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By Charles W. Sorenson Jr.

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ADOPTING THE JUDICIAL DELIBERATIONS PRIVILEGE:
MAKING EXPLICIT WHAT HAS BEEN IMPLICIT

By Charles W. Sorenson Jr.

Charles W. Sorenson Jr. is a professor of law at New England Law | Boston, in Boston, Massachusetts. The author can be reached at sorenson@nes.edu. Many thanks to Brian McNiff, class of ’14 for his invaluable assistance.

I. INTRODUCTION

The Massachusetts Supreme Judicial Court (SJC) is the most recent court to join the small number of courts that expressly have adopted the judicial deliberations privilege.1 The privilege, which is well-grounded in “common-law and constitutional jurisprudence and [] precedents,” protects the deliberative processes of a judge from intrusion.2 In re Enforcement of a Subpoena,3 involved the efforts of a special prosecutor for the Commission on Judicial Conduct4 to obtain testimony and documents from the petitioner, a trial court judge being investigated for alleged misconduct.5 The judge resisted producing the documents and giving testimony, asserting that the information and testimony sought was shielded by a privilege for his deliberative communications and thoughts. The matter came before the Supreme Judicial Court when the judge filed motions for a protective order and to quash the subpoena that had been issued.6 In its unanimous opinion, the court undertook a thorough analysis of the issue.7 The court recognized that deciding whether the privilege should be adopted and determining the scope of that privilege required a careful evaluation of the values served by the privilege and the cost to society of the application of that privilege.8 The court concluded that a judicial deliberations privilege is “necessary to the finality, integrity and quality of judicial decisions”9 and would “not overly impede the commission’s investigations.”10 The court also held that the privilege was absolute—that is, in deciding whether to apply the privilege there will be no ad hoc balancing of the need for the information against the values served by the privilege. Once it is determined that information is within the scope of the privilege, it applies.11

This article reviews the history and precedents pertaining to the judicial deliberations privilege, and examines the Supreme Judicial Court’s decision formally adopting the privilege. The article concludes that the court has properly balanced the important values served by the privilege against the recognized need to hold judges accountable for misconduct. In doing so, the court has created a robust privilege with a limited scope. The court’s decision should serve as an influential precedent for courts that face this issue in the future.12

1. See infra notes 30-43 and accompanying text.
7. See infra notes 71-114 and accompanying text. As will be discussed below, not only are there very few precedents on the issue, but many of those that exist have not contained extensive analysis.
8. See In re Enforcement of a Subpoena, 463 Mass. 162, 167 (2012); infra notes 79-85 and accompanying text.
9. Id. at 163.
10. Id. at 176.
11. Id. at 174.
II. THE IN RE ENFORCEMENT FACTS

The case arose from a longstanding contention by the Suffolk County District Attorney that a Boston Municipal Court judge was too lenient in his rulings in criminal cases. In a complaint filed with the Commission on Judicial Conduct in December, 2010, Suffolk County District Attorney Daniel F. Conley alleged that the judge “had repeatedly exhibited ‘disregard for the law, lack of impartiality, and bias against the Commonwealth in violation of the Code of Judicial Conduct.’” In support, the district attorney cited 24 categories of decisions allegedly showing bias, with examples of cases decided between 1993 and 2009. In response to the complaint, special counsel was appointed by the commission to launch a confidential investigation.

In the fall of 2011, the special prosecutor requested a deposition of the judge and subpoenaed a large number of documents. The testimony and documents sought related to the following subjects: “alien warnings, bail and sentencing determinations, motions to suppress and pretrial proceedings, generally; jury-trial waivers and trial proceedings, generally; police testimony; and search warrants.” In response, the judge filed with the commission motions to quash or modify the subpoena and for a protective order on the grounds that the document requests were overbroad and intruded upon “his confidential, deliberative communications.” The issue of a judicial deliberations privilege was brought to a head when the special prosecutor obtained a revised subpoena seeking “[a]ny notes, notebooks, bench books, diaries, memoranda, recordation or other written recollections of any of the cases described in the Complaint, cited in our letter to you of October 24th, or described in the Boston Globe articles.” The special prosecutor “plainly and admittedly” was seeking material about the judge’s decision-making process because he believed it was “necessary to delve into the judge’s mental processes because of the ‘notoriously elusive’ and ‘difficult task’ of proving bias.” As a result, the judge filed another motion to quash or modify the subpoena and for a protective order—this time from a single justice in the county court. The single justice did not render a decision but, instead, reported the matter to the full Supreme Judicial Court.

