guilty, the SJC had not yet determined the quantum of credible evidence necessary to establish probable cause to bind over an accused. Consequently, as the SJC pointed out, judges often used the same standard as they did for probable cause to arrest or search, including relying on inadmissible hearsay. What this meant in practice was that a judge often listened to testimony only until he concluded there was probable cause to bind the defendant over for trial in the Superior Court, irrespective of whether all the relevant testimony had been presented.

At Myers’s hearing, the Commonwealth called the complaining witness to testify. In the middle of the defendant’s cross-examination of that witness, the District Court judge interrupted and summarily found probable cause, denying defense counsel the opportunity to continue his cross-examination or present witnesses on the defendant’s behalf. On appeal, we first argued that the judge’s determination of probable cause prior to the completion of the cross-examination of the complaining witness constituted a violation of the defendant’s “substantive rights” to call his own witnesses.

The SJC agreed. In its decision, it first construed Mass. Gen. Laws ch. 276, § 38 according to its express terms, which stated that “witnesses for the prisoner, if any, shall be examined” (emphasis supplied). Beyond pointing to the clear, mandatory statutory language, the SJC explained that the purpose underlying the probable cause determination is to establish an effective bind-over standard which distinguishes between groundless or unsupported charges and meritorious prosecutions. The SJC held “that [Mass. Gen. Laws ch.] 276, § 38, granted defendants mandatory statutory rights to cross-examine prosecution witnesses and present testimony in their own behalf before the examining magistrate determines whether there is sufficient legally admissible evidence of the defendant’s guilt to bind him over for trial” (emphasis in original).

In Myers we also challenged the minimum quantum of evidence required to determine probable cause to bind over defendants because, as discussed above, the court had not yet defined a standard and “some District Court judges … equated probable cause to bind over with probable cause for arrest ….” The SJC stated, “[t]here is a large difference … between the two things to be proved [guilt and probable cause to arrest or search] as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.” Furthermore, it stated that, because evidence sufficient to make a valid arrest of a particular defendant may be inadmissible at trial (e.g., hearsay), “probable cause to arrest does not automatically mean that the Commonwealth has sufficient competent legal evidence to justify the costs both to the defendant and to the Commonwealth of a full trial.” “Therefore [the SJC concluded] the standard of probable cause to bind over must require a greater quantum of legally competent evidence than a probable cause to arrest finding ….”

The Myers court “decided to adopt a ‘directed verdict’ rule in defining the minimum quantum of credible evidence necessary to support a bind over determination. The examining magistrate should view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send the case to the jury.” If evidence proffered at the hearing would ordinarily require an acquittal at trial, a magistrate or judge would similarly be required to dismiss the complaint.

Corey.

Just two months later, the Corey case extended the probable cause standard set out in Myers to those cases within the concurrent jurisdiction of the District Court. I was the attorney for the defendant, Robert Corey, in the District Court, and argued the case on appeal before a single justice of the SJC and before the full bench. Prior to addressing the substance of the Corey opinion, I want to point out that, although it was not raised as an issue, Corey memorializes one of the ongoing conflicts we had with district court judges: their disapproval of our appeal of the bail they set for defendants.

In Corey the defendant had been arraigned “in the Municipal Court of the Roxbury District on charges of possession of marijuana and unlawfully carrying a firearm.” The defendant was not represented by counsel and the judge entered a not guilty plea. A statute, Mass. Gen. Laws ch. 218, § 30, stated that a district court judge

the prosecution, in the presence of the defendant, relative to any material matter connected with such charge … [T]he witnesses for the prisoner, if any, shall be examined on oath, and he may be assisted by counsel in such examination and in the cross examination of the witnesses in support of the prosecution” (emphasis in original).

51. Id. at 848.
52. Id. The probable cause for arrest standard was whether, in the facts and circumstances known at the time of arrest, there was probable cause to believe that a defendant had committed or was committing a crime. Id., quoting Commonwealth v. Stevens, 362 Mass. 24, 26 (1972).
54. At that time, there were no female judges at the Roxbury District Court.
56. Id.
57. Id.
59. Id. at 846-47. The SJC cited the Britt case as endorsing the United States Supreme Court’s statement that preliminary hearings are a “critical stage” of the criminal process and listed reasons that was true, including that it could “expose weaknesses in the [prosecutor’s] case,” provide a “vital impeachment tool” for trial, allow the defendant to see the case against him, and allow argument for bail or for a psychiatric evaluation. Id. at 847-48, citing Britt, 362 Mass. at 330-31.
60. Id. at 856. Because the SJC concluded that the statute granted the defendant the rights he sought, it declined to address whether the defendant had the same right to cross-examine and present his own witnesses under the due process clause of the United States Constitution. However, in dicta, the SJC indicated that the denial of such rights probably was unconstitutional. Id. at 854-55.
61. Id. at 848.
63. Id. at 849.
64. Id.
65. Id. at 850, footnote omitted.
67. Corey, 364 Mass. at 139. The SJC stated, “A conversation … ensued between the judge and the Roxbury Defender Committee’s attorney concerning bail proceedings in the Commonwealth’s court system … [the judge] express[ed] his disapproval of the Roxbury Defenders Committee’s former and present course of action in bail matters.” Id.
68. Id. at 138.
69. Id. at 138-39.
could “bind over for trial” a defendant “who appear[s] to be guilty of crimes [charged] … .”70 The judge heard testimony only from the arresting officer to determine whether the defendant should be bound over for trial in the Superior Court.71 “The [defendant] was not given a meaningful opportunity to cross-examine this witness or present evidence on his own behalf and he was not advised that he could [do so].”72

During a recess, I happened to be in the courthouse and the defendant’s family asked for legal representation from the Roxbury Defenders Committee because, as I explained to the judge, I had previously represented the defendant.73 It was at this point that the judge and I had the conversation about bail, referred to above. The judge declined jurisdiction, bound the defendant over for trial in the Superior Court, and set bail at $5,000.74

Twenty-five years later, I still have a memory, albeit somewhat hazy, of arguing Corey on appeal. In its decision the SJC held that Corey’s preliminary hearing, consisting as it did only of the testimony of the arresting officer, “[did] not satisfy the procedural requirements of a probable cause hearing which we held in … Myers … are mandated by [Mass. Gen. Laws ch.] 276, § 38.”75 The Commonwealth argued that the statute, Mass. Gen. Laws ch. 218, § 30, binding over a defendant “who appear[s] to be guilty” for trial, would trump the statutes providing for a finding of probable cause, especially Mass. Gen. Laws ch. 276, § 38 (at issue in Myers) and Mass. Gen. Laws ch. 276, § 42 (requiring a judge to determine that there is probable cause to believe a defendant is guilty where that judge declines to exercise final jurisdiction).76 The SJC held that, not only was such a reading of Mass. Gen. Laws ch. 218, § 30 inconsistent with the plain language of Mass. Gen. Laws ch. 276, §§ 38 and 42, but also that it would defeat the purpose of the preliminary hearing—to screen out those cases where there is insufficient admissible credible evidence of the defendant’s guilt.77

Another important procedural issue addressed in Corey in a footnote, was the practice by district court judges of deferring the decision whether to hold a trial on the merits until after the prosecution had presented its evidence.78 The SJC held:

This practice creates serious tactical problems for defense counsel who have no way of knowing until the end of the hearing whether the hearing is for probable cause or a full trial on the merits. “The problem is that [counsel’s] tactics are different, depending upon the nature of the hearing. If it is a probable cause hearing, his objective is discovery, and he will not ordinarily object to inadmissible evidence nor will he offer any evidence in the defendant’s behalf. However, if the hearing is a trial on the merits, he will ordinarily try the case ‘right’ and object to evidence and offer a defense.”79

The SJC held that a district court judge should “announce, before the hearing commences, whether he is conducting a probable cause hearing or a full trial on the merits” (emphasis in original).80 In addition, prior to making this determination, “the District Court judge may ask counsel for both the prosecution and defense for a discussion limited to the circumstances of the particular case necessary to aid him in his decision to exercise or decline final jurisdiction” to try the case.81 In cases “[w]here the judge decides that the District Court will retain its jurisdiction … but reaches this decision after reviewing information which was inadmissible as evidence and prejudicial to the defendant, the case, on defendant’s motion, shall be tried on the merits before another District Court judge.”82

In the event that the judge decides to conduct a probable cause hearing and not a trial on the merits, the same standards that were announced in Myers must be employed.83

The cumulative impact of these two cases was discussed in a 1974 Boston Bar Association journal article, which stated that Myers “established a landmark in the Massachusetts law of probable cause hearings … [by] setting out a newer and higher standard for probable cause hearings than had hitherto pertained, previous standards having left the matter entirely to the discretion of the district court judges.”84 As a result, the Roxbury Defenders Committee can pride itself on helping to create and fortify protections afforded to criminal defendants at probable cause hearings and to assist in “alleviating some of the inequities and procedural deficiencies previously found at the District Court level.”85

IV. Soares v. Commonwealth

The final case I will discuss, Soares v. Commonwealth,86 was not a Roxbury Defenders case, but it is one of the most important

70. Id. at 140 n.5.
71. Id. at 138–39.
72. Id. at 139.
73. Id.
74. Id.
75. Id.
76. Id. at 140–41.
77. Id. at 141–42.
78. Id. at 141–42 n.7.
79. Id., quoting Smith, Criminal Practice and Procedure, § 686.
80. Id. at 141–142 n.7.
81. Id.
82. Id., citing Commonwealth v. Rice, 216 Mass. 480, 481 (1914).
83. Id. at 139.
85. Id. at 19.
criminal cases in our state’s history. Wally represented one of three defendants who were charged with murder.87

In Soares, a member of the Harvard College football team was murdered during a street brawl in Boston.88 The three defendants were black and the murder victim was white.89 During jury selection, the prosecutor challenged the seating of twelve out of thirteen black members of the venire, all of whom the judge had found to be indifferent and available to be seated.90 In all, “the prosecutor exercised a total of 40-four peremptory challenges. . . [and] excluded ninety-two [percent] of the available black jurors, and only thirty-four [percent] of the available white jurors.”91

The SJC detailed what happened next: The defendants carefully laid the foundation for appeal. … Each time a prospective black juror was challenged by the prosecution, they noted for the record the race of that individual, objected to the prosecutor’s use of the peremptory challenge, and took exception to the judge’s refusal to sustain their objection. The defendants also attempted to be heard more fully on this matter during empanelment, but were unsuccessful. After the first black [person] had been challenged by the Commonwealth, counsel for [one of] the defendant[s] tried to make what he characterized as an offer of proof:

Counsel … : “If it develops during the course of the selection of the jury that [the prosecutor] systematically challenges black jurors through the use of peremptory challenges, … I would like to make an offer of proof at that time, and I would take exception to it, and I would direct the Court’s attention to — “The judge: “Well, you’re familiar with the decisions in that area?”[2] Counsel … : “Correct, your Honor, and I would — “The judge: “Wait a minute. So far as I’m concerned, if I were sitting down there, either on the prosecution or the defense, I would have challenged that person on the basis of his lack of intelligence.” Counsel … : “Please note my exception on behalf of the defendant …” When the prosecutor had challenged the second prospective black juror, counsel for the defendant … objected and said: Counsel … : “And again, your Honor, it is my position that — “The judge: “I don’t care what your position is. You’ve noted your exception, and that’s it. I’m not going to have any more speeches about that, and I’ll see you in the lobby at one o’clock.” At the lobby conference, the judge made his position clear: The judge: “Now, you look here, [Counsel]. Sit down for just a moment. I’ve got something to say to you on the record. I’m not going to have any injection of racial prejudice into this case if I can prevent it, and I want you making no speeches out there. The law is clear in recognizing the purpose of peremptory challenges. You’ve already got it on the record in respect of your position, and I don’t want it being repeated any more . . . .” Finally, after twelve of the thirteen black veniremen called had been challenged by the Commonwealth, the defendant requested a hearing on the matter. Counsel … : “Your Honor, if the Court were to conduct a hearing at this time directed to the District Attorney to find out if any of the peremptory challenges exercised by him were in any manner used to exclude black people from this jury — “The judge: “Do you wish to reply to that Mr. [prosecutor]?” The prosecutor: “No, your Honor.” The judge: “Very well. Denied and your exception is saved.”93

On appeal, the defendants argued that the prosecutor’s “systemic use of peremptory challenges to eliminate all but one black [person] from the jury, … effectively deprived them of their constitutional right to a fair trial, and their right to be tried by an impartial jury . . . .”94 They did not attempt to present evidence that there was an equal protection violation pursuant to the Supreme Court’s holding in Swain v. Alabama.95 In the Swain case, the Court held that “striking black persons from the jury in that particular case did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.”96 “The Court stated [that there must be a presumption] ‘that the prosecutor is using the State’s challenges to obtain a fair and impartial jury . . . .’97 This holding effectively made the use of racial bias in removing jurors unreviewable because, as the Soares court noted, “every defendant who has tried to rebut the Swain presumption of prosecutorial propriety has found it to be an illusory goal, in both federal and state courts.”98 Rather than attempt to surmount the tremendous obstacle that Swain presented to making an argument under the United States Constitution, the defendants invited the SJC to reexamine the use of peremptory challenges on the basis of race through the lens of article 12 of the Massachusetts Declaration of Rights, guaranteeing a right to a fair trial before a jury of peers.99 The Commonwealth argued that the SJC should adopt the standard set forth in Swain.100

The SJC rejected the Commonwealth’s argument, stating that previous case law had established that, under article 12, a fair jury ought to be drawn from a representative cross-section of the community, which would, among other things, “guard against the exercise of arbitrary power . . . .”101 Further, the SJC concluded that “[t]he

87. Wally represented defendant Leon Easterling. On appeal the other attorneys were Richard K. Latimer for defendant Richard S. Allen, and Walter J. Hurley and Robert T. Capless, Jr. for defendant Edward J. Soares. Id. at 462. At trial Henry Owens had represented defendant Richard S. Allen.

A brief video clip of Wally Sherwood discussing the state of the law just after he argued before the SJC, but before the decision was issued, can be found at: http://openvault.wgbh.org/catalog/sbomla0010100lackofminorityrepresentationinjury/jurysystem.


89. Id. at 473.

90. Id.

91. Id.


94. Id. at 473.

95. 380 U.S. 202 (1965); Soares, 377 Mass. 475 n.10.


97. Id. at 475, quoting Swain, 380 U.S. at 222.

98. Id. at 475 n.10.

99. Id. at 473.

100. Id. at 474.

101. Id. at 478-79, quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975), internal citations omitted.
‘assurance of a diffused impartiality’ is a key objective sought to be furthered by the requirement of a representative cross-section of the community.”

The SJC created a procedure for determining whether the peremptory challenges have been used properly, beginning with the presumption of proper use of peremptory challenges. That presumption is rebuttable, however, by either party on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership.

If the judge determines that these two elements have been satisfied, the presumption is rebutted and the burden shifts to the other party who must then “demonstrate, if possible, that the group members disproportionately excluded were not struck on account of their group affiliation.” If the [judge] finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. The judge must then “dismiss the jurors thus far selected … [and] quash any remaining venire … “ Jury selection must then “begin anew.”

Applying this new rule to Soares, the SJC found that there was indeed a pattern of conduct that was used to eliminate prospective jurors and, because of the disproportionate exclusion of qualified jurors, there was a likelihood that they were excluded because they were black. Further, it concluded that the Commonwealth failed to meet its burden of justification, because when questioned about defense counsel’s allegation of an impermissible use of peremptory challenges, it declined to address the issue. The SJC reversed the judgments, set aside the verdicts, and remanded the case for a new trial.

The Soares decision represents far more than a victory resulting from the zealous advocacy for an individual’s constitutional rights. In Massachusetts it marked the end of legally permissible discrimination in the jury selection process, the effects of which are no doubt immeasurable.

**V. Alumni/ae**

In my years at the Roxbury Defenders there were many people who were important members of the office family. There were a number of lawyers, law clerks, social workers, investigators, secretaries, and other office staff who passed through the doors. A number of lawyers went on to stellar careers in the law. I like to think that the experience and training they received at the Defenders laid the foundation for their future successes. The following attorneys worked as Roxbury Defenders during my tenure:

 ISAAC BORENSTEIN (Retired)
 Associate Justice of the Superior Court

 MARGARET BURNHAM
 Professor at Northeastern University School of Law, formerly
 Associate Justice of the Boston Municipal Court

 MARGERY GERMAN
 Associate Justice of the Boston Juvenile Court

 MARTIN GIDIONSE (Deceased)
 Well-respected criminal lawyer

 LESLIE HARRIS
 Associate Justice of the Boston Juvenile Court

 WILLIAM HICKMAN
 Attorney and international entrepreneur: operating partner of
 Pegasus Capital Advisors and former president of FreeMarket
 Global, Inc.

 GERALDINE HINES
 Associate Justice of the Massachusetts Appeals Court; former
 Justice of the Superior Court

 CHARLES JOHNSON
 Chief Justice of the Boston Municipal Court

 ANDREW KETERRER
 Andrew Ketterer Law Firm (Maine) and former Attorney General
 of Maine

 STEPHEN M. LEONARD
 Principal of the Boston law firm Crinion & Leonard

 WILLIAM MCNEILL III
 Managing Attorney at The Legal Aid Society of San Francisco
 Employment Law Center

 JUNE MILES (Deceased)
 Associate Justice of the Boston Juvenile Court

 LINDA S. OLMSTEAD
 Solo practitioner in Jamaica Plain, Massachusetts

 EZENONYE ONUJIOGU
 Nigerian prince, legal practitioner, graduate of Northeastern Uni-
 versity School of Law

 PRIMITIVO PAGAN
 Attorney from Puerto Rico (who came to Massachusetts to practice
 law for one year)

 WALTER PRINCE
 Founding partner of the Boston law firm Prince, Lobel, and Tye

 HARVEY M. PULLMAN
 Massachusetts Department of Revenue, Office of Appeals

102. Id. at 480, quoting Taylor, 419 U.S. at 530-31, internal citations omitted.
103. Id. at 489-90, footnote omitted.
104. Id. at 491.
106. Id.
107. Id.
108. Id. at 490.
109. Id. at 492.
110. Id.
111. If you asked any of these folks, I would venture that each would say that his or her time at the Roxbury Defenders Committee, while not financially re-
warding, were the best years of their careers. I concur. This list of alumni/ae is by no means exhaustive and any omissions are inadvertent and unintentional.
VI. THE CLIENTS

A few words about the clients, who were, after all, the reason for our very existence. Because there were trials almost every day, that meant there were lots of clients in every type of criminal case, from minor to major. District and Superior Court. Bench trials and jury trials. Second seating with more experienced lawyers whenever possible. There were clients in drug treatment programs, in jails, and in prisons. There were cases that required visits to "Big Jim's Shanty Lounge," Dudley Station's "The Patio," and the world famous "Sugar Shack" on Boylston Street. Some of the cases were funny, and some very sobering, and even after more than 40 years, I can remember a number of them and my former clients. A few still stand out.

There was the time I was speaking to a group of young men about turning their lives around and staying out of trouble. While I was talking to them one member of the group stole my hubcaps. It was only after a lot of begging on my part that the hubcaps were eventually returned.

There was also one client who was a master of "three-card monte," a card game in which the object is to pick the one red card from three cards while the dealer moves the cards around as fast as possible. My client was charged with armed robbery and his defense was that the victim was embarrassed that he lost his money gambling and accused him of robbery. The judge allowed my client to put on a demonstration, and five times in a row the judge could not pick the red card. But he still found the defendant guilty.

And then there was the "Duffle Bag" gang. The leader was a fellow named "Broadway." He was very smart, articulate, even charming. Had he taken a different path he could have been a doctor, lawyer, or judge. The gang was notorious for committing a series of armed robberies using shot guns which they carried in a duffle bag. We hit it off and he called me "Ricky." After they were arrested, Broadway and another member of the gang escaped from the Charles Street Jail by tying sheets together and climbing out a window. He would call me from time to time to say "hello." I would always advise him to turn himself in before he was rearrested, and he would always tell me not to worry. He was not rearrested while I was at the Defenders.

I also remember the young man who was charged with kidnapping a bank president during the commission of a robbery. I was able to negotiate a reduced charge for him in return for a plea and the return of the money. At the last minute, his family retained a well known and high-priced lawyer who succeeded in getting him a long sentence to MCI Walpole, at which point his family contacted me to see if I could get him the same deal I had negotiated before. Of course, it was too late.

Another client was a young man who, with a co-defendant, was charged with a very serious crime. The co-defendant was found guilty and received a very long sentence. My client was found not guilty and "saw the light," and turned his life around. He became an accomplished, well known artist and 40 years later his niece clerked for me at the Supreme Judicial Court. She asked me if I remembered him, and of course, I did. She arranged a reunion, and shortly before his death he presented me with a beautiful, full-sized oil portrait of myself that hangs in my office.

I also represented a woman who, after her trial, was incarcerated at MCI Framingham. We represented her on appeal, but lost her appeal. Upon her release, I hired her as a paralegal at the Defenders. My thinking was that we talked about rehabilitation in almost every case, and that she deserved a second chance. I am pleased to report that she did a fantastic job for several years at the Defenders before moving on to work for the Girl Scouts Association.

And finally, for purposes of this article, there was the young man who was accused of an extremely serious and violent crime. His mother came to me and begged me to represent him. She was convinced of his innocence, even though the victim of the crime had positively identified him. I promised his mother that I would do my best. Shortly thereafter she died. As his trial approached he informed me that he had heard on the street that another young man, named "Junior," had committed the crime. I have to say that I did not believe him, it sounded so contrived. Nonetheless I attempted to have a subpoena served on Junior, without success. On the last day of the trial I went to the police again and asked them to make a final effort to find Junior. They did, and they brought him to court. The victim, who had testified earlier identifying my client as the culprit, took one look at the second young man and informed the district attorney that she had been mistaken earlier when she identified my client. The case was dismissed and I learned several valuable lessons which I have never forgotten. That was over 40 years ago. My client, now in his 50s, is a model citizen, with a family, and a job, and a life.

I could tell more stories about my clients, but will stop here. The one thing I will say is that the clients were, and are, real people, each with a story to tell.

VII. CONCLUSION

I now have been a judge for 35 years and have enjoyed a full and very satisfying career, as both a trial and an appellate judge. But I have to say, when I look back on my years at the Roxbury Defenders, they were some of the most enjoyable, exciting, and fulfilling times of my life. I learned a lot, not just about the practice of law and how to try a case, but about life in general. As I said earlier, one very important lesson that has stayed with me all these years is that the clients were, and are, real people, each with a story. That lesson was an enormous help to me throughout my judicial career, especially when I sat at the Boston Juvenile Court for thirteen years, where so many of the clients had not only legal issues, but also life issues related to poverty, unemployment, inadequate housing, inadequate education, teenage pregnancy, and substance abuse. Thanks to my years at the Defenders, I was prepared for some of the challenges that a juvenile court judge deals with on a daily basis.

I am extremely grateful and honored that I had the opportunity to play a small role in the establishment of the Roxbury Defenders,
an institution that has made such a positive contribution to the community and to the state. It is humbling to think back on those early days and to realize just how much we did not know. And yet, somehow we helped to create and build an institution with a proud tradition that continues to provide a service to clients each and every day. I am very proud of all the good that the Roxbury Defenders has done over the years.

I note that the issues we addressed in Myers and Corey had been recognized and challenged by many, many others over the years, long before we arrived at the scene. It is not that we were somehow more insightful or more enlightened than others. In some ways we were simply in the right place at the right time, young and full of energy. We also received encouragement and support from many experienced members of the bar. In fact, there was a cadre of lawyers at the Roxbury District Court whom I would speak to just about every morning before trials would start, in particular, the late Henry Quarles and the late Calvin Weir. I would give them a brief synopsis or summary of each case and my strategy, and they often would give me a suggestion or an idea concerning how to approach the case. They were always willing to help and always had a kind word. I am grateful to them both for helping out a young, inexperienced lawyer.

In conclusion, mindful of the philosopher Soren Kierkegaard’s observation that, “[L]ife is best understood looking backwards … [b]ut must be lived forward,” I embrace the challenges of each new day in my work at the Supreme Judicial Court, but I look back with fondness on the wonderful experiences and friendships I had during my years at the Roxbury Defenders. I am a better judge, for that matter a better person, because of the Roxbury Defenders Committee, and in no small part, because of Wally Sherwood.

112. See supra note 7, discussing the creation of the Reginald Heber Smith Fellowships. For a detailed history of legal aid to the poor, see Earl Johnson, Jr., Justice and Reform: The Formative Years of the American Legal Services Program, supra, note 7. Mr. Johnson was the first deputy director of the OEO’s Legal Services Program and became its director. Id. at ix, 72.

A Primer on CORI Reform for Employers

by Catherine E. Reuben

Catherine E. Reuben is one of the founding partners of Hirsch Roberts Weinstein LLP in Boston, Massachusetts. She provides counseling, training and litigation defense for employers in labor and employment matters. Reuben speaks and writes extensively on employment law matters, and is an active member of the MBA and other professional organizations.

I. What is CORI? What is CORI Reform?

The acronym “CORI” stands for “criminal offender record information.” The term CORI is commonly used to refer to the specific criminal offender record information that employers, landlords and others can obtain directly from the Commonwealth of Massachusetts.

In 2010, Governor Patrick signed a new law, commonly referred to as “CORI Reform,” that vastly changed the legal landscape with respect to access and use of CORI. Among the changes was the creation of a new agency, the Department of Criminal Justice Information Services (DCJIS), to oversee the authorized release of CORI, and to provide a public information system and network to support data collection and information sharing.

While CORI Reform deals largely with CORI obtained directly from DCJIS, the new law also impacts criminal offender record information obtained by employers from other sources, such as private background check companies, consumer reporting agencies (CRAs), private detectives and court records.

Most of the key provisions of CORI Reform went into effect on May 25, 2012. DCJIS issued CORI regulations, which became final on May 4, 2012. Effective May 4, 2012, any employer that registers annually for CORI or criminal history screening.

To register for an iCORI account, the employer must provide identifying information regarding the individual user and the business as required by DCJIS. The employer must also provide information regarding the purpose for requesting CORI, including any statutory, regulatory or accreditation requirements that mandate CORI or criminal history screening.

To complete the registration process, the individual user must agree to comply with all iCORI terms and conditions. Per the regulations, the individual must also complete training. Specifically, individuals are required by DCJIS to certify that they have reviewed the training materials posted on the DCJIS website. The regulations further state that a registration fee may be required.

All iCORI registrations expire after one calendar year. After expiration, the registrant must renew the registration, including again completing the iCORI training. Employers that access CORI are subject to audit by DCJIS.

III. What Information Can Employers Get?

Effective May 4, 2012, any employer that registers annually for an iCORI account can get “Standard Access” to CORI. Standard Access includes felony convictions disposed of (including any period

1. Mass. Gen. Laws ch. 6, §171A (requirements apply whether information is obtained from DCJIS or “any other source”).
2. 803 CMR 2.00 et seq.
3. See Parts XIII and XIV, infra.
4. See, e.g., 101 CMR 15.00 et seq., (EOHHS), 606 CMR 14.00 et seq. (EEOC), and 104 CMR 34.00 et seq. (DMH).
5. 804 CMR 2.02 and 2.04.
6. Mass. Gen. Laws ch. 6, §172(a)(3). The term “contract employee” is not defined in the statute or proposed regulations. 804 CMR 2.04(2) discusses an employer’s ability to register for an iCORI account but does not reference contractors.
7. 804 CMR 2.04(2).
of incarceration) within the past ten years, misdemeanors disposed of within the past five years and pending charges. Standard Access also includes convictions for murder, voluntary and involuntary manslaughter, and certain sex offenses, regardless of how recent, unless sealed. If a crime is eligible to be included on a CORI report, prior misdemeanor and felony convictions are available for the entire period that the subject’s last available conviction record is available. Standard Access does not include charges that did not result in a conviction, or offenses that are sealed, juvenile, civil or non-incarcerable.

Employers such as banks, hospitals, schools, and nursing homes that are authorized or required to receive CORI pursuant to a statute, regulation or accreditation requirement can get access to broader information. The regulations specify four levels of “Required Access,” depending on the language of the underlying requirement. Employers should consult with counsel regarding whether they are subject to any statutory or regulatory requirement to conduct CORI checks, and their eligibility for and/or obligation to obtain broader information.

Per the regulations, if an employer uses a consumer reporting agency (CRA) to obtain CORI, that CRA will have the same level of access to CORI “as the iCORI-registered client on whose behalf the CRA is performing the CORI check.” The reference in the regulations to a “registered” client suggests that, even if the employer is using a CRA to access CORI, the employer itself must still register. The regulations include more detailed provisions with respect to the type of information that the CRA can share with the employer, depending on the client’s level of access and the annual salary for the position for which the applicant is being screened. For example, if the iCORI registered client is entitled to Standard Access to CORI, and the annual salary for the position for which the subject is being screened is less than $75,000, the CRA is not permitted to disclose pending cases that are seven or more years old and that did not result in a warrant; if the position pays more than $75,000, all pending charges may be disclosed.

IV. Should employers conduct CORI checks?

Some employers, like human service providers, are required by law to conduct CORI checks. Even if an employer is not legally required to conduct CORI checks, however, there are good business reasons to consider doing so. Knowledge is power. The more information a business has about an applicant or employee, the better the company can assess whether or not the individual is the right person for the job, and the better it can effectively mentor and supervise the person if he/she is hired. Also, as discussed below, in some circumstances failing to conduct criminal background checks could subject an employer to a negligent hiring claim.

If an employer does conduct CORI checks, however, the employer will be subject to strict procedural requirements, as set forth in this note, and to audits by DCJIS. Failure to follow those requirements can subject an employer to civil and criminal liability. Further, an employer that obtains or uses criminal history information in a discriminatory manner can be subject to liability.

V. Can an employer be sued for negligent hiring if the employer chooses not to conduct criminal background checks?

Depending on the nature of the position and the circumstances, if an employer fails to obtain criminal offender record information about an applicant or employee, and such individual engages in a harmful act, the employer could be exposed to a claim for negligent hiring. Massachusetts law imposes a duty on employers to exercise reasonable care in the hiring, supervision, and retention of employees who are brought into contact with members of the public. Negligent hiring cases generally involve situations where (1) an employee engages in a violent, dangerous, or otherwise harmful act toward a member of the public and (2) the employer could reasonably have anticipated that such harm would occur, based on the employee’s having engaged in similar acts in the past. The plaintiff in such action would have to show that by obtaining the criminal information, the employer would actually have learned something that would have made the alleged harm foreseeable.

The new CORI law provides a “safe harbor” for employers from negligent hiring claims. If an employer makes a hiring decision within 90 days of receiving CORI through DCJIS, and if the employer followed the statute and DCJIS regulations pertaining to verification of the subject’s identity, the employer cannot be sued for negligent hiring based on the employer’s decision to rely solely on CORI and to not conduct additional criminal history checks. This “safe harbor” presumably would not apply if the employer did not check the individual’s CORI at all, or if the employer obtained criminal offender information from another source, including a CRA.

VI. Can an employer face discrimination claims for conducting criminal background checks?

The state and federal non-discrimination laws do not prohibit the use of criminal offender record information. Indeed, the CORI

17. Id.
18. Id.
21. 804 CMR 2.05(3)(b).
22. 804 CMR 11.04(1)(b).
23. 804 CMR 11.11.
24. 804 CMR 11.11(1).
25. See Part V, infra.
26. See Part XVII, infra.
27. See Part VI, infra.
29. Id.
30. See, e.g., Coughlin v. Titus & Bean Graphics, Inc., 54 Mass. App. Ct. 633, 639-41 (2002) (defendant not liable for wrongful death where background check would not have provided any additional information that would have enabled defendant to reasonably foresee that employee posed a threat to members of the public, and where individual was not expected to have regular contact with the public in the normal course of business); Doe v. Wendy’s Old Fashioned Hamburgers of New York, Inc., 19 Mass. L. Rptr. 663, 2005 WL 1971036 (Mass. Super. June 16, 2005) (negligent hiring claim fails because there is no evidence from which a jury could conclude that Wendy’s would have learned anything to make the alleged incident foreseeable if more stringent hiring procedures were enforced, including independently conducted criminal background investigations).
32. Note also that this safe harbor would only apply to claims brought under Massachusetts law. Other states have differing laws with regard to employer
Reform law specifically states that it should not be construed to prohibit a person from making an adverse decision on the basis of an individual’s criminal history or to provide or permit a claim of an unlawful practice under the state non-discrimination law. Further, the law provides another “safe harbor” that protects employers from liability for discriminatory hiring practices for failing to hire a person on the basis of erroneous CORI obtained from DCJIS.

That said, the law still prohibits both “disparate-treatment” and “disparate-impact” discrimination in how an employer obtains and/or uses criminal offender record information. Disparate treatment, or intentional discrimination, occurs when an employee or applicant is treated differently due to his or her protected class status. Thus, an employer would be in violation of the law if it were to reject male applicants who have conviction records while accepting similarly-situated female applicants.

Disparate-impact discrimination occurs when a uniformly-applied neutral selection procedure disproportionately excludes people on the basis of protected class, and the procedure is not job-related and consistent with business necessity, or when the employer’s business goals can be served in a less discriminatory way. Thus, even in the absence of discriminatory intent, an employer violates the law when it uses a selection criterion (for example, excluding any applicant that has a felony on his/her record) if such criterion disproportionately excludes racial or ethnic minorities, unless the employer can show that the criterion is “job-related and consistent with business necessity” for the position in question.

To reduce the potential for such claims, employers should conduct criminal background checks on all current or prospective employees in a given job classification, so as to avoid an inconsistent practice that could give rise to an allegation of disparate treatment discrimination. Further, employers should not automatically reject any candidate with a criminal record (unless required to do so by law or regulation), but should instead consistently consider factors such as:

a. the relevance of the crime to the position sought;

b. the nature of the work to be performed;

c. the time since the conviction;

d. the age of the person at the time of the offense;

e. the seriousness and circumstances of the offense;

f. whether the person has pending charges;

g. any relevant evidence of rehabilitation or lack thereof;

h. any other relevant information, including information provided by the person or requested by the employer.

Employers also need to remain mindful of the provisions of Massachusetts General Laws chapter 151B, section 4(9), which prohibits employers from requesting, keeping a record of, or otherwise discriminating against any individual by reason of his or her failure to furnish certain types of criminal record information.

VII. ARE EMPLOYERS LEGALLY OBLIGATED TO HAVE A WRITTEN POLICY WITH REGARD TO CRIMINAL BACKGROUND CHECKS?

Employers who annually conduct five or more criminal background checks per year, whether through DCJIS or some other source, are required to maintain a written criminal offender record information policy. The policy must provide that the employer will (i) notify the applicant of the potential of an adverse decision based on criminal offender record information, (ii) provide a copy of the criminal offender record information and the policy to the applicant, and (iii) provide information concerning the process for correcting a criminal record.