III. HISTORY AND PARAMETERS OF THE JUDICIAL DELIBERATIONS PRIVILEGE

A. Precedent Recognizing a Privilege or Protection for Deliberations.

While the judicial deliberations privilege, which protects a judge’s deliberative thoughts and communications with other judges and their staff, has been implicitly and fairly widely recognized by courts for a relatively long time, it is one of the most recent privileges to be formally recognized by the courts. Before delving further into the judicial deliberations privilege, it is important to bear in mind the purposes of testimonial privileges generally. The basic underlying premise is that certain values outweigh obtaining evidence that may serve the value of truth seeking. These values include the need for privacy of thought in formulating decisions and the need for candor of communications within certain relationships that ultimately benefit society; the expectation of privacy in those relationships and communications; and constitutional values, including separation of powers. The Supreme Judicial Court alluded to this principle in the In re Enforcement case when it stated that testimonial privileges apply in the limited circumstances where “excluding evidence has a public good transcending the normal dominant principle of utilizing all rational means for ascertaining truth.”

Identifying the exact origins and extent of recognition of a judicial deliberations privilege is somewhat difficult. Relatively few cases expressly have recognized the judicial deliberations privilege or applied the privilege. Nevertheless, its existence has been long-recognized, and, therefore, few efforts to obtain testimony and


14. Id.


16. In re Enforcement, 463 Mass. at 164-65. It seems that the investigation was not really confidential for long, given the fact that in the spring of 2011 the Boston Globe published an article and editorial detailing the complaint. The Globe, in criticizing the judge, offered ten additional example cases showing misconduct, four of which had not been cited by the district attorney. Id. at 165.

17. Id. The special prosecutor also advised the judge that he was also seeking information about the cases cited in the complaint, thirty additional 1998 to 2011 cases, and the cases cited by the Boston Globe. Id. at 164.

18. Id. at 165. As a result of the motions, the special prosecutor modified the subpoena, by reducing the number of new cases inquired into, identifying the area of inquiry each case related to, and eliminating a category of documents sought. Id.

19. Id.

20. Id. at 166.

21. In re Enforcement of a Subpoena, 463 Mass. 162, 165 (2012). The judge also argued that he could not be compelled to testify about the 23 cases cited by the special counsel that were in addition to those in the original complaint. Id.

22. See infra notes 30-43 and accompanying text.

23. See infra notes 44-70 and accompanying text; Sorenson, supra note 2, at 47.


26. See In re Enforcement, 463 Mass. at 173; Sorenson, supra note 2 at 66-67; infra notes 30-43 and accompanying text.

27. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting) (“No statute gives this Court express power
documents regarding judicial deliberations would be expected. 28
As will be seen below, cases arise in many contexts, but only one
other reported case has arisen in the context of judicial misconduct
investigations like *In re Enforcement of a Subpoena.* 29 This first
section will review cases that raised some sort of judicial privilege
or freedom from having to testify as to deliberations in various con-
texts, but that did not engage in extensive analysis. The next sec-
section will focus on those cases not only specifically referencing
and applying a judicial deliberative process privilege in cases involving
allegations of judicial misconduct, but also containing substantial
analysis beyond the reliance on precedent.

1. Cases Not Involving Claims of Judicial Misconduct

Probably the earliest reported case to expressly recognize and
discuss a testimonial privilege for judicial deliberations and communi-
cations is a little known 1919 surrogate court case from New York,
*In re Cohen’s Estate.* 30 There, a party challenging the award of
attorney’s fees in a probate proceeding wanted depositions of the chief
clerk and stenographer to the then-retired judge. The court found
that a court’s discussions of its decision with its staff are confidential
and privileged. In doing so, the court analogized this privilege to the
common law attorney-client privilege, and indicated that it believed
the privilege was well established. 31 The court believed the privilege
was necessary to avoid inquiries that would offend “the dignity of the
court” and be inconsistent with “[the fair administration of justice].” 32
While the court did not discuss whether the privilege was absolute or qualified, it indicated a judge could be questioned about
“acts which were directed against the proper administration of the
law, as, for example, his advice to destroy public records in his of-
ice, or direction to commit forgery or perjury.” 33 This would seem
to be criminal conduct similar to the type of conduct the Supreme
Judicial Court in *In re Enforcement of a Subpoena* indicated would fall outside the privilege. 34

Similarly, later cases address efforts by private parties in litiga-
tion to obtain documents or testimony from judges or their staffs. 35
For example, *Statewide Grievance Comm. v. Burton,* 36 involved a bar

32. Id. at 428.
33. Id. at 428-29.
34. See *In re Enforcement of a Subpoena,* 463 Mass. 162, 175 (2012); infra note
103 and accompanying text.
35. The judicial deliberative privilege has also been extended to administrative
law judges. See Grant v. Shalala, 989 F.2d 1332, 1344 (3d Cir.1993) (applying
the judicial privilege and noting threat to administrative law judges and serious
interference with ability to decide cases solely on evidence and law if thought
process subject to subsequent inquiry).
36. 10 A.3d 507 (Conn. 2011).
37. Id. at 514. The court held that factual testimony from the judges could be
obtained only upon a showing of compelling need. Id.
39. Id. at 8.
41. Id. at 735. See also United States v. Roth, 332 F. Supp. 2d 565 (S.D.N.Y.
2004), aff’d sub nom. United States v. St. John, 267 F. App’x 17 (2d Cir. 2008)
(denying criminal defendant’s subpoena to state trial judge seeking his testi-
mony as to reasons for accepting a plea because mental processes underlying
opinions and decisions cannot be probed); United States v. Roebuck, 271 F.
Supp. 2d 712, 718 (D.V.I. 2003) (quashing a criminal defendant’s subpoenas
issued on all federal judges within the district and stating that a judge is not

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removal. In 1953 a House of Representatives Subcommittee investigating the Justice Department’s conduct in certain grand jury proceedings subpoenaed a federal judge. In response, all of the federal judges in the United States District Court for the Northern District of California signed a statement that was read by the subpoenaed judge when he appeared and refused to testify. The letter, citing separation of powers principles, stated that Congress lacked the power to compel judges to testify about judicial proceedings.

2. Cases Involving Claims of Judicial Misconduct.

The two major cases involving efforts to obtain judicial deliberative materials in connection with claims of judicial misconduct are also the cases that, prior to In re Enforcement of a Subpoena, engaged in the most extensive analysis of whether and when the judicial deliberations privilege should apply. Both were considered by the 5th Circuit in its recent opinion. Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, arose from a complaint filed under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, alleging that through bribery-related activities, Judge Hastings “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and has violated several Canons of the Code of Judicial Conduct.” When the Investigating Committee of the Judicial Council subpoenaed the Judge, his secretary and present or former law clerks, the judge and his staff refused to comply. Among the grounds asserted was that the information sought was protected by a testimonial privilege for “confidential communications among an Article III judge and members of his staff regarding the performance of his judicial duties,” which was likened to the Executive privilege protecting presidential communications, the protection afforded Congress under the Speech and Debate Clause, and the common-law attorney-client privilege.

Admitting that it could find no cases applying a judicial deliberations and communications privilege, the Eleventh Circuit relied for support on the dicta discussed above, alluding to such a privilege in Nixon v. Sirica, New York Times v. United States, Soulie v. David, and United States v. Nixon, where it was seen as necessary for judges effectively to perform their decision-making functions. The Eleventh Circuit noted that confidentiality of communications in the context of judicial deliberations was of the same “critical importance” as it was for the Executive in the decision-making process as to which the Supreme Court in United States v. Nixon, had recognized a qualified privilege. Therefore, the court held that a “privilege [exists] (albeit a qualified one[)] protecting confidential communications among judges and their staffs in the performance of their judicial duties.” Where information sought pertained to the deliberative process relating “to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings,” as in Hastings, there was a presumption of a privilege, but because it was qualified, further analysis must be undertaken to “weigh the investigating party’s demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications.”

Applying this ad hoc balancing test in Hastings, the court concluded that the privilege would not shield testimony by the law clerks regarding their role in cases in which bribery of the judge had been alleged. On the side of need for the information, the court noted the “surpassing importance” of the matter given the gravity of the alleged offense, the relevance of the testimony and the implications for “the public confidence in the judiciary, [and] the independence and reputation of the accused judge[.]” Balanced against these values was only the judge’s generalized interest in confidentiality, the intrusion into which would be mitigated by the fact that the documents and testimony of the staff would only be disclosed to the

required to explain decisions or reveal reasons for an opinion or decision); (Greene v. Gassam, No. 11-CV-0618 PJS/TNL, 2012 WL 1563927 (D. Minn. May 3, 2012) (denying request of pro se litigant alleging bias on the part of the judge and who sought “case-related correspondence and background material,” including correspondence between the [the judge and his law clerk], drafts of orders and opinions.” In denying the request, the court noted the absence of any authority “holding that a litigant had a right to access to communications between a judge and his or her clerk.”); Wallace v. Kmart Corp., No. 1:02-CV-107, 2010 WL 3363656 (D.V.I. Aug. 25, 2010) (explaining in denying discovery of a judge in support of a motion to recuse, that a judge is not required to explain decisions or reveal reasons for an opinion or decision); Leber v. Stretton, 928 A.2d 262, 270 & n.12 (Pa. Super. 2007) (holding an attorney plaintiff who filed a defamation claim against another lawyer and a publication in connection with a judicial proceeding could not compel a judicial officer to testify, or inquire into his or her deliberative process. The court distinguished situations where testimony of a judicial officer is “sought regarding a matter in which he or she merely happened to witness or was personally involved in a circumstance that later becomes the focus of a legal proceeding.”).

42. See Sorenson, supra note 2, at n. 238; Milne, supra note 24, at 216-17. The removal attempt was abandoned because it would require a trial for criminal misconduct. Id.