The regulations state that the written policy must meet the minimum standards of the DCJIS model policy. The DCJIS model policy is available on the DCJIS website.

VIII. IF AN EMPLOYER IS A UNIONIZED COMPANY, DOES THE EMPLOYER HAVE A DUTY TO BARGAIN WITH THE UNION ABOUT ISSUES ASSOCIATED WITH BACKGROUND CHECKS?

Depending on the circumstances and the language of the collective bargaining agreement, employers may have a duty to bargain about the decision to conduct background checks, the effects of such practice, and/or the policies and procedures involved.

IX. MAY EMPLOYERS ASK APPLICANTS TO VOLUNTARILY DISCLOSE INFORMATION ABOUT THEIR CRIMINAL RECORD?

It is unlawful to request or require that an individual provide a copy of his criminal offender record information, except through the specific procedures in the CORI Reform law. An employer that does so can be subject to criminal sanctions.

Further, most employers are not permitted to include any access and use of criminal offender record information, and the extent to which an employer’s failure to conduct a criminal background check could support a negligent hiring claim.


34. Per Mass. Gen. Laws ch. 6, §172(e), if an employer makes a hiring decision within ninety days of receiving CORI through DCJIS, and if the employer followed DCJIS regulations pertaining to verification of the subject’s identity, the employer cannot be held liable for discriminatory hiring practices for the failure to hire a person on the basis of erroneous CORI obtained from DCJIS, if the employer would not have been liable had the information been accurate. This “safe harbor” would not apply if the employer did not obtain the criminal history information from DCJIS.


38. These factors are taken from the model CORI policy on the DCJIS website, available at http://www.mass.gov/eopss/docs/chsb/dcjis-model-cori-policy-may-2012.pdf. The EEOC recommends consideration of similar factors. See, EEOC Enforcement Guidance, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Note that some other states (e.g., New York) have statutes that affirmatively require employers to consider such factors before taking adverse action against an individual based on a criminal record. See, e.g., N.Y. Correct. Law §752 (McKinney’s 2010).

39. See Part IX, infra.


41. Id. The DCJIS website has a publication that employers can provide to employees with information on how to correct CORI: http://www.mass.gov/eopss/docs/chsb/cori-process-correcting-criminal-record-2012.pdf

42. 803 CMR 2.15.


questions about an applicant’s criminal offender record in an initial application form. This law, effective November 4, 2010, is enforced by the Massachusetts Commission Against Discrimination (MCAD). Per the MCAD’s Fact Sheet on this so-called “ban the box” provision,” such questions may only be asked after an initial interview has been conducted. Some employers do so by utilizing a supplemental written application form, which is presented to the applicant after the interview has concluded, but before a hiring decision is made.

Even after the interview, employers are prohibited by law from requesting, keeping a record of, or otherwise discriminating against any individual by reason of his or her failure to furnish information regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting from the conviction, whichever date is later, occurred five or more years prior to the date of application for employment, unless the person has been convicted of any other offense within the immediate past five years.

X. WHAT DOCUMENTATION DOES AN EMPLOYER NEED TO SUBMIT TO DCJIS IN ORDER TO ACCESS AN INDIVIDUAL’S CORI?

Before an employer conducts a CORI check, it must have the individual sign an “Acknowledgement Form” authorizing the employer to obtain the person’s criminal offender record information. To query the iCORI database, the employer must submit the subject’s name, date of birth and first six digits of his or her social security number. The employer must also certify under oath that (a) the requestor is an authorized designee of a qualifying entity, (b) the request is for a purpose authorized under the law, and (c) the subject has signed an Acknowledgement Form authorizing the requestor to obtain the subject’s criminal offender record information. The requestor must also certify that he/she has verified the identity of the person by reviewing a form of government-issued identification. The regulations further require that the employer actually submit the Acknowledgement Form to DCJIS, as opposed to simply certifying that one has been signed. The regulations state that the employer must sign and date each form certifying that the subject was properly identified. The regulations list the types of government-issued identifications that are acceptable, namely, a state-issued driver’s license, state-issued identification card with a photograph, passport or a military identification. The regulations further provide that if an employer cannot verify the individual’s identity and signature in person, the individual may sign the Acknowledgement Form in the presence of a notary. CORI Acknowledgement Forms must be maintained for a period of one year from the date the request is submitted. Such forms are subject to audit by DCJIS.

The regulations state that CORI Acknowledgement Forms shall be valid for a year from the date of signature or until the subject’s employment ends, whichever comes first. Per the regulations, an employer can “re-CORI” a subject during the one-year period, but must provide the subject at least 72 hours notice before submitting the request. If the subject objects to the re-CORI, however, the original Acknowledgement Form becomes invalid, and a new form must be obtained from the subject before a new CORI check can be conducted.

The regulations go on to note that nothing in the regulations should be construed to prohibit an employer from making an adverse decision on the basis of a subject’s objection to a request for CORI. That said, employers should not assume that it is always lawful and appropriate to insist that an applicant or employee authorize the release of criminal history information. It should be noted that the regulations impose additional disclosure requirements on employers prior to taking adverse action. These requirements are discussed in more detail below. Per the law, DCJIS maintains a log of all CORI requests, including who requested it, the date and the purpose of the inquiry. Individuals have the right to see which employers and other non-law

49. Mass. Gen. Laws ch. 151B, §4(9). The wording of the statute appears to create a practical dilemma for employers, since a properly-obtained CORI report may include such data. In Bynes v. Sch. Comm. of Boston, 411 Mass. 264, 266-69 (1991), however, the court held that the legislature’s intent was to prevent employers from requesting such information directly from employees, not to proscribe them from seeking such information from other sources, or, presumably, from keeping a record of it. That said, employers that use third party background check companies should consider asking the company to exclude such information from their reports.
52. Id.
53. 803 CMR 2.09(1).
54. Id.
55. 803 CMR 2.09(3).
56. 803 CMR 2.09(5).
58. Id.
59. 803 CMR 2.09(9).
60. Id.
61. 803 CMR 2.09(12).
62. See Part VI, infra.
63. Mass. Gen. Laws ch. 6, §172(c); 803 CMR 2.11.
64. Mass. Gen. Laws ch. 6, §172(c).
65. See Part XII, infra.
enforcement entities have requested their CORI. Such “self-audits” may be obtained without cost every 90 days. The law further provides that, subject to funding and technology considerations, DCJIS shall establish a mechanism to alert individuals if a query is made about them.

XII. ARE THERE CERTAIN PROCEDURES AN EMPLOYER MUST FOLLOW BEFORE TAKING ADVERSE ACTION AGAINST AN EMPLOYEE AS THE RESULT OF A CRIMINAL BACKGROUND CHECK?

Yes. The statute provides that, prior to taking adverse action against an applicant based on the content of a criminal background check, whether obtained from DCJIS or some other source, the employer must provide the person with a copy. The regulations additionally require that, before taking adverse action on an applicant’s application for employment based on the applicant’s CORI, an employer shall:

a. comply with the applicable federal and state laws and regulations;

b. notify the applicant in person, by telephone, fax, electronic or hard copy correspondence of the potential adverse employment action;

c. provide a copy of the CORI report;

d. provide a copy of the employer’s CORI policy, if applicable;

e. identify the information in the applicant’s CORI that is the basis for the potential adverse action;

f. provide the applicant with the opportunity to dispute the accuracy of the information in the CORI report;

g. provide the applicant with a copy of DCJIS information regarding the process for correcting CORI; and

h. document all steps taken to comply with these requirements.

The statute and regulations consistently use the word “applicant.” There is no reference to existing employees, as there is in the Fair Credit Reporting Act (FCRA) That said, there are good reasons to follow these requirements with respect to existing employees as well as applicants. It is not uncommon for CORI and other criminal history reports to contain erroneous information. The employee is the person best able to alert the employer to such errors, before an unwise or unfair decision is made. Further, if the report was obtained through a third party, the employer would be obligated, under the FCRA, to provide a copy to an existing employee, as well as to a prospective employee, prior to taking adverse action.

If the adverse employment decision is based on criminal offender record information received from a source other than DCJIS, such as a private background check company, slightly different procedures apply. The employer must not only provide the applicant with a copy of the criminal history, but must also identify the source of the information. The requirement that the employer identify the specific information in the report that is the basis for the potential adverse action does not apply, but all other requirements are the same. Note, however, that if the source is a “consumer reporting agency,” a term that is broadly defined in the regulations, there are additional requirements.

XIII. DO THE REQUIREMENTS OF THE FAIR CREDIT REPORTING ACT (FCRA) APPLY TO CORI CHECKS?

Virtually all background checks performed by third parties fall under the purview of the FCRA. Thus, employers who contract with third parties (e.g., private background check companies, consumer reporting agencies, detectives or contracted recruitment professionals) to conduct any background check, including obtaining CORI from DCJIS, must comply with the FCRA’s authorization and disclosure requirements. The FCRA would not apply if an employer itself obtains information directly from DCJIS, but would apply if the employer engages a third party to do so on its behalf.

Many of the procedural requirements imposed by the FCRA are mirrored in the new CORI Reform law. The requirements are similar, but not identical. If an employer complies with the FCRA, the employer is not necessarily in compliance with Massachusetts law. The reverse is also true—compliance with CORI reform does not necessarily satisfy the FCRA. Employers need to comply with both laws.

XIV. IF AN EMPLOYER USES A THIRD PARTY TO CONDUCT CRIMINAL BACKGROUND CHECKS, AND COMPLIES WITH THE FCRA, DOES THE EMPLOYER NEED TO WORRY ABOUT CORI REFORM?

Yes. Most of the legal requirements imposed by the CORI Reform Law that are discussed in this note apply regardless of whether

67. 803 CMR 2.24(4).
70. See Part VII, supra.
71. The DCJIS website has a publication that employers can provide to employees with information on how to correct CORI: http://www.mass.gov/eopss/docs/chsb/cori-process-correcting-criminal-record-2012.pdf.
72. 803 CMR 2.17.
73. 15 U.S.C. §1681(a)(k) (defines adverse action as “a denial of employment or any other decision for employment purpose that adversely affects any current or prospective employee”).
74. The FCRA additionally requires that the employer give the individual a “pre adverse action disclosure” statement that includes a copy of the actual consumer report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” which is a document published by the Federal Trade Commission. 15 U.S.C. §§1681(a)(k) and (b)(3)(A).
75. Mass. Gen. Laws ch. 6, §168(a) makes reference to “questioning a subject about his criminal history in connection with a decision regarding employment…or in connection with an adverse decision on such an application.”
76. 803 CMR 2.18.
77. Id.
78. See Part XIV, infra.
79. The CORI Reform statute specifically states that if a consumer reporting agency (CRA) is accessing CORI from DCJIS, such CRA shall be deemed to be in compliance with the CORI statute and regulations so long as the CRA’s practices are in compliance with the state and federal Fair Credit Reporting Acts, Mass. Gen. Laws ch. 6, §167A(e). There is no similar language applicable to employers.
the employer obtained the criminal offender record information itself, or used a third party to do so. Similarly, these requirements apply whether the criminal record information was obtained directly from DCJIS or some other source.\textsuperscript{86} Employers should choose third party background check companies carefully, and consider contract provisions to ensure that the information provided is accurate and that the third party complies with all applicable laws (state and federal).

Further, the regulations impose special requirements on employers that use consumer reporting agencies (CRAs) to conduct criminal background checks.\textsuperscript{81} These procedures incorporate and expand on those required under the FCRA. The term CRA is broadly defined in the regulations, and would encompass most private background check companies, private detectives and other persons or entities that employers commonly use to obtain criminal history information.\textsuperscript{82}

**Obligations before obtaining criminal history information from a CRA:**

If an employer wishes to use a CRA to request CORI from DCJIS, the employer must: (1) notify the applicant in writing, “in a separate document consisting solely of such notice,” that a consumer report may be used in the employment decision-making process, and (2) obtain the applicant’s separate written authorization to conduct a background screening before asking the CRA for the report. The regulations state that an employer may not substitute the CORI Acknowledgment Form for this written authorization.\textsuperscript{83} The requirements of the FCRA are virtually identical.\textsuperscript{84}

The regulations also require employers to certify to the CRA that (a) they are in compliance with the FCRA, (b) that they will not misuse the information in the report in violation of federal or state laws or regulations, and (c) that they shall provide accurate identifying information to the CRA, as well as the purpose for which the individual’s CORI is being requested.\textsuperscript{85} The certification requirements of the FCRA are very similar but not identical.\textsuperscript{86} Employers and their background check vendors may need to make slight modifications to their FCRA-compliant forms to comply with the regulations.

**Obligations before taking adverse action based on CORI obtained by a CRA from DCJIS:**

The regulations state that, before taking adverse action on an applicant’s application based on CORI that a CRA receives from DCJIS on an employer’s behalf, the employer itself must do the following:

- a. provide the applicant with a pre-adverse action disclosure that includes a copy of the consumer report and a copy of the document “A Summary of Your Rights Under the Fair Credit Reporting Act,” which is a document published by the Federal Trade Commission;\textsuperscript{87}
- b. notify the applicant, either in person, or by telephone, fax or electronic or hard copy correspondence, of the potential adverse employment action;
- c. provide a copy of the CORI to the employment applicant;
- d. provide a copy of the employer’s CORI policy, if applicable;\textsuperscript{88}
- e. identify the information in the applicant’s CORI that is the basis for the potential adverse decision;
- f. provide the applicant with an opportunity to dispute the accuracy of the information contained in the CORI;
- g. provide the applicant with a copy of the DCJIS information regarding the procedures for correcting a criminal record;\textsuperscript{89} and
- h. document all steps taken to comply with these requirements.\textsuperscript{90}

This requirement mirrors that of the FCRA, pursuant to which an employer must give the individual a “pre-adverse action disclosure” statement that includes a copy of the actual consumer report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.” 15 U.S.C. §§1681a(a)(k) and (b)(3)(A).

**Obligations before taking adverse action based on criminal offender record information obtained by a CRA from a source other than DCJIS:**

The regulations provide that if an employer uses a CRA to obtain criminal offender record information from a source other than DCJIS, and if the employer is “inclined to make an adverse employment decision based on that criminal history,” the employer must provide the individual with a copy of the consumer report and of this practice. (FTC Opinion Letter, Steer, 10/27/97). Since it appears that the proposed regulations were designed to track the requirements of the FCRA, one can hope that DCJIS would reach the same conclusion.

80.  See, e.g., Mass. Gen. Laws ch. 6, §171A (requirements apply whether information is obtained from DCJIS or “any other source”).
81.  803 CMR 2.21.
82.  805 CMR 2.02 (defines CRA as “any person or organization which, for monetary fees, dues, or on a cooperative, nonprofit basis, regularly engages in whole, or in part, in the practice of assembling or evaluating consumer, criminal history, credit, or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports”).
83.  803 CMR 2.21(a).
84.  The FCRA provides that, before getting a consumer report on an individual, the employer must: (1) ask for and receive a clear written authorization form from the individual before asking the CRA for a report; and (2) notify the person in writing, in a document consisting “only of this notice,” that a report may be used for employment decisions. 15 U.S.C. §1681b(b)(2). Although the FCRA, like the proposed regulations, suggests that the disclosure and authorization must be separate documents, most background check companies combine them into a single form. The FTC has issued an opinion letter that approves this practice. (FTC Opinion Letter, Steer, 10/27/97). Since it appears that the proposed regulations were designed to track the requirements of the FCRA, one can hope that DCJIS would reach the same conclusion.
85.  803 CMR 2.21(b).
86.  Pursuant to 15 U.S.C. §1681b(1), when getting a report from a CRA, the employer must certify that (a) the employer has complied with the FCRA and will not unlawfully use the information it receives, and (b) that the employer will comply with the requirements of the FCRA for adverse actions should such action be taken in whole or in part due to the report.
87.  The proposed regulations state that the employer may provide this information by meeting with the applicant in person, or by telephone, electronic communication, fax or hard copy correspondence.
88.  See Part VII, supra.
89.  The DCJS website has a publication that employers can provide to employees with information on how to correct CORI: http://www.mass.gov/eops/docs/chsb/cori-process-correcting-criminal-record-2012.pdf.
90.  803 CMR 2.21(2).
follow all of the other requirements set forth above, except for the
to identify the information in the criminal offender record
requirements is the basis for the potential adverse deci-

Obligations after taking adverse action based on criminal
offender record information obtained by a CRA:
The FCRA requires that, following taking adverse action against
an existing or prospective employee based on a consumer report, the
employer must give the individual a notice within a “reasonable”
period of time that the action was actually taken, as well as other
information. Neither the Massachusetts statute nor the regulations
includes these obligations. That said, the regulations do speak of an
employer’s requirement to comply with state and federal laws and
regulations, and to certify to the CRA that it is in compliance.

XV. ARE THERE LIMITS ON THE EXTENT TO WHICH AN EMPLOYER CAN DISSEMINATE CORI?
Employers may share CORI with individuals within the organi-
ation that have a need to know the contents to serve the purpose
for which the CORI was obtained. The statute further provides that,
upon request, employers “shall” share CORI with government enti-
ties charged with overseeing, supervising or regulating them. Oth-
erwise, employers are prohibited from disseminating CORI, except
upon request by the individual about whom the CORI request was
made.

Employers are required to keep a “secondary dissemination log”
for a period of one year following the dissemination of any individu-
als’ CORI. The log must include (1) the name of the individual,
(2) the individual’s date of birth, (3) the date of the dissemination,
(4) the name and, per the regulations, the organization of the per-
son to whom it was disseminated, and (5) the specific purpose of
the dissemination. Per the regulations, the log may be maintained
electronically or on paper. This log is subject to audit by DCJIS.