43. Statement of the Judges of the U.S. Dist. Court for the N. Dist. of Cal., Made to the Subcomm. of the Comm. of the House of Representatives to Investigate the Dept of Justice of the U.S., 14 F.R.D. 335, 335-36 (1953). The letter stated: “The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.” Id. at 340. Apparently the subpoena was not pursued by the committee. See Nunley, supra note 24, at 73.
Committee, which was required to keep privileged materials confidential unless a recommendation for impeachment was made. The court seemed to leave open the possibility that the privilege might apply in circumstances where the alleged misconduct involved is less serious than the “impeachable offense of bribery” or the privilege is asserted for a reason other than the “generalized need for confidentiality.”

The somewhat unusual Illinois case of *Thomas v. Page,* which contains a more in-depth analysis of the issue, adopted a much broader interpretation of a judicial deliberations privilege. In *Thomas* as an Illinois Supreme Court Justice sued a newspaper, reporter, and editor for defamation for publishing an article that accused the judge of influencing the court’s decision in an attorney discipline case, for political reasons. When the defendants subpoenaed documents and testimony from the other justices of the court and their law clerks that related to the attorney discipline case, they resisted on the basis of the “Doctrine of Judicial Privilege.”

While the court regarded the law as settled that the mental impressions or thought processes of a judge in deciding a case are protected from disclosure, it thought that this case raised a different question; whether a judicial deliberations privilege existed that included the communications between judges and their staffs relating to deciding a case. Citing the *Hastings* case as an example of a case holding that such a deliberations privilege existed in these circumstances, the Illinois court agreed with the Eleventh Circuit rationale that effective discharge of judicial duties requires that judges be able to have candid, confidential conversations with their staffs and other judges and their staffs. “Confidentiality helps protect judges’ independent reasoning from improper outside influences … [and] safeguards legitimate privacy interests of both judges and litigants.”

Citing Dean Wigmore on Evidence, the Illinois court believed that determining whether to adopt a judicial deliberations privilege required identifying and balancing interests. The court noted that in deciding cases, judges clearly expect their communications with their staffs and each other to be confidential so that they can act effectively. Judges must be able to receive “open and honest” input and advice from other judges and staff members “freely and frankly without fear of disclosure.” Fear that communications may be transcripts of previous testimony of the law clerks in the criminal trial and grand jury proceedings regarding Judge Hastings, because there were areas not covered by previous testimony and there was a need for the Committee to see live testimony to make its own credibility determinations. *Id.* at 1522-23.

54. *Id.* at 1524-25 & n. 34. With regard to its assessment of the strength of the judge’s interest in confidentiality, the court again analogized to *United States v. Nixon,* where the Supreme Court determined that needs of the criminal process overrode the President’s generalized interest in confidentiality.

55. *Id.* at 1525.


58. Thomas, 837 N.E.2d at 487.

59. *Id.* at 488-89 (emphasis added) (quoting *Hastings,* 783 F.2d at 1520); *see id.* at 489-94 (explaining the rationale, extent, and limits of the judicial deliberations privilege). In *Thomas,* the court referred to the Eleventh Circuit case as “Williams” (the name of a member of Judge Hastings’s staff who was resisting the subpoena).

60. The Wigmore test for communications privileges requires the following:

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.


62. *Id.* at 490.

63. *Id.*

64. *Id.*

65. *Id.*


67. *Id.*

68. *Id.* at 491-92. A common example of a situation in which a judge may communicate with another judge’s clerk would arise where a law clerk for one appellate judge drafts a bench memorandum that is intended to be used by all judges on the court. Also, the court noted that as part of the deliberative process of providing research and recommendations to their judges, law “clerks frequently discuss cases among themselves in order to clarify and distill the issues before...
information or communications.69 Rejecting the Eleventh Circuit’s approach in Hastings, the Illinois court held that the judicial deliberation privilege was absolute. It reasoned that the privilege was already “narrowly tailored, applying only to intra-court communications made in the course of the judicial decision-making process and concerning the court’s official business[,]” and that “[a]nything less than the protection afforded by an absolute privilege would dampen the free exchange of ideas and adversely affect the [judicial] decision-making process.”70

B. In re Enforcement of a Subpoena

As the foregoing discussion shows, there is substantial authority supporting the adoption of a privilege in the context of information being sought from judges and their staff concerning the deliberative processes in deciding cases. Thus, it would have been easy for the Massachusetts Supreme Judicial Court, like the courts in many of the cases discussed above,71 merely to have cited existing precedent. Indeed, the court noted that the special counsel could not cite, and the court could not find, a single case “rejecting a privilege for a judge’s mental processes or intra-court deliberative communications.”72 Instead of following the easy path, the court analyzed the issue in detail, attempting to demonstrate that the privilege was consistent with other relevant legal principles established in the Commonwealth and supported by public policy.

Before further examining the court’s analysis, it should be noted that the In re Enforcement case was not the first opportunity for the Supreme Judicial Court (“SJC”) to recognize the judicial deliberations privilege. The issue of intrusion into the confidential judicial deliberations process was raised in the bizarre 2008 discipline cases of In re Crossen73 and In re Curry,74 which involved the efforts of three lawyers to obtain, through an elaborate ruse, confidential information from a former law clerk about the judge’s deliberations in their client’s cases, in order to demonstrate the judge’s disqualifying bias.75 During the course of the Board of Bar Overseers disciplinary proceedings and in the SJC’s review of those proceedings, references to and arguments about the judicial deliberations privilege were made.76 Although the circumstances were arguably right for recognizing the privilege, the Board of Bar Overseers and the court side-stepped the issue, finding other grounds for imposing discipline.77 In In re Enforcement, the court essentially acknowledged that Crossen and Curry involved the circumstances where a judicial deliberations privilege was implicated and noted that in those cases, it had determined that attorneys’ “attempts to pierce the confidential communication of a former law clerk and judge … were prejudicial to the administration of justice ….”78 The SJC could not avoid addressing the privilege issue in In re Enforcement.

Because determining whether the privilege should apply involves balancing interests, the court in In re Enforcement first discussed the interests served by the privilege. The court led off with the interest in finality, an interest that the cases discussed above really did not address.79 The Supreme Judicial Court viewed as directly tied to the issue of finality the long-standing principle that judges and justices cannot impeach their own judgments or verdicts by testifying as to their thought processes.80 Among the specific reasons mentioned by the court were that parties should be able to rely on a judgment, which is a “sacred record.”81 There also would be a question about the integrity of decisions because of the serious questions as to the accuracy of later testimony about the mental processes used to reach an earlier decision.82 In addition, the court noted that not allowing juror testimony absent a showing of extraneous influences, “protects jurors from harassment, reduces incentives for jury tampering, promotes the finality of verdicts, [and] confidence in jury verdicts.”83 In addition to the points raised by the SJC, it seems clear that “judicial efficiency and finality in the administration of justice could be seriously undermined” if intrusion were allowed into the deliberative process, “given the incentive that litigants … often have to leave virtually no stone unturned in order to get the result” they seek to achieve.84 With this “would also come increased costs to parties and

78. In re Enforcement of a Subpoena, 463 Mass. 162, 169 (2012) (citation omitted). See Mass. R. Prof. C. 8.4(d) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”) The Board of Bar Overseers and the SJC in Crossen and Curry also found that lawyers had violated rules of professional conduct relating to misrepresentations, fraud and false statements, as well as engaging in conduct showing a clear lack of fitness to practice. See Sorenson, supra note 2, at 8-9.

79. The interest of finality as an interest supporting the privilege had been previously noted in commentary on the judicial deliberations privilege. See generally Sorenson, supra note 2, at 28-30, 34.

80. See In re Enforcement, 463 Mass. at 167-68 (citing, inter alia, Fayerweather v. Ritch, 195 U.S. 276, 307 (1904) (testimony of trial judge not admissible to overcome res judicata); Glenn v. Aiken, 409 Mass. 699, 703-04 (1961) (in legal malpractice case judge’s affidavit about his decision-making could not be used by defendant lawyer alleged to have mishandled trial); Commonwealth v. Fidler, 377 Mass. 192, 195-97 (1979) (jury testimony may not be used to impeach verdict absent extraneous influences); Commonwealth v. McCown, 458 Mass. 461, 494 n.35 (2010) (Even where there is an allegation of bias, a judge may not inquire into the jurors’ “subjective thought process, such as their reasons for concluding that the defendant was guilty [or] the content of their deliberations.”)).

81. In re Enforcement, 463 Mass. at 167 (citation omitted).

82. Id. (citation omitted).


84. See Sorenson, supra note 2, at 28.

85. See id. at 34.
to the administration of justice generally resulting from challenges to the finality of judicial decisions based on perceived defects in the deliberative process . . . .”

The court next addressed the interest most relied upon by the prior decisions adopting the privilege: the “[q]uality and integrity of decision-making.” The argument essentially is that the judicial deliberations privilege protects the public interest more than the personal interests of a judge because it ensures that decision-making will benefit from “the free and open development of the judge's own thinking and candid communications among judges and between judges and the court's staff [.]” The assumption is that absent the privilege, judges will be less effective in their decision-making because of concern that their “decisions and communications might be made public” later.

While this argument is often repeated and has intuitive appeal, courts, including the SJC in In re Enforcement, have really not fleshed out why public disclosure of their deliberations would alter their decision-making process and harm the public interest. Among possible explanations are that thorough testing of ideas would be inhibited by disclosure because of the impact upon a judge of popular opinion, which can often be inconsistent with the law and justice. The judicial deliberations process is necessarily one that entails uncertainties as to the law and the facts and, at the appellate level, involves compromises among judges. Public confidence in the judicial system could be eroded by the exposure of these compromises and uncertainties. Furthermore, revelation that judges may be uncertain as to what is a proper result or may have initially arrived at an erroneous decision that was later corrected through the deliberative process, may harm the privacy and reputational interests of judges.