XVI. ARE THERE REQUIREMENTS WITH REGARD TO RETEN-
TION, STORAGE AND DESTRUCTION OF CORI?
The regulations contain rigorous requirements with respect to
storage and retention of CORI. Hard copies must be stored in
a separate locked and secure location, such as a file cabinet. Em-
ployers must limit access to the locked location to employees who
have been approved by the employer to access CORI, which, per
the statute, are only those with a need to know for the purposes for
which the CORI was obtained. If employers store CORI elec-
tronically, it must be password protected and encrypted. Once again,
access must be limited to those who are approved to access CORI.
CORI may not be stored using “public cloud storage methods.”

Unless otherwise provided by law or court order, an employer
may not maintain a copy, electronic or otherwise, of CORI obtained
from DCJIS for more than seven years from the last date of employ-
ment or volunteer services, or from the date of the final employment
decision, whichever occurs later. Although the statute specifically
references CORI “obtained from DCJIS,” the regulations refer only
to CORI, and thus could possibly be interpreted as applicable
to criminal record information obtained from other sources.

Per the regulations, employers must destroy hard copies of CORI
by shredding them. To destroy electronic copies of CORI, the
employer must delete them from the hard drive on which they are
stored and from any back-up system. The employer must further
“appropriately clean all information by electronic or mechanical
means” before disposing of or repurposing a computer used to store
CORI.

XVII. WHAT CAN HAPPEN TO AN EMPLOYER WHO VIOLATES
THE LAWS REGARDING CORI?
Complaints before the Criminal Record Review Board
The CORI Reform law creates a new entity within DCJIS called
the “Criminal Record Review Board” (“CRRB”). The CRRB is em-
powered to hear complaints and investigate incidents alleging that
an employer that requested or received criminal record information
failed to provide the subject with a copy prior to questioning him/her
about it, or in connection with an adverse decision. If a viola-
tion is found, the CRRB may impose a civil fine of up to $5,000 for
each knowing violation, and may impose conditions on that em-
ployer’s continued access to CORI. The CRRB may also refer a
complaint for criminal prosecution.

Criminal Penalties
A person or entity that (1) knowingly requests, obtains or at-
tetempts to obtain CORI or a self-audit from DCJIS under false pre-
tenses, (2) knowingly communicates or attempts to communicate
CORI except as permitted under the law, (3) knowingly falsifies
CORI or related records or (4) “requests or requires” a person to
provide a copy of his/her CORI except as authorized by law, can be

91. 803 CMR 2.21(3).
92. Per 15 U.S.C. §1681m(a), this adverse action notice must include: (a) dis-
closure that the employer is taking adverse action; (b) the name, address
telephone number of the CRA; (c) a statement that the CRA did not itself make
the adverse action and cannot explain or give specific reasons for it; (d) notice of
the individual’s right to dispute the accuracy or completeness of the information
provided by the CRA; and (e) notice of the right to ask for additional free con-
sumer reports from the CRA within the next 60 days. These notice requirements
apply any time the consumer report was a factor in the decision, even if it was not
the primary motivating factor.
93. 803 CMR 2.10(1) and 2.21(b)(1). Both of these sections relate to an
employer’s obligations prior to taking the adverse action, not afterwards. Thus, it
is not clear whether a violation of the FCRA’s post-adverse-decision notification
requirements could be deemed a violation of Massachusetts laws as well.
94. Mass. Gen. Laws ch. 6, §172(f); 803 CMR 2.16.
95. 803 CMR 2.16(1).
96. 803 CMR 2.16(2).
97. 803 CMR 2.16(3).
99. 803 CMR 2.21(3).
100. Id.; Mass. Gen. Laws ch. 6, §172(f).
101. 803 CMR 2.11(1).
102. 803 CMR 2.11(3).
103. Mass. Gen. Laws ch. 6, §172(f); 803 CMR 2.11.
104. 803 CMR 2.11. The term “CORI” is not included in the definitions sec-
tion of the proposed regulations, and thus is not clear whether the term in-
cludes criminal record information obtained from sources other than DCJIS.
105. 803 CMR 2.12(1).
106. 803 CMR 2.12(2).
107. 803 CMR 2.12(3).
109. Id.
110. Id.

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subject to criminal sanctions. Each such offense is punishable by imprisonment for up to one year, a fine of up to $5,000, or both. If the offender is an entity, rather than a person, the penalty is up to $50,000 per violation.

The law further states that CORI may not be used to harass an individual. Harassment is defined as “willfully and maliciously engaging in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer emotional distress.” Violation of this provision carries a penalty of up to $5,000, up to one year of imprisonment, or both.

Private Right of Action

In addition, the law provides individuals with a private right of action. Any aggrieved person may institute a civil action in superior court for damages or injunctive relief. The statute provides for imprisonment for up to one year, a fine of up to $5,000, or both.

DCJIS Audits

Employers that access CORI are also subject to audit by DCJIS. Per the regulations, DCJIS may inspect CORI-related documents “including, but not limited to” CORI Acknowledgement Forms, secondary dissemination logs, the employer’s CORI policy, and documentation of any adverse employment decisions based on CORI. During an audit, DCJIS shall assess the employer’s compliance with the statutory and regulatory requirements, including but not limited to:

- a. whether the employer is properly registered for the appropriate level of CORI access and provides correct registration information;
- b. if the employer is properly completing and retaining CORI Acknowledgement Forms;
- c. if the employer is requesting CORI in compliance with the regulations;
- d. if the employer is properly storing and safeguarding CORI;
- e. if the employer is properly maintaining a secondary dissemination log;
- f. if the employer is screening only those individuals permitted by law; and
- g. if the employer has a CORI policy that complies with DCJIS requirements.

An employer that refuses to cooperate with or respond to a DCJIS audit may have its access to CORI revoked, and further may not obtain CORI through a consumer reporting agency. DCJIS may initiate a complaint with CRRB against any employer for failure to respond to or to participate in an audit. DCJIS may also refer the audit results to state or federal law enforcement agencies for criminal investigation. Audit results may be published.

XVIII. Where Can an Employer Turn for Assistance in Complying with CORI Reform and Other Laws Related to Criminal Background Checks?

Employers should be cautious about relying wholly on forms and procedures obtained from private background check companies. In the author’s experience, these companies do not always comply fully with the FCRA, and may not be fully up to speed on the new Massachusetts law and regulations. Further, even if an employer uses a third party to conduct criminal background checks, that employer—as opposed to the third party—is still subject to certain procedural requirements.

It is anticipated that DCJIS will continue to update its website to incorporate and explain the new statutory and regulatory requirements. For assistance with FCRA compliance, employers can consult the Federal Trade Commission website.

XIX. Conclusion

As with any new law, there is always a learning curve. Ultimately, however, compliance with the procedures mandated by the new CORI statute and regulations should not be overly burdensome for employers. The DCJIS website contains helpful publications with step-by-step instructions. CORI Reform also brings potential business benefits. Employers that formerly had to rely on third parties to obtain criminal history information can now obtain it for themselves. The policy requirement will encourage employers to be more consistent in their use of background checks, which may help to reduce the potential for discrimination claims. Best of all, due to the notice procedures, there is less risk that employers will unwittingly lose out on qualified, competent candidates due to incorrect or incomplete criminal history information, a winning result for both individuals and businesses.

112. Id.
113. Id.
115. Id.
117. Id.
118. Mass. Gen. Laws ch. 6, §172(c), (f) (CORI Acknowledgement Forms and secondary dissemination logs are subject to audit by DCJIS).
119. 803 CMR 2.22(4).
120. 803 CMR 2.22(2).
121. 803 CMR 2.22(6).
122. 803 CMR 2.22(7).
123. 803 CMR 2.22(5).
124. See Part XIV, supra.
128. See Part III, supra.
129. See Part VII, supra.
130. See Parts XII and XIV, supra.
**Rule 56(f): Precursor to a Substantive Opposition to Summary Judgment**

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I. Introduction

“The Supreme Judicial Court and Appeals Court have had occasion to deal with Rule 56(f) only infrequently.” Is Massachusetts Rule of Civil Procedure 56(f) little known, seldom used, underappreciated, or extremely effective? Rule 56(f) provides a defense to those who cannot present, by affidavit, facts essential to justify opposition to summary judgment—in short, it is a means to argue that summary judgment is premature. “When properly invoked, Rule 56(f) allows a party opposing summary judgment additional time to conduct discovery on matters related to the motion.” A party’s motion for summary judgment may be challenged directly if there is a genuine issue of material fact, or indirectly if the case needs to develop further.

Rule 56(f) offers an analytical framework which, like summary judgment, favors the nonmoving party. Even in circumstances where Rule 56 mandates summary judgment “the court has discretion to deny the motion … [for] the court should have the freedom to allow a case to continue when it has any doubt concerning the wisdom of terminating the action before a full trial.” Judicial discretion is particularly favorable to the Rule 56(f) proponent in cases involving negligence, a party’s state of mind, or complex factual or legal issues.

The reader must bear in mind that Rule 56(f) supplements the defense to summary judgment; it is the first prong of a two-pronged defense to summary judgment. When successfully pled, Rule 56(f) results in a denial of summary judgment, a continuance of the summary judgment hearing, or “other order as is just.” When unsuccessful, the hearing moves to the second prong defense — the head-on opposition to a summary judgment under Rule 56(c).

This article explores the function, application, and analysis of Rule 56(f). The reader will learn that Massachusetts Rule 56 is akin to its federal counterpart; the analytical framework applied in the Commonwealth was adopted from First Circuit Court of Appeals precedent.

Parts II and III of this article explore the short history of Mass. R. Civ. P. 56, not only to explain its origin but also to provide context and meaning to its subpart—Rule 56(f). Parts IV through VI, respectively, identify and explore the purpose, role and application of Rule 56(f). Parts VII and VIII are dedicated to outlining the drafting requirements and applying the analytical framework of Rule 56(f). Part IX highlights the beneficial presumption when raising Rule 56(f). Part X, the conclusion, urges trial lawyers to consider Rule 56(f) as a preemptory challenge to a motion for summary judgment and to include a Rule 56(f) proffer along with their substantive opposition to a motion for summary judgment.

II. The Short History of Massachusetts Rule 56

The Massachusetts Rules of Civil Procedure became effective in 1974. Before the adoption of Massachusetts Rule 56, only a narrow class of contract actions could be disposed of prior to trial. All other contested civil litigation matters awaited an outcome by trial regardless of the level of factual dispute.

Rule 56 provides the parties a tool to resolve litigation when there is no genuine issue as to any material fact. Where there is no dispute as to the facts, the parties may then move the court for adjudication of the purely legal questions remaining. The opposing party may preclude summary judgment by raising a genuine issue of material fact requiring a trial on the merits or by challenging the legal grounds asserted.

The aim of Rule 56 is “to avoid delay and expense of trials in cases where there is no genuine issue of fact.” Savings to the differences between current Rule 56(d) and former Rule 56(f) are purely stylistic. See Fed. R. Civ. P. 56 advisory committee’s note; see also Godin v. Schencks, 629 F.3d 79, 90 n.19 (1st Cir. 2010). Consequently, the case law developed under the earlier version remains authoritative … .


Id.


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3. C.B. Trucking v. Waste Mgmt., 137 F.3d 41, 44 (1st Cir. 1998) (citing Resolution Trust Corp. v. North Bridge Assoc., 22 F.3d 1198, 1203 (1st Cir. 1994)).
4. Greaney, supra note 2, at 125; see also Phelps v. MacIntyre, 397 Mass. 459, 461 (1986) (discretion to deny summary judgment permits case to develop).
5. Greaney, supra note 2, at 126-27 (judicial discretion affords erring on the side of caution).
7. See Jones v. Secord, 684 F.3d 1, 5 (1st Cir. 2012) (Federal “Rule 56(d) was formerly Rule 56(f). This change in nomenclature is unimportant; the textual
parties and the judicial system as a whole is further provided by means of partial summary judgment. For example, partial summary judgment may be appropriate in a tort matter on the issue of liability leaving only the factual dispute of damages for trial.13

The Supreme Judicial Court enthusiastically welcomed Massachusetts Rule 56 shortly after its adoption:14

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.”15

The court stressed the importance of developing Massachusetts case law that relies upon the language of Rule 56. The court warned that “[a] body of law has developed under the Federal counterpart to our Rule 56 which we think has generated some misunderstanding regarding summary judgment…. In a large sense [summary judgment] has been the victim of its own overwhelming popularity.”16

The rule is practical; it does not require absolute absence of factual doubt.17 The substance of Rule 56 precedent must be considered; with regard to the denial of summary judgment, interlocutory relief is limited18 and post-trial relief offends the policy behind Rule 56.19 Therefore, the bulk of appellate precedent focuses upon cases overturning summary judgment.20

The Supreme Judicial Court warned that the power of Rule 56 may not be readily apparent in federal precedent:

Opinions denying (motions for summary judgment) give an inaccurate impression that the rule is not really usable. … One undesirable consequence of the multitude of cases applying the rule is that too often … courts have looked, not to the rule itself, but to colorful glosses upon it which have developed in the reported opinions, as that it does not provide for “trial by affidavit” and that motions under the rule are to be denied whenever there is “the slightest doubt” as to the facts. Another undesirable consequence has been that opinions granting motions for summary judgment are routine and little noticed, while opinions denying such motions are likely to contain more quotable language, and to be widely regarded as controlling precedents.21

“Despite the court’s solid endorsement, Rule 56 was not an overnight success.”22 As of 1980, an appeal in the Massachusetts appellate courts concerning summary judgment was more likely reversed than affirmed.23 The likely reason for this result was “that the requisites of Rule 56 might not yet have been fully comprehended by the bar and the trial courts… presumably with education the problem would cure itself over time.”24 As Justice Greaney observed in his thoughtful overview:

The court’s early caution in applying the rule is completely understandable. Granting summary judgment resolves important and substantive issues, or disposes of a party’s entire case, without a trial. In a judicial system devoted to the adversary process, where notice and opportunity to be heard are essential to due process, it is not surprising that many judges at first looked warily at a procedure designed to eliminate trials in particular cases or to reduce the issues in cases that go to trial.25

With time, summary judgment became accepted as a useful tool in resolving cases where no genuine issue of material fact exists and all that remained were issues of law.26 In 1986 the United States Supreme Court trilogy of Matsushita,27 Anderson,28 and Celotex29 changed the landscape of summary judgment in the federal system. This trio embraced the use of Federal Rule 56 to dispose of cases before trial where appropriate “to secure the just, speedy and inexpensive determination of every action.”30 After almost fifty years in federal practice, Federal Rule 56 was now friendlier to the moving party.31

Massachusetts noted, but was slow to embrace, the new federal

16. Id. at 554.
17. Id. at 555.
18. See 28 U.S.C. §1292 (interlocutory appeals); Will v. Hallock, 546 U.S. 345, 349 (2006) (collateral doctrine rule as the narrow exception to final appeal under 28 U.S.C. §1291); Maddocks v. Ricker, 403 Mass. 592, 597-98 (1988) (“As a general rule, there is no right to appeal from an interlocutory order unless a statute or rule authorizes it…. [A] long-standing exception to the general rule [is the doctrine of present execution under which an immediate appeal is appropriate] if an interlocutory order will interfere with rights in a way that cannot be remedied on appeal ….” (citations omitted)).
19. Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 126 (1986) (“[A] majority of jurisdictions do not allow the denial of motions for summary judgment to be reviewed on appeal after a trial on the merits. We think such a rule is sound. Accordingly, we hold that the denial of motions for summary judgment and partial summary judgment will not be reviewed on appeal after a trial on the merits. The purpose of summary judgment is to bring litigation to an early conclusion without the delay and expense of a trial when no material facts are at issue, and it goes without saying that that purpose cannot be served after the case has gone to trial. The merits of a claim are better tested on appeal on the record as it exists after an evidentiary trial than on the record in existence at the time the motion for summary judgment was denied.” (citation omitted)).
21. Id. at 554-55 (citations omitted, parentheses in original).
22. Greaney, supra note 2, at 25.
23. Id. (citing R.F. McCarthy & P.M. Cronin, Summary Judgment in Massachusetts, 65 Mass. L.Q. 61, 66 (1980)).
25. Id. at 26.
27. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (5-4 decision) (White, Brennan, Blackmun, Stevens, JJ., dissenting) (once a moving party has met its burden, the nonmoving party must prove a genuine and plausible factual dispute exists).
29. Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (5-4 decision) (White, J. concurring) (Burger, CJ., Brennan, Blackmun, Stevens, JJ., dissenting) (movant need not disprove an element for which nonmovant has burden at trial; movant may need only show that nonmovant lacks evidence sufficient to support his burden at trial).
30. See id. at 327 (“Summary judgment procedure is … an integral part of the Federal Rules as a whole ….”) (citing Fed. R. Civ. P. 1)).
Summary judgment was still difficult to obtain under Massachusetts Rule 56; presumably judges were denying relief “when there was the ‘slightest doubt’ as to the facts.” This situation soon changed as Massachusetts summary judgment case law matured beginning in 1991.

The landmark case of Kourouvacilis changed the landscape of summary judgment under Massachusetts Rule 56 by expressly adopting the Celotex standard. Kourouvacilis displaced Community National Bank, which until that point placed the trial burdens of both parties upon the shoulders of the party moving for summary judgment to prove the absence of a genuine issue as to any material fact. The moving party was now entitled to relief under the Celotex-Kourouvacilis doctrine when the nonmoving party had no reasonable expectation of proving an essential element of its case for which it bore the burden at trial.