Next the SJC devoted substantial attention to the interests in judicial independence and impartiality. The court, noting the link between independence and impartiality, began by discussing the fundamental historical recognition in Massachusetts that the “judiciary's independence from the other branches of government and from outside influences and extraneous concerns” is critically important to the preservation of individual rights. In doing so, the court cited the writings of John Adams and the fact that in 1780, the right to be “judged by an independent and impartial tribunal was incorporated into the Massachusetts Declaration of Rights.”

Among the extraneous influences or outside concerns to be avoided is the popularity of a judge's decision. Contemporary politics and public emotions are irrelevant and must be disregarded.

According to the court, the longstanding common law doctrine of judicial immunity from suit serves the constitutional maxim of judicial independence and is “essential to impartial decision-making and … public trust . . . .” The court saw the protection of a judge’s deliberative process as equally important to judicial independence and impartial judging. Judges are given substantial discretion in judging, and different judges may reasonably come to different conclusions as to many aspects of their decision-making. As the court explained, the threat that decisions, which will likely be unpopular with at least one of the parties, will expose the judge’s decisional thought processes after the fact “would amount to an enormous looming burden” that would create an “external influence or pressure” inconsistent with “conscientious, intelligent, and independent decision-making. . . . [E]ven the most steadfast jurist” would consider choosing a decisional route “less likely to disturb the interests of those with the greatest ability to bring about such an intrusive examination.” Interestingly, the court noted that the risk of intrusion through a judicial misconduct complaint by a disgruntled plaintiff is greatest in the circumstances like the In re Enforcement case involving the district attorney, “whose office is generally involved in all criminal prosecutions before a given court and is thus uniquely able to exert pressure that may arise from the probing of deliberative material.”

The court found the foregoing reasons established the need to protect judicial deliberations “which has been implicit in our view of the nature of the judicial enterprise since the founding,” and stated that it was joining other courts who have “uniformly recognized a judicial deliberations privilege.” However, the analysis did not end with the recognition of a privilege that applies to Judicial Conduct Commission proceedings; the scope and nature of the privilege needed to be defined. The leading prior cases had determined that the privilege was either qualified or absolute. If qualified, “the court [then] must weigh the investigating party’s need for the information against the degree of intrusion upon the confidentiality of privileged communications . . . .” A sufficient demonstration of need will allow access to information that is within the scope of the privilege.
whereas an absolute privilege prevents access to information as long as that information is within the scope of the privilege.\textsuperscript{99}

The SJC concluded that the best approach was to recognize an absolute but "narrowly tailored" privilege because of the importance of the interests, discussed above, that the privilege serves.\textsuperscript{100} This means that the determination of whether particular information falls within the scope of the privilege is critical. The privilege includes "the judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally" or written in non-public materials.\textsuperscript{101} Although not necessary to the decision of the In re Enforcement case, the court also held that the privilege extends to "confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases."\textsuperscript{102} It does not include: a judge's recollections of non-deliberative events, statements on the record explaining the basis of a decision, information sought to determine "whether a judge was subjected to improper 'extraneous influences' or ex parte communications during the deliberative process," and information sought from a judge as a witness to an event or as someone "personally involved in circumstance that later becomes the focus of a legal proceeding."\textsuperscript{103}

It was at this late point in the opinion when the court first made reference to any argument by the Commission on Judicial Conduct. Perhaps this is because the Commission did not really address in any detail the legal principles and precedents underlying the judicial deliberations privilege, including the values or interests served by the privilege and the scope of the privilege. As previously mentioned, the Commission's threshold argument essentially was that the court did not have the power to create a privilege in the circumstances of this case involving the Judicial Conduct Commission proceedings.\textsuperscript{104} The Commission did attempt to distinguish cases recognizing a privilege, like Hastings, In re Cohen, and Thomas v. Page, by arguing that their holdings and rationale should be limited to situations involving efforts to obtain information from judicial staff. It also argued, without authority, that judges should not be allowed to make the decisions of what constitutes deliberative material and thereby invoke their own protective privilege.\textsuperscript{105} However, none of the previous cases suggested that the privilege would be more applicable to deliberative communications with staff than to a judge's internal thoughts. Moreover, as the review of the cases above shows, the principle that a judge could not be forced to reveal internal deliberative thought processes is far more well-established than the notion that the judge's communications with court staff and among judges are protected by a deliberative privilege.\textsuperscript{106}

The Commission's main argument boiled down to the proposition that judicial misconduct proceedings regarding the biases and prejudices of a judge are too important to the public interest in the integrity of the judiciary and, thus, the need for deliberative information too great, to accept the privilege in this context.\textsuperscript{107} According to the Commission, even if a qualified privilege were recognized as in Hastings, the need for the information sought about the judge's deliberative processes outweighs the value of any privilege because the information is crucial and could not be otherwise obtained.\textsuperscript{108}

By recognizing an absolute judicial deliberations privilege, the SJC implicitly rejected most of the commission's arguments without enumerating them. As to the last argument, however, the court acknowledged the importance of investigations into judicial misconduct, but stated "contrary to the special counsel's assertions, the recognition of a judicial deliberative privilege will not overly impede the commission's investigations. Indeed, in prior cases, the commission has never needed to use information falling within the scope of this privilege to conduct its proceedings."\textsuperscript{109} The court then discussed the ways in which misconduct, such as judicial bias and willful disregard of law, may be uncovered without invading the judicial deliberations process. Citing many case examples, the court noted that a judge's partiality or other abuse can be identified by looking for "outward expressions of partiality or by examining the judge's conduct over time ...."\textsuperscript{110} In this regard the court noted that such identification is facilitated by the fact that there are no restrictions on the media and public attending judicial proceedings (other than certain juvenile proceedings), and on the media in reporting on the proceedings.\textsuperscript{111} Furthermore, with very limited exceptions, court records are open to the public, and the judicial conduct commission has full access to those records, including transcriptions and recordings of proceedings.\textsuperscript{112} Finally, a judge's rulings, decisions, and actions are reviewable on appeal for "consistency with law[,]" and "repeated and intentional failure to follow" the law subjects a judge to "judicial investigation and discipline." The commission, lawyers and the public have ready access to the appellate decisions addressing judges' errors and abuses of discretion.\textsuperscript{113}

The court then applied the newly recognized privilege to the subpoena at issue in this case. It held that the subpoena must be quashed to the extent that it sought "the judge's internal thought processes and deliberative communications, memorialized in notes, diaries, or otherwise."\textsuperscript{114}

IV. SUMMARY AND CONCLUSIONS ABOUT THE SJC’S DECISION

As the discussion above clearly shows, the SJC was on very firm ground generally in recognizing a judicial deliberations privilege.
Indeed, some would argue that the support for a judicial deliberative privilege is stronger than it is for most privileges, given the negative effect that the absence of the privilege is likely to have on constitutional values protected by the privilege, and on the quality of justice.115 Nevertheless, the privilege is not without its critics. A few commentators have argued that the process by which judges arrive at decisions should be more open to the public because of the impact those decisions have on legal rights and society generally, and because shielding the process is inconsistent with democracy.116 They also argue that more access to the deliberative process would improve “the public’s confidence in the integrity of the judiciary and would encourage judges to make careful and informed decisions.”117 In a slight variation on this argument, the district attorney who brought the complaint at issue in the In re Enforcement case, was quoted as saying in reaction to the court’s decision “we must take very seriously how decisions such as the one issued today, when combined with the legitimately reported questions of judicial conduct, can actually undermine popular support for an independent judiciary. Everyone in government, including judges, must be accountable to someone.”118

The short answer to this argument is that the majority of courts and commentators that have examined the issue and balanced the interests involved disagree.119 In deciding cases, a judge is not engaged in a democratic process. Instead, it is the duty of the judge to act impartially and resist deciding cases on the basis of ever-shifting, often uninformin, public opinion.120 The threat to judicial independence and impartiality is real. Indeed, one commentator in reviewing the SJC’s decision noted that currently judges generally are being attacked by partisans who disagree with certain of their decisions, and that recently “Republican presidential candidates were threatening to subpoena federal judges to Capitol Hill.”121

Furthermore, although like any privilege, the judicial deliberations privilege comes with a potential loss of information and a possibility that the truth will not be known, those who advocate greater public scrutiny of judicial decision-making “underestimate the debilitating effect” that such scrutiny could have on a judge’s ability to “remain impartial” and on the thoroughness a judge devotes to a decision.122

The SJC was on equally firm ground when it determined that the privilege, while narrowly defined, is absolute. Only Hastings, Thomas, and Kaufman have discussed whether the privilege should be considered absolute or qualified. Of the three, only Hastings involved a judicial misconduct proceeding similar to that in In re Enforcement. The majority of cases, while not explicitly addressing the issue, did not even suggest that the common law privilege was anything but absolute. This could be seen as supporting the conclusion that Hastings is the only case to have concluded that the privilege is not absolute.123

As was discussed previously, in Hastings the court recognized a qualified privilege that would require an ad hoc balancing of the need for the deliberative information against the extent of intrusion upon the confidentiality of deliberations.124 In doing so, the court analogized the judicial deliberative privilege to the Executive Branch deliberative process privilege, which has been held to be qualified.125 It also emphasized the “surpassing” importance of the inquiry into serious alleged judicial crimes like bribery, which is an impeachable offense, and the implications for the public’s confidence in the judiciary, stating: “The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.”126 The Illinois court in Thomas and the SJC in In re Enforcement, in finding that the privilege was absolute, came to the opposite conclusion regarding the importance and balancing of the values involved.127 Noting the narrowness of the privilege and the importance of confidentiality in the deliberative process, the courts found that the public interest in sound decision-making was better served by an absolute privilege.128