One year later the Supreme Judicial Court expanded upon Kourouvacilis in Williams v. Hartman. Under Kourouvacilis, the moving party to summary judgment was required to reference materials listed in Rule 56(c) (i.e., “the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any…”). In Williams, the court expanded the permissible source of reference materials to include an admission made by counsel at oral argument. “Thus, for the purposes of the Celotex-Kourouvacilis doctrine, the court adopted a rule similar to that which had been established in such ordinary summary judgment cases as White v. Peabody Construction Co. ….”

Massachusetts case law regarding summary judgment continues to evolve. In W.R. Grace & Co. v. Maryland Casualty Co., the nonmoving party to summary judgment was permitted to rely upon reference materials beyond those listed in Rule 56(c), namely attachments to the memorandum in opposition to the motion for summary judgment.

Grace sued four of its insurers "based on their failure to defend or pay defense costs and to indemnify Grace for the settlement of a lawsuit filed against Grace in [Federal District Court]." Maryland Casualty had denied coverage for injuries caused by Grace’s negligent disposal of chemicals. Furthermore, they claimed that Grace was judicially estopped from seeking coverage during the 1963 to 1973 policy term because Grace’s defense in Federal Court was that chemical contaminants could not have reached the water supply before the wells closed in 1979.

The trial court allowed Maryland Casualty’s motion for summary judgment, reasoning that:

Grace failed to controvert Maryland’s verified allegations that none of the injuries of the Anderson claimants occurred during Maryland’s policy periods of 1963 to 1973. … Since Grace had the burden of proving coverage under the Maryland policies and had not done so, Maryland was entitled to summary judgment as matter of law.

The Appeals Court disagreed:

Grace had filed a memorandum in opposition to Maryland’s motion for summary judgment to which were attached a number of documents including a copy of the fourth amended complaint in the Anderson action and the verdict slip. That complaint alleged that as early as 1965 Grace deposited contaminants at a site adjacent to two wells which provided the plaintiffs with their domestic water supply between 1964 and 1979; that the contaminants migrated into the aquifer which supplied these wells; and that the ingestion of the contaminated water caused the plaintiffs or their decedents to develop leukemia, the injuries for which the plaintiffs sought recovery against Grace. Of the plaintiffs named in the complaint, three were alleged to have been born and diagnosed as having leukemia between 1963 and 1973. These allegations were sufficient to establish a material question of fact as to whether the contamination occurred during Maryland’s policy periods and were sufficient to defeat summary judgment for Maryland.

As a result, attachments to a party’s opposition to summary judgment were deemed permitted reference materials beyond those listed in Rule 56(c).

In Smith v. Massimiano, where the moving party did not meet its burden under Rule 56(c), the nonmoving party had no obligation to present countervailing proof.

In 2008, the court in Alphas Company v. Kilduff adopted the First Circuit analytical framework applied to Federal Rule 56(f).

The question raised in Alphas Company was whether the trial judge abused his discretion in granting summary judgment against Alphas Company rather than allowing its request for continuance
under Rule 56(f). Although prior cases identified various requirements for obtaining relief under Rule 56(f), the Appeals Court adopted the uniform analytical framework articulated by the First Circuit. The court proceeded to employ each of the five requirements of the Rule 56(f) analytical framework. Parts VII and VIII of this article are dedicated to outlining the drafting requirements and applying the Rule 56(f) analytical framework.

In adopting Federal Rule 56(f) precedent, the court in Alphas Company observed that “the Massachusetts Rules of Civil Procedure were patterned on the Federal Rules of Civil Procedure, and the wording of our rule 56(f) is identical to its federal counterpart; it is well established that we may accordingly take guidance from the relevant federal jurisprudence in construing the rule.”

The 2010 amendment to Federal Rule 56 affected subpart (f); however, the “change in nomenclature is unimportant; the textual differences between current Rule 56(d) and former Rule 56(f) are purely stylistic.” “The substance of the rule has not materially changed.” Consequently, the case law developed under the earlier version remains authoritative …” Hence, interpretation of Massachusetts Rule 56(f) benefits from the ongoing development of its federal counterpart—albeit under the designation of Federal Rule 56(d).

III. RULE 56 AND THE GENUINE ISSUE OF MATERIAL FACT

Rule 56 requires that the trial judge first determine whether there is a genuine issue as to any material fact. “For this purpose, ‘genuine’ means that the evidence is such that a reasonable fact finder could resolve the point in favor of the nonmoving party, and ‘material’ means that the fact is one that might affect the outcome of the suit under the applicable law.”

Not all facts in a case are genuine and material for purpose of summary judgment. When evaluating a Rule 56 motion, “the existence of disputed facts is consequential only if those facts have a material bearing on disposition of the case. The substantive law will identify whether a fact, in the context of the case, is material.”

Summary judgment is appropriate only when no genuine issue of material fact exists. Summary judgment is akin to a motion for directed verdict, the distinction being timing.

The first responsibility of the trial judge is to “be careful not to usurp the function of the fact finder by passing on the credibility of the witnesses or evaluating the weight of the evidence.” The issue is whether the nonmoving party to summary judgment, viewing all reasonable assumptions and inferences in its favor, can prevail at trial.

Summary judgment is not appropriate if founded upon the greater plausibility of the moving party’s facts or case for trial; that is the role of the fact finder. Summary judgment is also inappropriate as a means to save the time and expense of trial.

When a motion for summary judgment is made and supported, the adverse party must offer an affirmative defense to avoid judgment. “Summary judgment is not a casual procedure. It is a dispositive proceeding where casual or supine reaction to a moving party’s affidavits is not a minor error.”

IV. RULE 56(f): THE INABILITY OF AN OPPOSING PARTY TO RESPOND

The standard for summary judgment is simple: viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.” The typical response is defensive—to allege, by a specific factual showing, the existence of a genuine and triable issue of material fact.

Rule 56(f) provides the nonmoving party with a preemptory opportunity to challenge the timing of summary judgment before the court moves on to a hearing on the application for judgment. In practice, Rule 56(f) is addressed and resolved immediately prior to, or in concert with, the summary judgment hearing. As noted above, if the Rule 56(f) motion is resolved in favor of its proponent, then the court may refuse the motion for judgment, order a continuation of the summary judgment proceeding, make any other just order, or some combination thereof. If the Rule 56(f) bid is unsuccessful then the hearing proceeds on the motion for summary judgment, where the nonmoving party may still raise a genuine issue of material fact as well as argument on any legal issue posed.
The most obvious application of Rule 56(f) is at the beginning of an action. Under Rule 56, a defendant may seek summary judgment “at any time,” and a claimant may seek summary judgment after “the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party ….” At this very early stage of litigation, the nonmoving party to summary judgment has most likely not had any meaningful discovery or a “fair opportunity to determine what facts, if any, are open to dispute. The problem … is particularly difficult where the facts are within the exclusive knowledge of the moving party. Rule 56(f) was promulgated to protect the nonmovant in such a situation.

Rule 56(f) may be utilized whenever a party has moved for summary judgment. The intent of Rule 56(f) is to provide an “escape hatch” for a party who genuinely requires additional time to marshal facts essential to justify its opposition. The Rule requires that its proponent be vigilant in handling the case prior to requesting relief, while at the same time protects its proponent from premature or hasty summary judgment.

V. THE ROLE OF RULE 56(f) DURING SUMMARY JUDGMENT

Rule 56(f) is designed to work hand-in-hand with Rule 56(c), and to provide the nonmoving party to summary judgment an additional interval in which to marshal facts essential to mount an opposition. As a result, a Rule 56(f) motion is litigated under the umbrella of a Rule 56 hearing.

As the nonmoving party to summary judgment, the Rule 56(f) proponent who seeks a continuance is entitled to the benefit of a favorable viewpoint and all inferences therefrom. This benefit is in stark contrast to the equal footing on which the parties would otherwise find themselves under the highly discretionary general rule for continuances set forth in Rule 40(b).

Invoking Rule 56(f) begins with a timely affidavit of justification. The gateway to Rule 56(f) relief is a prerequisite proffer as to why relevant facts essential to justify opposition are not currently available. Such proffers must not be vague, based upon unreliable, gauzy generalities or be an exploratory vehicle seeking delay to discover a right of action. The purpose of Rule 56(f) is to provide limited discovery on specific legal issues, as opposed to the broad discovery provided under Rule 26. If the limited discovery requested is irrelevant to raising a genuine issue of material fact then a continuance is unwarranted.

The Rule 56(f) proffer should state “some plausible basis for the party’s belief that specified ‘discoverable’ material facts likely exist …[,] some realistic prospect that the facts can be obtained within a reasonable (additional) time, and will, if obtained, suffice to engender an issue both genuine and material.” The proffer must also provide a showing of due diligence and “demonstrate good cause for failure to have conducted the discovery earlier.”

VI. THE APPLICATION OF RULE 56(f) DURING SUMMARY JUDGMENT

Rule 56(f) is a provision permitting the deferment of summary judgment until such time as the nonmoving party has conducted suitable discovery so as to address facts essential to justify opposition by affidavit. Upon receipt of a motion for summary judgment there are a myriad of questions that may arise which are pertinent to Rule 56(f) relief. Which facts are relevant to the summary judgment motion? Are there relevant facts that have not already been discovered? Are those facts obtainable? Will they provide a defense to summary judgment? Will privilege be raised in opposition to summary judgment?

Relevancy, in the context of Rule 56(f), is founded upon “material fact.” The substantive law applicable to the issues addressed at summary judgment defines which facts are “material” and which facts are immaterial for Rule 56 purposes. Not all facts material to a litigated matter need be material at summary judgment. This is evident when summary judgment is sought, for example, on a partial basis or purely upon procedural grounds (such as a statute of limitation or jurisdiction).

In the Rule 56(f) context, not only must there be a demonstrable hole in the factual record, but the prior failure to obtain, or produce, the necessary facts for opposition must be justifiable. The spirit and letter of Rule 56(f) require due diligence. "Rule 56(f) is designed to minister to the vigilant, not to those who slumber.
upon perceptible rights."\textsuperscript{95} The rule is available to those who have been diligent \textsuperscript{96} "both in pursuing discovery before the summary judgment initiative surfaces and in pursuing an extension of time thereafter."

The domain of opposing facts is not limited to that in the possession or under the control of the party moving for summary judgment. Facts may be sought from any identifiable source (e.g., identified by name, function, or purpose). That source may be a party to the action, a witness, an expert, etc.

A particularly bothersome issue arises when privilege is asserted in the context of summary judgment. Asserting privilege in a motion to continue without an offer of proof is insufficient.\textsuperscript{97} When asserting privilege "at the stage of the case designed to ferret out and dispose of unsubstantiated claims, there is a need for sufficient specificity … to permit a judge weighing a request … a remedy which protects the rights of all parties and accommodates the policies underlying the privilege and the rule."\textsuperscript{98}

For example, in the civil case of United States Trust Co. v. Herriott,\textsuperscript{99} a party asserted its Fifth Amendment privilege against self-incrimination as an opposition to summary judgment. The Trust Company sued Herriott for payment on two promissory notes.\textsuperscript{100} Herriott was under grand jury investigation at the time of the summary judgment motion; among other matters, the investigation included the loans in dispute.\textsuperscript{101} Herriott asserted his Fifth Amendment privilege against self-incrimination in a Rule 56(f) motion for which no affidavit was included.\textsuperscript{102} As a result, Herriott failed to properly invoke Rule 56(f); furthermore, he did not file an opposition to summary judgment.\textsuperscript{103} In the end, summary judgment entered in favor of the Trust Company, and was upheld on appeal.\textsuperscript{104}

There was no doubt as to Herriott's Fifth Amendment privilege, but that privilege did not require the court to suspend the civil matter.\textsuperscript{105} In the civil context, the assertion of privilege requires a balancing of equities; the potential harm to the party asserting privilege if compelled to respond verses the prejudice to the opposing party.\textsuperscript{106}

Other important lessons are gleaned from Herriott. First, the request for continuance under Rule 56(f) must be for a reasonable period of time; Herriott's request for an open-ended continuance would have postponed the civil action indefinitely.\textsuperscript{107} Second, Herriott made no request for an in-camera viewing of privileged materials and an order of impoundment; the judge is not obligated to accept the subjective impressions of a litigant.\textsuperscript{108}

"To avoid summary judgment, an opposing party may not rely upon his pleadings or bald conclusions but 'must set forth specific facts showing that there is a genuine issue for trial.'\textsuperscript{109} Without the opportunity to balance the parties' competing interests, the court's discretionary power to delay or deny summary judgment is limited.\textsuperscript{110}

Civil litigants are also on notice that asserting privilege can be a disadvantage; that an adverse inference can be drawn against them.\textsuperscript{111} In the civil context, the parties are on relative equal footing, therefore, "one party's assertion of [privilege] should not obliterate another party's right to a fair proceeding."\textsuperscript{112}

VII. DRAFTING REQUIREMENTS

The Rule 56(f) proffer need not cite Rule 56(f); however, it must place the court on notice.\textsuperscript{113} The party invoking the rule must, at a minimum, include an affidavit and request that the court refrain from allowing summary judgment until specific additional discovery can be conducted.\textsuperscript{114} This treatment is akin to converting a motion to dismiss under Rule 12(b) into one for summary judgment—the parties are placed on notice and provided reasonable opportunity to present all material pertinent to Rule 56.\textsuperscript{115}

Rule 56(f) is the precursor to, not a replacement of, a substantive opposition to summary judgment.\textsuperscript{116} If Rule 56(f) relief is denied, then the motion for summary judgment will be addressed immediately.

Although not required for Rule 56(f) relief, the filing of a substantive opposition to summary judgment is a prudent contingency. It is particularly important when, even if Rule 56(f) relief is granted, partial summary judgment on the remaining issues may be warranted.

From United States Trust Co. v. Herriott\textsuperscript{117} we learn that relying solely upon a continuance can be fatal when that request is denied. Upon denial, the matter transitioned immediately into a summary judgment hearing.\textsuperscript{118} With no substantive opposition filed under Rule 56(c), Herriott was left fully exposed to summary judgment.\textsuperscript{119}

Rule 56(f) matters are considered "delayed discovery cases."\textsuperscript{120}
The skeleton of the motion should comport with the analytical framework to be applied, which consists of five inherently flexible but necessary considerations:

1. authoritativeness;
2. timeliness;
3. good cause;
4. utility; and,
5. materiality.\(^\text{121}\)

In the context of Rule 56(f), the presence of an introductory foundation is often overlooked and underutilized. The proffer should clearly define the supporting documents which are affidavits based on firsthand knowledge (authoritative) and why the motion is timely (timeliness). Doing so verifies that these two components of the analytical framework—that are solely within the control of the drafter—have been met.

The meat of the Rule 56(f) argument is threefold: good cause for not discovering the specific facts sooner (good cause); a plausible basis for believing that the specified facts exist and are obtainable within a reasonable time frame (utility); and, a showing that the discovery sought is capable of defeating summary judgment (materiality).\(^\text{122}\)

Adding flesh to this skeleton requires knowledge of how the analytical framework is applied to Rule 56(f) proffers.

VIII. APPLYING THE ANALYTICAL FRAMEWORK

The standards that apply to a Rule 56(f) affidavit are lax in comparison to those of Rules 56(c) and 56(e).\(^\text{123}\) Like Rule 56 generally, Rule 56(f) favors the nonmoving party to summary judgment. This policy favors construing Rule 56(f) motions generally, “holding the parties to the rule’s spirit rather than its letter.”\(^\text{124}\)

 “[A] Rule 56(f) proffer need not be presented in a form suitable for admission as evidence at trial, so long as it rises sufficiently above mere speculation.”\(^\text{125}\) This lesser standard is appropriate to Rule 56(f) because it is “a complement to other provisions contained in Rule 56, allowing the opposing party to explain why he is as of yet unable to file a full-fledged opposition, subject to the more harrowing evidentiary standard that governs under Rules 56(e) and 56(c).”\(^\text{126}\)

Step 1: Is the Proffer Authoritative?

Rule 56(f) is invoked by the proffer of an authoritative statement.\(^\text{127}\) The rule requires substantiation via the filing of at least one “affidavit based on firsthand knowledge.”\(^\text{128}\) It should include:

- good cause for not discovering the facts sooner;
- a plausible basis for believing that the requested discovery exists and is susceptible to collection within a reasonable time frame; and,
- an indication as to how the requested discovery would influence the outcome of the pending summary judgment motion.\(^\text{129}\)

The written statement must be either sworn before an officer authorized to administer an oath or verified under the penalties of perjury.\(^\text{130}\)

Failing to file at least one affidavit in support of a request for Rule 56(f) relief is typically fatal.\(^\text{131}\)

A narrow exception to fatality was discussed in \textit{Paterson-Leitch Co. v. Mass. Municipal Wholesale Elec. Co.}\(^\text{132}\). Although the proponent of Rule 56(f) is provided leniency,\(^\text{133}\) “he departs from the plain language of the rule at his peril. … When a departure occurs, the alternative proffer must simulate the rule in important ways.”\(^\text{134}\)

Extreme cases could result in the realization that additional discovery is needed at the time of oral argument—but no later.\(^\text{135}\) The proffer need not be an affidavit, so long as it is authoritative, “say, by the party under penalty of perjury or by written representations of counsel subject to the strictures of Fed. R. Civ. P. 11—and filed with the court.”\(^\text{136}\)

The court in \textit{Paterson-Leitch Co.} distinguished the First Circuit case of \textit{Herbert v. Wicklund} from the Fifth Circuit case of \textit{Littlejohn v. Shell Oil Co.}\(^\text{137}\). In both cases the proponent of Rule 56(f) failed to provide an affidavit; they each provided a letter to the court.\(^\text{138}\) But in \textit{Littlejohn} the letter was docketed, thus subject to Fed. R. Civ. P. 11, and therefore authoritative under Rule 56(f).\(^\text{139}\)

In \textit{Herbert}, the Rule 56(f) proffer consisted of “a loose collection of miscellany … [including] an undocketed letter from counsel to the court’s clerk requesting a delay pending certain further
Given the leniency afforded Rule 56(f) proffers, the term “good cause” should be interpreted as a legally sufficient reason rather than the more stringent standard of excusable neglect. The excusable neglect standard addresses three components:

- timeliness in addressing the deficiency;
- exceptional circumstances justifying extraordinary relief; and,
- absence of unfair prejudice to the opposing party.

With the exception of timeliness, these factors are excessive and incongruent with the lenient policy of Rule 56(f). That said, the rule still has bite; to benefit from its protection, a party must provide a sufficient factual showing.

First, the facts sought must be specifically identifiable, to a level of case-specific granularity, and must be material to the motion for summary judgment. At summary judgment, the court’s duty is to ferret out and dispose of unsubstantiated claims; therefore, sufficient specificity is required in order to protect the rights of all parties. A general statement as to the need for additional discovery is grossly insufficient, so too is an unsupported, speculative assertion of unspecified facts. Specificity is required in order to opine as to the prior efforts to uncover that which is now requested.

For example, in C.B. Trucking v. Waste Mgmt., the trucking company brought suit alleging, among other things, that Waste Management had illegally attempted to monopolize business through predatory pricing. Waste Management filed a motion to dismiss for failure to state a claim; the court requested affidavits then converted the matter to a summary judgment proceeding. C.B. Trucking’s request for Rule 56(f) relief was denied; summary judgment entered.

C.B. Trucking’s Rule 56(f) affidavit made reference to only one discovery need, to allow them discovery on the issue of predatory pricing. This non-specific request was deemed insufficient for failure “to identify any material evidence that it was likely to uncover if it was given additional time to conduct discovery.” The court opined that a party seeking Rule 56(f) relief must proffer more than speculative assertions that the opposing party possesses unspecific facts which are necessary to develop a defense to summary judgment.

A request for relief under Rule 56(f) must be filed in a timely manner. Rule 56(f) should be invoked “within a reasonable time following receipt of a motion for summary judgment,” however, the rule does not state a fixed filing deadline. Rule 56 does provide guidance; affidavits must be filed at least one day prior to the summary judgment hearing.

In addition to complying with timing under Rule 56, a party must comply with the local rules of court. For example, the parties must comply with Massachusetts Superior Court Rule 9. As with the element of an authoritative proffer, this element of the Rule 56(f) analytical framework is completely within the proponent’s control—why invite vulnerability?

Step 2: Is the Proffer Timely?

A request for relief under Rule 56(f) must be filed in a timely manner. Rule 56(f) should be invoked “within a reasonable time following receipt of a motion for summary judgment,” however, the rule does not state a fixed filing deadline. Rule 56 does provide guidance; affidavits must be filed at least one day prior to the summary judgment hearing.

In addition to complying with timing under Rule 56, a party must comply with the local rules of court. For example, the parties must comply with Massachusetts Superior Court Rule 9. As with the element of an authoritative proffer, this element of the Rule 56(f) analytical framework is completely within the proponent’s control—why invite vulnerability?

Step 3: Does the Proffer Provide Good Cause?

Good cause requires a showing of inability to complete discovery, or the failure to have discovered facts, prior to summary judgment.
judgment. 165
Second, the spirit and letter of Rule 56(f) require due diligence. 166
The rule is available to those who have been diligent “both in pursu-
ing discovery before the summary judgment initiative surfaces and in
pursuing an extension of time thereafter.” 167 Rule 56(f) is
designed to minister to the vigilant, not to those who slumber upon
perceptible rights.” 168 Good cause seeks an answer as to why reasonable-
diligence did not result in the discovery of that which is now
sought.169

A few examples of good cause are when:
• A valid claim of privilege is asserted as a defense to summary
judgment and that privileged information is sufficient to war-
rant a denial of summary judgment.170
• There was insufficient time for discovery due to the early stage
of litigation.171
• There were newly surfaced factors which, by due diligence,
could not have been discovered in time.172
• The court imposed an impediment to discovery that impacted
the discovery sought.173
• The discovery that was sought was not provided.174

Due diligence was also an issue in C.B. Trucking v. Waste Mgmt.175 “Rule 56(f) relief was also unjustified because C.B. Truck-
ing was not diligent in pursuing discovery.” 176 During the twenty-
two months of litigation, it conducted no discovery on the summary
judgment issue of predatory pricing.177 As a result, it was in no posi-
tion to request Rule 56(f) relief.

Step 4: Does the Proffer Provide Utility?

Utility is the presentation of “a plausible basis for a belief that
discernable materials exist that would likely suffice to raise a genu-
ine issue of material fact, and, thus, defeat summary judgment.”178
Utility requires a credible belief that specific requisite facts neces-
sary to oppose summary judgment exist and are discoverable. “For
purposes of achieving this benchmark, a Rule 56(f) proffer need not
be presented in a form suitable for admission as evidence at trial,
so long as it rises sufficiently above mere speculation.”179 “Although
Rule 56 sets out stricter standards for materials offered on the merits
of a summary judgment motion, those standards do not apply to the
proffers under Rule 56(f).”180 If, however, the facts sought are privi-
leged or are not otherwise discoverable, even with a continuance,
then no utility exists.

The case of Commonwealth v. Fall River Motor Sales, Inc. provides
an example where utility was lacking.181 In Fall River Motor Sales,
the Attorney General commenced a civil contempt action for the failure
of Fall River Motor Sales to comply with a prior judgment prohibit-
ning misleading advertisement.182

The Commonwealth moved for, and achieved, partial summary
judgment on the issue of contempt.183 The statute provided for a
civil penalty of ten thousand dollars for each violation.184 The
Commonwealth then moved for summary judgment on the issue of sanc-
tions seeking a civil penalty of thirty thousand dollars due to the
three separate publications of the misleading advertisement.185 Fall
River Motor Sales sought further discovery to uncover whether the
penalty sought by the Commonwealth “was grossly disproportion-
ate when compared to the Commonwealth’s civil penalty policy in
other cases … [and to] assist the judge in setting the amount of the
civil penalty.”186

The hearing judge denied further discovery and allowed sum-
mary judgment in favor of the Commonwealth, assessing a penalty
of twenty thousand dollars.187 Fall River Motor Sales appealed and
the judgment was affirmed.188 Fatal to Fall River Motor Sales was
the discretion of the hearing judge to find an absence of utility in
the requested discovery.

First, “much of the discovery sought … appeared to be privileged
as work product and would not have been allowed even if a con-
 tinuance was granted.” 189 The discovery requested “appeared to have
been prepared for litigation … and to contain litigation strategies
and policies [of the Attorney General’s Office].”190

Second, “the discovery seeking the factual basis of the
Commonwealth’s claim … [was] already in the defendant’s possession. … Any additional discovery on this point would be of marginal significance.”

Fall River Motor Sales believed discovery was required to uncover facts necessary to oppose summary judgment; however, that discovery lacked utility under the Rule 56(f) analytical framework, for it was either not discoverable or already in the possession of Fall River Motor Sales. Hence the court’s statement: “One common reason for the denial of a continuance in [the Rule 56(f)] context is the irrelevance of further discovery to the issue being adjudicated in summary judgment.”

Step 5: Does the Proffer Provide Materiality?

Materiality requires that the facts sought are “foreseeably capable of breathing life into [the] claim or defense;” that is, potentially affecting the outcome of summary judgment.

The substantive law defines which facts are material and which facts are immaterial. A fact is “material” if it might affect the outcome. A dispute about a material fact is “genuine” when a reasonable jury could find for the nonmoving party.

Unless it can be said that the Rule 56(f) proponent’s merits-related arguments are plainly unmeritorious and that the discovery sought is unrelated to the issue disputed, then the Rule 56(f) motion passes the materiality test.

Under Rule 56(f), the threshold for materiality is low. “[A] fact may be material for some purposes as long as there is ‘any reasonable likelihood’ that it could affect the outcome.”

This treatment is consistent with the precept favoring the nonmoving party at summary judgment: “Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment.” It is also consistent with the policy of Rule 56(f), to enforce “the rule’s spirit rather than its letter.”

IX. Rule 56(f) Favors its Proponents

Like Rule 56 generally, Rule 56(f) favors the nonmoving party to summary judgment. The court may relax, or even excuse, one or more of the five considerations of the Rule 56(f) analytical framework. “[T]hough a trial judge enjoys considerable discretion regarding those factors, and though all need not be present, when all five requirements are satisfied, … a strong presumption arises in favor of relief.” This policy favors construing Rule 56(f) motions generously, “holding the parties to the rule’s spirit rather than its letter.”

The party seeking Rule 56(f) relief controls the procedural considerations of authoritativeness and timeliness. In essence, the party seeking Rule 56(f) relief will determine the fate of these criteria by correctly adhering to the first two steps of the analytical framework.

When arguing good cause, utility, and materiality, it is important to coordinate these three fiercely interrelated substantive considerations. For example, there is no use in arguing good cause for the delayed discovery of a factual issue which provides no utility to the defense at summary judgment, or if it is not material to the outcome of summary judgment.

It is also important to recognize and acknowledge that the stricter standards of Rule 56 do not apply to proffers under Rule 56(f).

For example, the affidavit requirements of Rule 56(e) do not apply to Rule 56(f).

Unlike proffers under Rule 56(e), affidavits under Rule 56(f) are not required to meet the standards for admission as evidence at trial.

Rule 56(e) requires that supporting and opposing affidavits to summary judgment “shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” On the other hand, “a Rule 56(f) proffer need not be presented in a form suitable for admission as evidence at trial, so long as it rises sufficiently above mere speculation.”

This is as it should be, for Rule 56(f) is best understood as a complement to other provisions contained in Rule 56, allowing the opposing party to explain why he is as of yet unable to file a full-fledged opposition, subject to the more harrowing evidentiary standard that governs under Rules 56(e) and 56(c). Unlike affidavits under Rule 56(e), an affidavit under Rule 56(f) may rely, in part, on inadmissible hearsay. However, while the evidentiary standards are significantly lower than those under Rule 56(e), a Rule 56(f) proffer must rise sufficiently above mere speculation.

A Rule 56(f) affidavit exhibiting mere speculation arose in the case of Carney v. United States Dept of Justice. Carney was a doctoral student researching “the role of the DOJ in the federal judicial
selection and confirmation process." He forwarded requests to the DOJ under the Freedom of Information Act (FOIA), which were denied for various reasons. Carney sued the DOJ to compel compliance under the FOIA.

Nearly a year later the DOJ moved for summary judgment. In response, Carney filed several motions, including one seeking Rule 56(f) relief; he did not file an opposition to summary judgment. In the end, summary judgment was awarded to the DOJ and Carney’s complaint was dismissed.

The thrust of Carney’s Rule 56(f) proffer was “that the DOJ [ ] concealed the existence of records and mischaracterized other records in order to avoid disclosing them to him.” In support of his proffer, Carney alluded to over one hundred interviews … with numerous individuals, including current and former DOJ officials, White House personnel, Senators and their staffs, and others, along with other research he had performed, [leading him to believe] that the DOJ improperly had classified numerous documents as exempt [under the FOIA] and had failed to disclose the existence of many other documents which should have been provided to him.

In his proffer, “Carney [did] not identify, by name, title or otherwise, any of the individuals he interviewed, nor [did] he point to any of the published sources on which he supposedly relied.”

Arguing that “his sources spoke to him in confidence … [did not bolster the] complete lack of tangible proof [concerning] his allegations.” The court recognized that “[Carney] was not required to present evidence that would be admissible at trial, but something more than his bare allegations is needed. Without factual support, Carney’s allegations are grounded in mere speculation … .”

X. Conclusion

Rule 56(f) is a powerful tool available to the nonmoving party to a motion for summary judgment. It is a procedural rule that requires precise attention to detail; the proffer must be authoritative and timely. These first two requirements under the Rule 56(f) analytical framework are like mushrooms—abundant in opportunity but easily fatal. The remaining three requirements of the Rule 56(f) analytical framework offer a guide to applicability—good cause, utility, and materiality.

The Rule 56(f) analytical framework should be at the top of a trial lawyer’s summary judgment defense checklist, to evaluate whether Rule 56(f) is appropriate in tandem with an opposition to summary judgment.

Like Rule 56 generally, Rule 56(f) can provide a strong presumption for relief in favor of the party opposing summary judgment. However, that relief must be earned. Relief is not provided to those who slumber. It is not a last minute savior for those who unreasonably failed to act sooner. It is a powerful tool available to those who find themselves forced to oppose a premature motion for summary judgment; premature being case relative. If an opponent can procedurally move for summary judgment then the potential of a Rule 56(f) defense exists.

While society is governed by the rule of law, our work as litigators is governed by the rules of procedure. The fundamentals of legal persuasion are rooted in the understanding and application of those rules. The next time a summary judgment motion crosses your desk, why not consider Rule 56(f) as a potent arrow in your quiver?

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215. Id. at 809.
216. Id. at 810-11.
217. Id. at 811.
218. Id.
220. Id. at 812.
221. Id. at 813.
222. Id. at 813.
223. Id. at 813.
225. Id. (citation omitted).
Massachusetts Supreme Judicial Court Clarifies the Law on Multiple Damages Under 93A for an Insurer’s Unfair Refusal to Settle Where Liability is Reasonably Clear

Rhodes v. AIG Domestic Claims, Inc.

The Massachusetts Supreme Judicial Court’s decision in Rhodes v. AIG Domestic Claims, Inc.,1 clarifies the law regarding an insurer’s liability for multiple damages for unfairly refusing to settle under Massachusetts’s unfair and deceptive trade practices statute, chapter 93A. The court held that where the carrier unfairly refuses to settle and the plaintiff prevails in the underlying case, multiple damages are based on the total amount of the underlying judgment. The case has important implications for both insurers and claimants.

Factual Background

The underlying case involved an automobile accident in which Marcia Rhodes suffered catastrophic injuries, including permanent paraplegia, after an 18-wheel tractor trailer crashed into the back of her vehicle. The trucking company had $2 million of primary coverage with Zurich American Insurance Company and $50 million of excess coverage with National Union (“AIG”).2 The Rhodes family filed suit, seeking to recover damages for Marcia’s injuries, and her husband’s and daughter’s loss of consortium.3

At a mediation, AIG offered $3.5 million, a figure that included Zurich’s $2 million of primary coverage.4 The plaintiffs rejected the offer, the case proceeded to trial, and the plaintiffs secured a judgment of $11.3 million.5 The amount of the tort judgment reflected the damages awarded by the jury ($9.412 million), prejudgment interest, and a $550,000 deduction resulting from a settlement previously reached with another party.6 Defendants appealed and AIG then offered only $7 million to settle (which included Zurich’s $2 million in coverage).7 After the plaintiffs rejected that offer, Zurich paid $2,322,995.75 and the plaintiffs filed a 93A action against Zurich and AIG.8 At that point, AIG settled the tort case by paying an additional $8.965 million.9 Having collected more than $11 million from the tort action, the plaintiffs pursued their claim for additional recovery under chapter 93A.10

In the chapter 93A case, the trial judge found that Zurich had not violated chapter 93A, but that AIG had committed willful and knowing violations of the statute both before and after trial.11 The judge concluded, however, that the pretrial violation did not cause any “actual damages” to the plaintiffs, because he concluded that the family would not have accepted a reasonable offer at that time, and would have proceeded to trial in any event.12 With respect to the post-verdict conduct, the judge awarded double damages based on loss of use of the funds, i.e., lost interest on the $8,965 million settlement from the date that AIG should have settled the case until the date of the actual settlement.13

The Supreme Judicial Court (“SJC”) upheld a factual finding that Zurich had not violated chapter 93A.14 AIG did not challenge the factual findings that it had committed willful and knowing violations of chapter 93A both before and after the verdict.15

With respect to AIG’s pretrial violation, the SJC rejected the trial judge’s rationale that AIG’s conduct had not harmed the plaintiffs.16 The court reiterated that “the plaintiffs need only prove that they suffered a loss, or an adverse consequence, due to the insurer’s failure to make a timely, reasonable offer; the plaintiffs need not speculate about what they would have done with a hypothetical offer that the insurers might have made, but in fact did not make, on a timely basis.”17 The SJC rejected the trial judge’s conclusion that the court’s decision in Hershenow v. Enterprise Rent-A-Car Company Of Boston, Inc.,18 altered that principle.19 The court did not have to resolve the causation question regarding AIG’s pre-trial conduct, however, because the plaintiffs were entitled to recover multiple damages based upon AIG’s post-verdict conduct alone.20

2. The plaintiffs filed their 93A claims against National Union and AIG Domestic Claims, Inc., National Union’s claims administrator. For convenience, the AIG defendants will be collectively referred to as AIG.
4. Id. at 490-92
5. Id. at 493.
7. Id.
8. Id.
9. Id.
10. Id.
12. Id. at 494.
13. Id.
14. Id. at 505-06.
15. Id. at 495 n.15.
17. Id. at 497 (emphasis in original).
20. Id. at 497.
The court then addressed the key issue – the measure of multiple damages where a liability insurer commits a willful or knowing violation of chapter 93A by failing to settle a claim where liability was reasonably clear, and a judgment enters against the insured in the underlying case.

**Statutory Framework**

Massachusetts General Laws chapter 176D, section 3 defines unfair and deceptive acts or practices in the business of insurance, and chapter 176D, section 3(9) lists a number of unfair claims settlement practices. The most commonly invoked provision is section 3(9)(f), which states that it is an unfair claims settlement practice to fail “to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.”

Chapter 93A, section 9 specifically provides a remedy for persons aggrieved by violations of section 9 of chapter 176D. As a result, an insurer that engages in unfair claims settlement practice as prohibited by chapter 176D, section 9 may be liable under chapter 93A, section 9. That section, in turn, allows a successful plaintiff to recover actual damages plus attorneys’ fees. In addition, if the insurer commits a willful or knowing violation of chapter 93A, the insurer may be liable for double or treble damages. A chapter 93A, section 9 defendant can avoid exposure to multiple damages by making a reasonable offer of settlement in response to a demand letter sent by the plaintiff prior to filing suit.

**Measure of Damages for Unfair Failure to Settle**

The measure of damages in a failure to settle case has important implications. Early decisions focused on the harm suffered by the claimant, namely the delay in receiving payment. Thus, in *Wallace v. American Mfrs. Mut. Ins. Co.*, the Appeals Court held that the insurer’s failure to settle had caused damages equal to the interest on the amounts that the insurer should have paid earlier. The chapter 93A damages were equivalent to the loss of use of the money that the insured should have received earlier and an insurer that committed a willful or knowing violation would be liable for double or triple the loss of use damages.

Under this interpretation, the exposure of the insurer was relatively limited. At most, an insurer would be liable for a multiple of interest.

The legislature apparently concluded that this interpretation of chapter 93A did not provide a sufficient penalty for insurers that committed willful or knowing violations of chapter 93A. In 1989, it amended both sections 9 and 11 to add the following language:

> the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.

Issues arose, however, regarding the meaning of the word “judgment.” In *Clegg v. Butler*, the SJC held that a settlement was not a “judgment” within the meaning of the amendment. As a result, when the underlying case settled prior to trial and the plaintiff pursued a chapter 93A claim against the insurer for violating chapter 176D, section 3(9)(f) by not settling the case earlier, the plaintiff was not entitled to recover a multiple of the settlement amount and instead, multiple damages were assessed using the loss of use measure of damages.

Similarly, in *Bonofgio v. Commercial Union Ins. Co.*, the SJC held that an arbitrator’s award was not a “judgment,” so that the 1989 amendment did not apply. As a result, the plaintiff who proved that the insurer committed a willful or knowing violation in connection with an arbitration was only entitled to recover a multiple of loss of use damages, rather than a multiple of the underlying arbitration award.

**Rhodes: Multiple Damages Where Judgment Enters Against the Insured in the Underlying Case**

In *Rhodes*, AIG argued that the damages should be limited to the loss of the use of the money that the plaintiffs sustained because AIG had not settled the case earlier. Under this approach, the damages would have been limited to interest on the $8,965 million settlement.

Rejecting AIG’s position, the SJC concluded that when a judgment enters against the insured in the underlying case, and the court awards multiple damages against the insurer in a subsequent chapter 93A case, the appropriate damages are the amount of the judgment, and not the loss of use of the money. As a result, AIG was liable for double the amount of the $11.3 million judgment.

AIG, invoking *State Farm Mut. Auto. Ins. Co. v. Campbell*, argued that the award was grossly excessive and violated AIG’s constitutional rights, where the United States Supreme Court held that excessive punitive damage awards violate the due process clause of the Fourteenth Amendment to the United States Constitution. The SJC rejected this argument, ruling that the award was not excessive under constitutional standards. As a preliminary matter, the court doubted that the *Campbell* analysis applied to statutory awards of multiple damages as opposed to punitive damage awards. In any event, the court concluded that the award was not excessive, reasoning that AIG’s conduct warranted the award, and that the ratio between the actual damages and the multiple damage award was not excessive. Given the court’s rationale and the result in this case,

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24. Id.
25. Id.
26. Id.
28. Id.
31. Id.
33. Id.
35. Id. at 498-502.
36. Id.
39. Id. at 503.
40. Id. at 503-04

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it is unlikely that it would ever find that a multiple damage award under chapter 93A violated due process limitations.\textsuperscript{41} The SJC rejected the plaintiffs’ claim that they were entitled to recover compensatory damages for loss of use of the money and emotional distress in addition to the multiple damage award.\textsuperscript{42} The court explained that if the plaintiff recovers multiple damages based on the judgment, they are not entitled to an additional recovery based on actual damages.\textsuperscript{43}

The court also explained that the measure of multiple damages is different if no judgment enters in the underlying case, such as when the underlying case settles before trial.\textsuperscript{44} In that situation, the measure of damages would be the loss of the use of the money for the period that the insurer failed to settle the case, and if multiple damages are awarded, the loss of use damages are multiplied.\textsuperscript{45} Furthermore, the SJC explained that the 1989 amendment only applies if multiple damages are awarded.\textsuperscript{46} If only single damages are awarded, the 1989 amendment does not apply, and the plaintiff recovers only loss of use damages.\textsuperscript{47} For example, suppose that an insurer violates chapter 93A by failing to settle a claim where liability is reasonably clear, but the insurer does not commit a willful or knowing violation. In those circumstances, the plaintiff’s chapter 93A damages would be limited to loss of use damages.\textsuperscript{48}

**Implications of Rhodes**

As the ultimate award against AIG illustrates, the court’s ruling increases a liability insurer’s potential exposure under chapter 93A significantly whenever a judgment enters against the insured in the underlying case. The decision, therefore, provides a significant incentive for insurers to settle cases prior to trial if it is possible that a judgment will enter against the insured in the underlying case.

The decision may actually provide a disincentive for plaintiffs with a chapter 93A claim who are considering a settlement of the underlying case prior to trial. The potential 93A recovery is much greater if the case proceeds to trial and the plaintiff recovers a judgment against the insured. Furthermore, the insurer still has a duty to make a reasonable offer of settlement even if the plaintiff would not have accepted the offer. In *Rhodes*, the SJC reiterated that “[a]n insurer’s statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer … [and] quantifying the damages … does not turn on whether the plaintiff can show that she would have taken advantage of an earlier settlement opportunity.”\textsuperscript{49}

On the other hand, proceeding to trial also poses a significant risk for the plaintiff, since it is possible that a jury will return a defense verdict, even in a case where the plaintiff thinks that she has a strong liability case.

It should also be noted that, although plaintiffs frequently invoke Massachusetts General Laws chapter 176D, section 3(9)(f), it is not easy to prove that liability really was “reasonably clear” within the meaning of the statute.\textsuperscript{50} The SJC has stated that liability includes both fault and damages.\textsuperscript{51} Thus, liability is not reasonably clear if there is a legitimate dispute about either fault or damages.\textsuperscript{52} The SJC recognized that its ruling resulted in an enormous judgment. It invited the legislature to examine the issue and perhaps modify the statute by “expanding the range of permissible punitive damages to be awarded for knowing or willful violations of the statute to include more than single, but less than double, damages; or developing a special measure of punitive damages to be applied in unfair claim settlement practice cases brought under c. 176D, § 3(9), and c. 93A that is different from the measure used in other types of c. 93A actions.”\textsuperscript{53}

**Conclusion**

The SJC’s decision in *Rhodes* clarifies the law by ruling that multiple damages under Massachusetts General Laws chapter 93A will be based on the underlying judgment if a judgment enters against the insured in the underlying case. The result in the case is a stark reminder for insurers that willful and knowing refusals to settle can lead to very substantial judgments.

—Andre A. Sansoucy


\textsuperscript{42} Id. at 504-05.

\textsuperscript{43} Id. at 505.

\textsuperscript{44} Id. at 499 n.19.

\textsuperscript{45} Id.


\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Rhodes, 461 Mass. at 495.

\textsuperscript{50} Mass. Gen. Laws ch. 176D, §3(9)(f).


When a mother loses full custody of her child, it is often presumed to be due to evidence of serious abuse or neglect. This is what made such a ruling in the case of Dr. Mazoltuv Borukhova, an immigrant physician from the former Soviet Union, all the more unusual, if not bizarre. By all accounts, her daughter, four-year-old Michelle, had been happy, healthy, and well-provided for when a New York family court judge removed Michelle from the custody of her mother, with whom she had lived all her life, and granted sole custody to her father, Daniel Malakov, a dentist and fellow refugee from the Soviet Union, who terrified her.

The stated reason for this action was that, whenever her father arrived for court-appointed visitation, Michelle would cling to her mother, cry incoherently, and refuse to go over to him (there had been unproven allegations that the father had abused the child and hit the mother a number of times and this made the child fearful of him). Judge Sidney Strauss thought that, perhaps, the mother might be overbearing and preventing their daughter from bonding with the father. So, even though the father had never requested this radical solution of awarding him custody; the social workers had suggested less stringent steps such as having the father’s visits take place in the absence of the mother; and the mother had written a conciliatory letter (never introduced into evidence) proposing a meeting on how they could make these planned visitations more successful and less stressful, Judge Strauss issued his order.

This Kafkaesque nightmare culminated, days later, in the mother realizing every parent’s most primal fear. She had to deliver the hysterically screaming child to the father as Michelle was pried loose from her arms and carried away sobbing.

“What malevolent fairy had written its surreal script?” asks Janet Malcolm in her book, Iphigenia in Forest Hills: Anatomy of a Murder Trial. Yet this was only a prelude to the even greater horror that followed. The family court ruling ended up being, according to Malcolm, merely the “navel of the case.”

In a book much like a four-act play where at every single turn—in the family court, the investigation of a crime, in a criminal court, and then during the aftermath—Malcolm describes how Dr. Borukhova is simply disliked by a series of unjust people bestowed with the imprimatur of licensed officialdom who are determined to treat her unfairly.

Having lost her child in act one, the second act unfolds when, less than a week after the disconcerting transfer of custody, Borukhova met her ex-husband at a playground where he had agreed to grant Borukhova a day-long visit with their daughter. The mother picked up the child and was swinging her as the father joined in. For a brief moment, they appeared once again to be a happy family. Suddenly, the child felt heavy to Borukhova as the father was no longer helping to bear her weight. He collapsed as blood flowed from bullet wounds. Borukhova did chest compressions and mouth-to-mouth resuscitation, and accompanied him in the ambulance to the hospital where he died.

The authorities identified Mikhail Mallayev, a distant cousin by marriage of Borukhova, as the assailant based on significant evidence: the fingerprints on the revolver’s makeshift silencer that had been dropped at the scene belonged to Mallayev; he was identified by an eyewitness; and cell phone records revealed that, in the three weeks preceding the murder, there were 91 calls between Borukhova and Mallayev.

Act three was the criminal trial itself, where Judge Robert Hanophy appeared as yet another addition to the relentless list of Dr. Borukhova’s antagonists as he summarily ruled against her defense team at seemingly every juncture. Known as “Hang ’em Hanophy,” he had previously been censured for “inappropriate” and “mean-spirited” remarks against the interests of accused citizens.

Malcolm writes that, perhaps, the judge’s most egregious set of actions centered around Hanophy’s earlier remark at the voir dire that, “This trial is going to be over on March 17 because I’m going to be sipping pina coladas on the beach in St. Martin.” As the date of his vacation neared and the trial droned on, he seemed to put the trial into hyper-speed as he summarily denied requests of the lawyers for sidebar conferences and kept the court in session well past 5 p.m.

When the trial ended on a Thursday with the summations expected to begin the following Monday, Judge Hanophy ordered the defense to do its closing arguments the next morning. Borukhova’s defense counsel expressed his outrage, saying that he could not possibly prepare his closing argument in the few hours remaining after his long commute back home to Huntington, Long Island. The judge merely commented, “Very nice homes out there.”

“I am not physically able to put this summation together in this long case now … it’s not fair to my client. I can’t do a proper job by tomorrow morning,” pleaded the attorney. The 68-year old counsel then argued that, if the defense had to give its closing argument the next morning, then so should the prosecution. It would be the height of unfairness to give the prosecution the entire weekend to prepare while defense counsel would only be given hours.

2. Id. at 48-49.
3. Id. at 46-47.
4. Id. at 84.
5. Id. at 53-54.
6. Id. at 16.
7. Id. at 47.
8. Id. at 45.
9. Id. at 72-73.
10. Id. at 71.
11. Id. at 21
12. Id. at 6-7.
13. Id. at 72.
14. Id.
15. Id. at 71.
16. Id. at 72-73.
17. Id. at 73.
judge denied every request.

The next morning, Borukhova’s veteran defense counsel, who had an otherwise superlative reputation, delivered a disastrous closing—his extreme exhaustion was apparent as he fumbled for papers, seemed to lose his train of thought, had to sit down at one point, and even apologized to the jurors for his disorganization.\(^{18}\)

Yet, Malcolm asserts that Borukhova’s “bad break” of landing the biased Hanophy for her judge with his “faux-genial manner that American petty tyrants cultivate,”\(^{19}\) was only one aspect of the stacked deck she faced. Again, Malcolm is less concerned with guilt or innocence than she is with what she perceives as the flawed mechanics of the American judicial system where she believes that the prosecution has every advantage. For example, she expresses her belief, from the very outset, in “the hollowness of the concept of presumption of innocence.”\(^{20}\)

“The prosecution does have an overwhelming advantage,” Borukhova’s attorney tells Malcolm. “The jury walks in and figures the defendant wouldn’t be there if he wasn’t guilty.”\(^{21}\)

Malcolm was further alarmed by a statement Judge Hanophy made to her that seemed to indicate that, in a system predisposed toward conviction, he agreed with the theorem that, if you’re accused, you’re guilty.\(^{22}\) “You seem to think that this is so extraordinary,” he says. “It’s not. Somebody’s life was taken, somebody’s arrested, they’re indicted, they’re tried, and they’re convicted. That’s all this is.”\(^{23}\)

In the case of Borukhova, Malcolm believes she weathered an additional burden. It was that, simply put, she did not come off as likeable. When she took the witness stand, jurors felt that she sparred too much with her questioners and seemed rigid and a bit odd. Even her physical appearance as a member of an Orthodox Jewish sect known as the Bukharans with enigmatic origins in Central Asia was off-putting due to the long skirts and turban she wore. She took on an even more peculiar facade as her weight plummeted precipitously during the course of the trial because she refused to eat the food she was served in jail at Riker’s Island since it was not sufficiently kosher for her.\(^{24}\)

The author views a jury trial as being, at least in part, a popularity contest. The jurors’ personal like or dislike of the defendant can sway a verdict despite where the weight of the evidence leads. In this case, post-trial interviews with jurors crystallized the fact that Borukhova rubbed everyone the wrong way.

“She didn’t show any emotion,” commented one juror. “That’s kind of what did her in.”\(^{25}\) Another juror echoed that view, “She didn’t seem upset. She wasn’t scared. If you were innocent and being tried for murder, you’d be upset. They dressed her in white to subliminally signal her innocence. Who wears white every day?”\(^{26}\)

The final act focuses on the aftermath of the trial that functions as a sad coda on one of the major themes of the book—that, in an almost Dickensian plot line, the happiness and wishes of the child, Michelle, continue to be ignored as she is served up into the maw of the unfeeling machinery of the state’s juvenile system.

The main villain throughout this tale is David Schnall, the child advocate who had been appointed by the Family Court as Michelle’s legal guardian. Under Malcolm’s reporting, Schnall’s actions begin to resemble those of Inspector Javert, the fictional fanatical pursuing police officer and main antagonist of Victor Hugo’s *Les Misérables* who, with a passionate and virulent hate, ceaselessly pursues the good protagonist at every turn.

Once Schnall was appointed law guardian, with little knowledge of the family situation and no contact with the child, his first action was to pull Michelle away from the parent she loved and knew best and send her back to the man accused of abusing her and her mother. When neither parent wanted such an outcome and requested a delay in the proceedings, Schnall pushed ahead anyway.\(^{27}\)

Later, after placing her with a nightmarish series of caretakers, most of whom did not want her,\(^{28}\) Schall helped place Michelle in the custody of her father’s brother. As evidence mounts that she is being physically abused by the uncle, Schnall uses his power to keep her with the uncle just as he had earlier insisted that she be delivered back to her father after the father had been accused of abusive behavior in the home. Despite Michelle’s plea to be with her mother’s side of the family, Schnall reduced the number of times she could visit them.\(^{29}\) When her incarcerated mother could no longer pay for a lawyer to fight for her daughter’s interests, Schnall even tried (unsuccessfully) to prevent Borukhova from obtaining a free, court-appointed lawyer.\(^{30}\)

In a riveting passage, Malcolm interviews Schnall during the trial. The interview quickly takes an unusual turn as Schnall goes off topic and speaks for nearly an hour, almost without pause, on a plethora of conspiracy theories (the United States was a Communist country; the male sperm gene is down 75 percent making all men today almost sterile; all banks are zombie banks without money; 9/11 and Hurricane Katrina were known ahead of time; the Internal Revenue Service came to his apartment a number of times with guns; Joe McCarthy was right; global warming is a hoax; the polio vaccine does not prevent polio; and the New York City police are a private army for a private company).\(^{31}\)

Malcolm was so alarmed by her conversation with Schnall that she questioned his competency and mental health and took unprecedented action. She writes, “I did something I have never done before as a journalist. I meddled with the story I was reporting. I entered it as a character who could affect its plot.”\(^{32}\) She called Borukhova’s defense counsel and informed him of the apparently unhinged law guardian’s rambling monologue.

18. Id. at 84-86.
19. Id. at 7.
20. Id. at 34.
21. Id. at 104.
22. In fact, when the state appeals court affirmed the conviction of Borukhova on October 25, 2011, it noted numerous errors made by Judge Hanophy in his rulings, but ultimately decided that “these errors were harmless beyond a reasonable doubt, and the defendant was not deprived of her right to a fair trial,” People v. Borukhova, 89 A.D. 3d 194, 199 (2011); see also, Janet Malcolm, *Michelle: Surviving in a Fixed World*, The New York Review of Books (December 20, 2012), p. 54.
23. MALCOLM, supra note 1, at preface.
24. Id. at 34-35.
25. Id. at 92.
26. Id. at 94.
27. Id. at 53-54.
28. Id. at 62-64.
29. Id. at 138.
30. Id. at 138-139.
31. Id. at 66-68.
32. Id. at 68-70.
Yet Malcolm argues that Schnall was not merely an aberrant renegade with his own agenda, but rather indicative of a larger systemic problem where the concept of children’s rights is actually a disguise for adults’ desires. Unlike an adult's lawyer who must abide by his client’s desires, a child’s lawyer is not so inhibited.33

Malcolm writes that the moment Schnall interceded in order to take the child away from the custody of the only parent she liked and didn’t fear, “the curtain rose on the tragedy of Daniel Malakov, Michelle Malakov, and Mazoltuv Borukhova.”34 If, in fact, the mother reprehensibly and inexcusably tried to have the father killed in order to rescue her daughter back from him, then Malcolm insists it was Schnall who unintentionally set this modern day tragedy into motion.

“[We] struggled with the enigma of the case: she couldn’t have done it and she must have done it,” writes Malcolm.35 Although the circumstantial evidence supported the conclusion that Borukhova committed the crime, Malcolm intentionally defies the typical thrust of trial journalists in making a determination of guilt or innocence. “Journalism is an enterprise of reassurance,” she states. “We explain and blame. We are connoisseurs of certainty.”36 She elaborates further that, in human nature, “Rooting is in our blood; we take sides as we take breaths.”37 In fact, the reader is quickly disabused of the notion that this slim volume falls into the true crime genre or within the category of traditional courtroom reporting. Instead, it is a disquieting meditation on ambiguity and the belief that “a trial is a contest between competing narratives.”38

For example, in the days preceding the murder, there was a single recorded conversation between the Borukhova and Mallayev while they were traveling in a car together. A Russian interpreter translated a question asked of Dr. Borukhova by Mallayev, “Are you going to make me happy?”39

Malcolm perceives the prosecutor’s delight at hearing this since it meant one of two things: either Mallayev was looking forward to the money he would receive by carrying out a contract murder or they were having an affair. However, defense counsel was able to bring out that a single Russian word was misheard and the true meaning was “Are you getting out of the car here?”

Malcolm views this as a classic strategy of lawyers as they frequently attempt to impose a radically different meaning or interpretation to what was said or heard:

But the mishearing so favored the prosecution, that it so well advanced the narrative of an unsavory association, suggests that this was a mishearing by design … We go through life mis-hearing and mis-seeing and misunderstanding so that the stories we tell ourselves will add up. Trial lawyers push this human tendency to a higher level. They are playing with higher stakes than what we are playing for when they tinker with actuality in order to transform the tale told by an idiot into an orderly self-serving narrative.40

Rather than concentrate primarily on telling the dramatic aspects of a murder case, Malcolm is more concerned with the faulty workings of the criminal justice system. Although she will not declare that Borukhova is innocent, she is certain that, at the least, Borukhova faced a system that unfairly failed her at almost every turn.

Malcolm, who frequently writes for The New Yorker, approaches this often gritty narrative with a sometimes overly-cerebral outlook as an intellectual observer surveying this strange unfamiliar world of grubby courtrooms from both a sociological and literary point of view. However, her perspective works with surprising effectiveness despite the fact that fans of crime procedurals may be disconcerted by Malcolm’s literary references, such as at one point quoting Alexis de Tocqueville41 and later drawing a comparison between some lost correspondence of Dr. Borukhova with a lost letter in Thackeray’s Tess of the D’Urbervilles.42 She describes a prosecutor’s reverie about how much he enjoys his job as a “Handelesque aria.”43 Malcolm calls one psychologist “the Kent of this tragedy” referring to the loyal servant of Shakespeare’s King Lear. In another passage, she labels the victim who lived alone to be “like Rochester” referring to the Byronic character of Bronte’s Jane Eyre.44

Even the book’s very title analogizes the child Michelle to the mythical Iphigenia who was sacrificed by her father, Agamemnon, before being avenged by her mother, Clytemnestra, who kills that father.45 To Malcolm, Michelle was the hapless, luckless pawn used by adults to fight their own battles and advance their own agendas while her own best interests were ignored.

Iphigenia in Forest Hills: Anatomy of a Murder Trial is not a legal thriller. Instead, it serves as a passionate denunciation by the author of a system needlessly stacked at every turn against an accused mother even though she may, indeed, be guilty. More importantly, Malcolm rails against what she perceives as a wrongheaded state system whose declared goal of working for the best interests of the child is all too often perverted into achieving the exact opposite. Malcolm’s portrayal of what she alleges is a systemic failure caused by unchecked, inept, bureaucratic child advocates inevitably summons up Hannah Arendt’s famous phrase of “the banality of evil.”46

—Peter Elikann

33. Id. at 150-153.
34. MALCOLM, supra note 1, at 155.
35. Id. at 32.
36. Id. at 129.
37. Id. at 22.
38. Id. at 5-6.
39. Id. at 12-13.
40. Id. at 13-14.
41. Id. at 29.
42. Id. at 84.
43. Id. at 101.
44. Id. at 136.
45. Id. at 16.

"[T]he aim of the law is not to punish sins, but is to prevent certain external results[.]"

Commonwealth v. Kennedy, 170 Mass. 18, 20 (1897)

Is the American system of criminal justice broken? Indeed, has it collapsed? If so, can it be fixed? What, exactly, does it mean to say that the system is broken or in a state of collapse? William Stuntz, the late Henry J. Friendly Professor of Law at Harvard University, has asked these questions, and provides these answers, in a sprawling, controversial analysis that will be of particular interest to those involved in the enforcement and administration of the criminal laws. Not everyone will like the answers. Some, surely, will believe he has asked the wrong questions.

Stuntz’s book is a pathbreaking taxonomy of the country’s criminal justice system’s institutions, players, and history. It is complex, innovative, and somewhat overstuffed. But the panorama is nonetheless compelling, and the criticisms of the system hard to shake. Indeed, Stuntz takes the system to task for what he considers its overly punitive, indeed oppressive, method of dispensing justice, particularly with respect to its treatment of African-Americans.

The tale is finely woven and compellingly told. Stuntz starts out with attention-grabbing statistics:

Today, among white men, the imprisonment rate stands just under 500 per 100,000 population: the highest in American history by a large margin. Among black men, the number tops 3,000; among black men in their twenties and thirties, the figure exceeds 7,000. If present trends continue, one-third of black men with no college education will spend time in prison. Of those who do not finish high school, the figure is 60 percent.1

Indeed, as a percentage of population, America’s imprisonment rate is the highest in the Western world.

These are jarring and sobering statistics. But there are, Stuntz asserts, reasons for them. Perhaps they are not good reasons, but they are reasons nonetheless. First, Stuntz decries the demise of localism. In the nineteenth and early twentieth centuries, the criminal justice system was a product of the immediate community. Juries were drawn from the neighborhood where the incident occurred, not a surrounding suburb or exurb. Police officers lived in the communities they protected, and so they knew well the people that lived there. These relationships, in turn, naturally lent themselves to better communication and crime control. As Stuntz notes as he contemplates what reform should look like:

The core principle should be the same as in the law of corporations: reduce agency cost, place more power in the hands of residents of high-crime city neighborhoods—for they are the ones who feel the effects of rising and falling rates of crime and punishment, just as shareholders feel the effects of rising and falling corporate profits. Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime.2

Indeed, Stuntz says, it is more likely that laws will be observed when citizens respect the laws, understand them and believe that the legal system treats them fairly and transparently. Compliance with the law thereby is promoted in a salutary way. The alternative, simple fear, may be counterproductive.

A new approach developed in the middle of the twentieth century. In order to catch more offenders and hence make more arrests, [law enforcement] doctrine stressed speed and surprise… . The goal was more efficient punishment, and that goal was reached: the number of arrests per officer rose steadily through the 1970s and 1980s. But greater efficiency didn’t produce the desired outcomes. On city streets, “shock and awe” generates shock and anger, plus sympathy for the young men the police are targeting.3

Such sympathy, in this context, promotes a dysfunctional culture where an ethic of community cooperation with law enforcement is not lauded, but instead frowned upon. Crime is not prevented via communication and cooperation, but instead is encouraged and covered up. No one talks because of a lack of trust of the authorities. The “community policing” model thus tragically breaks down, just when such a model has gained considerable recognition and shown noteworthy results.4

While localism has much to commend it, especially when it comes to the relationship between police and the citizens of the neighborhoods they protect, there are some wrinkles. For instance, Stuntz’s localism includes juries.

Urban communities exercised power in jury boxes as well as ballot boxes. Locally selected juries decided a large fraction (nearly half) of serious criminal cases. Those jurors were much more than prosecutorial rubber stamps. Most crimes were defined vaguely, leaving legal space for a wide range of defense arguments. The phrase ‘jury nullification’ was unknown a century ago—not because jurors were more respectful of the law, but because the law was more respectful of arguments for lenity.5

This opinion on jury nullification may not quite be in the legal mainstream, and there are many considered and forceful arguments against it.6 Nonetheless, Stuntz articulates his opinion effectively, and it is an important part of his iconoclastic vision. The loss of localism, in his view, has resulted in the loss of proportion, a sense of fairness in a system where law enforcement rules and policies now are formulated from afar.

Another reason Stuntz advances for the high rate of incarceration is Earl Warren and the Supreme Court he led. According to Stuntz, the problems created by the Warren Court had their roots in the passage of the Fourteenth Amendment immediately after the Civil War. In 1868, the Fourteenth Amendment was enacted with

2. Id. at 39.
3. Id. at 291-92.
5. Stuntz, supra note 1, at 30.
6. See e.g., United States v. Luisi, 568 F.Supp.2d 106, 120 (2008) (“Nullification has no basis in law, but if citizens felt free to nullify, it would undermine not
the purpose of providing the equal protection of the laws to the newly freed slaves. What this meant is the point of contention upon which Stuntz’s thesis turns. In the post-Reconstruction South, mob violence was a horrifying norm, and the book depicts three examples in particular. The first two occurred in Louisiana in the midst of Congressional debate on the Fourteenth Amendment’s provisions. In New Orleans, when blacks marched upon the state’s convention center (some armed) in support of black suffrage they were met by local whites (including police officers), and a riot ensued. At the end, thirty-four blacks and four whites were killed, and more than one hundred blacks were wounded.1

On Easter Sunday in 1873, the infamous Colfax Massacre saw whites attack a courthouse in central Louisiana manned by black defenders of Grant Parish, a newly created black-majority parish bearing the name of the famous Union general.9 Stuntz describes the massacre:

Three white men died, two of them killed by friendly fire. Most of the black dead were murdered after surrendering or while trying to do so. Some were killed in the course of a game the killers played: lining up two or three black prisoners in a row to see how many could be executed with a single bullet. Two days after this slaughter, black bodies still littered the courthouse grounds; passengers on a nearby steamboat reported being overwhelmed by the smell of rotting flesh.9

The third incident, in Memphis, Tennessee, involved a carriage accident that triggered a three day riot where four dozen people were killed, women were raped, and homes and businesses were laid to waste.10 Most of the victims were black, and, in the main, the rioters were the city’s white police officers and firemen.11

Whether the Fourteenth Amendment addressed such situations was, at the time, uncertain. Did the amendment provide a means for the federal government to protect blacks from mob violence inflicted upon them by white citizens, as in Colfax, or public officials, as in New Orleans and Memphis? Initially, the answer was yes. In an Alabama case, future Supreme Court Justice William Woods observed that

[T]he Fourteenth Amendment … prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect … [T]o guard against the invasion of the citizen’s fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the Amendment gives Congress the power to enforce its provisions by appropriate legislation.12

This ringing endorsement of a broad view of the Fourteenth Amendment’s remedial powers was echoed throughout the South for several years.

This interpretation of the Fourteenth Amendment proved to be short-lived. In 1876, in a case that arose out of the incident at Colfax, the United States Supreme Court ruled that the Fourteenth Amendment proscribed governmental action only, and not private conduct. Indeed, the court held, “the Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not … add anything to the rights which one citizen has under the Constitution against another.”13 This was followed by United States v. Reese, where, even though the defendants were government officials, the Supreme Court held that any relief under the Fourteenth Amendment must be based on a showing that the defendants’ conduct was racially motivated.14 And so Fourteenth Amendment jurisprudence remains.

Stuntz considers this wholly unsatisfactory and argues that this narrow concept of equal protection, lacking any substantive component, is plainly unsuited to the momentous task it was created to address. Indeed, Stuntz has kinder words to say about France’s Declaration of the Rights of Man and of the Citizen, with its substantive provisions (“Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has no limits except those that secure to the other members of society the enjoyment of these same rights.”), than he does about the Bill of Rights’s vaunted procedural protections.15 This focus on procedure rather than substance was, to Stuntz, a huge foundational mistake.16 Indeed, it is a mistake we still are paying for today. This lack of substantive content to constitutional protections is, for Stuntz, yet another contributor to criminal law’s “collapse.”17

In fact, the notion that the federal government has no role to play in enforcing the substantive equal protection of the laws in states where minorities are victimized by private citizens is anathema to Stuntz:

The ideal of equal protection—the notion that all Americans are entitled not only to freedom from government oppression, but to a measure of freedom from private violence as well, and the same measure their well-to-do neighbors received—was, for all practical purposes, dead. So were thousands of southern blacks who needed that protection, and needed it badly.18

That is where Justice Warren comes in. Stuntz argues that the Warren Court bears a lion’s share of the responsibility for the “collapse” of the system. Faced with a constitution demured of the capacity to rectify the law’s substance, the court instead decided to revolutionize procedure. If equal protection of the laws could not be achieved through the Fourteenth Amendment, then the Bill of Rights would have to do. This led to procedural safeguards such as the exclusionary rule19 and the right to the assistance of counsel during police interrogations where the suspects were in custody.20

With those decisions, among others, the constitutionalization of

15. Stuntz, supra note 1, at 74-78.
16. Id.
17. Id.
18. Id. at 117.
American criminal procedure proceeded apace. Fatefuly, as Stuntz notes, these decisions, seemingly to the benefit of criminal defendants (and not necessarily innocent ones) came at the same time that crime rates were exploding across the country. Thus, according to Stuntz, we now find ourselves with an even more unequal, and harshly punitive, justice system. Fewer violent criminals are successfully prosecuted because of Warren-era procedural rules, but, out of a perverse compensation, those who are successfully prosecuted are much more severely punished. It is a trade-off that Earl Warren surely never expected, but surely some could have easily predicted.

Further, Stuntz observes that the above backlash was also reflected in a deluge of new, easier-to-prove crimes, on both the state and the federal level. With the introduction of these new crimes came the ability for prosecutors to bring more charges, and hence create more bargaining chips for plea negotiations. Armed with this increased leverage, prosecutors found it easier, and found defendants much more amenable, to resolve criminal cases short of jury trials, the near extinction of which Stuntz laments, as have other prominent players in the criminal justice system.

Plea-bargaining is a necessarily opaque process. The negotiations take place behind closed doors in lawyers’ offices, not in an open courtroom. The lack of transparency is not optimal, but may be unavoidable, and the bargaining power, according to Stuntz, is heavily weighted to one side, usually not the defendant’s.

Stuntz decries all these developments. One point Stuntz acknowledges, however, and which the fair and careful reader cannot help but notice, is that, with the high rate of incarceration came a steep drop in crime rates. Although crime rates are higher now than they were mid-century, they are much lower than in the 1970s and 1980s, as the effect of the backlash gained strength and became ingrained in our institutions. Common sense tells us that the high rate of incarceration has contributed to the drop in crime. Some may not think the trade-off at all warranted. The cure, as the saying goes, may be worse than the disease.

Some may believe there are too many people in prison, and that too many of those people are African-American (as Stuntz recognizes, however, “the black crime rate is substantially higher than its white counterpart; the difference between the two rates accounts for most—though not all—of the difference between black and white imprisonment rates.”). Others, though, may not be as troubled. Indeed, they may even believe that, far from being in collapse, the system is working, albeit somewhat imperfectly. It is, after all like any other institution, run by human beings. The drop in crime is undeniable, though, and it would seem to be the goal that all players in the criminal justice system are working towards. The harshness of individual punishments can be debated as well. In the end, there are no final answers, but one can surely dispute Stuntz’s bleak outlook. It just depends, as all policies do, on one’s value judgments, and such judgments are rarely universally shared.

Stuntz’s book is learned, passionate, and wide-ranging. Such qualities are what the late professor was known for. Indeed, his provocative scholarship has long been a great source for practitioners, judges, academics, and policy-makers of all sorts. At times, however, the book can seem too wide-ranging and discursive. Its trips back and forth through history demand careful attention and patience, and some points are repeated unnecessarily throughout the text. There are some errors as well, but decidedly minor ones. Nonetheless, the book is a magnum opus indeed. It should be read both by our legislators those involved in the criminal justice system. With the passing of this book’s author, the law has lost a giant. He has, however, left quite a legacy.

—Dean Andrew Mazzone

22. Id. at 260-67.
25. Id. at 274-80.
26. Id.
27. Id. at 49.
29. Senator Moynihan’s seminal article, Defining Deviancy Down, was published not in The American Spectator, but in The American Scholar (Winter 1993), a very different publication.