The SJC in In re Enforcement also cited Kaufman as a case holding the privilege protecting the mental process of a judge in deciding cases to be absolute.129 Although the West Virginia court’s discussion of the issue could be clearer, on careful reading it appears that the SJC correctly characterized Kaufman. The court in Kaufman makes an unqualified “hold[ing] that, judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts.” In explaining their holding, the court analogized to the doctrine of judicial immunity from suit, which it described as absolute for conduct in which the judge is functioning

116. See Milne, supra note 24, at 230-31. See also Arthur Selwyn Miller & D.S. Sastri, Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtains, 22 Burf. L. Rev. 799, 802-06, 822-23 (1973); Sorenson, supra note 2, at 28. These arguments have been raised particularly in the context of the United States Supreme Court’s deliberative process. Id.

117. Miller & Sastri, supra note 116, at 822.

118. Ellement & Eastes, supra note 5. The implication of the district attorney’s comment was that the court’s decision was putting at risk its status as “one of the few states where all judges are appointed for life.” Id.

119. See text supra at notes 22-70; see, e.g., Catz, supra note 24, at 144; Milne, supra note 24, at 231-34; Sorenson, supra note 2, at 27-28. See also, Anderson, supra note 11; Judge Nancy Gertner, Privilege Precludes Asking: What Was the Judge Thinking?, 57 Boston Bar J. 1, 4-5 (Winter 2013).

120. See, e.g., Catz, supra note 24, at 144; Milne, supra note 24, at 232-33; Sorenson, supra note 2, at 28.

121. Cohen, supra note 13.

122. See Milne, supra note 24, at 232-33; text supra at 24-25. See also Terraza v. Slagle, 142 F.R.D. 136, 139 (W.D. TX 1992) (“[A]ll counsel admit that public inquiries by the litigants as to the internal operations and communications of the Court will, not may, destroy the integrity of our present legal system.”).

123. See Catz, supra note 24, at 142.
as a judge. The court did not undertake an independent policy analysis as to why the privilege should be absolute, but, like the SJC in *In re Enforcement*, the court did limit the privilege to a judge’s deliberative actions in an official proceeding, rather than to situations where the judge merely witnessed an event or was involved in a proceeding or event in a non-judicial capacity.

It appears that the courts holding the privilege to be absolute have the better position. There is no question that ensuring that judges adhere to the law in their decisions and in their actions, including adherence to the standards of judicial conduct, is of great importance, but it is wrong to suggest that it is necessary, even in some cases, to invade the judicial deliberative process to achieve that purpose. As the SJC and commentators have concluded, there are adequate mechanisms to serve these purposes, including judicial conduct proceedings, various writs and appeals, and review of the readily available record over time of a judge, that do not require resort to compelled testimony about judges’ thought processes in arriving at decisions.

Moreover, the concern about the seriousness of the potential misconduct that motivated the Eleventh Circuit to adopt a qualified privilege requiring ad hoc consideration of the importance of the inquiry for which the deliberative information is sought, seems misplaced. The narrowly defined absolute privilege recognized in *In re Enforcement, Kaufman, and Thomas* would not even apply to the serious kind of misconduct (i.e., bribery) that was involved in *Hastings*. The privilege only applies to the deliberative process itself and does not apply where there are “‘extraneous’ influences or ex parte communications during the deliberative process.”

Also, making the privilege qualified largely undermines the very purposes and values served by the privilege in the first place—to ensure that the decisions are thoroughly explored regardless of the potential negative ramifications, to serve the interest in finality, and to preserve the independence and impartiality of the judiciary in the face of political and public pressures. Because the qualified privilege requires a case by case balancing of the value of confidentiality against the importance of the issue for which the information is sought, considering the relevance of and ability to get the information elsewhere, it creates uncertainty for a judge in advance as to whether the privilege will ultimately apply to a particular proceeding or decision. This uncertainty can cause a judge to forego honest and open consideration in decision-making and, instead, take a decisional path that will be least likely to expose the judge to invasion of his or her thoughts at the hands of dissatisfied litigants. This result seems likely with a qualified privilege, given the increased incentive its balancing test gives those who are all too ready to use any means to challenge a judge’s decision that is inconsistent with their interests. In its *In re Enforcement* decision, the Massachusetts Supreme Judicial Court properly recognized that this ultimately would not serve the fundamental public interest in sound decision-making.

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130. See id. at 736; *In re Enforcement*, 463 Mass. at 174-75.
131. See id. at 736; *In re Enforcement*, 463 Mass. at 174-75 (2012); Cohen, supra note 13; Catz, supra note 24, at 144.
132. *In re Enforcement*, 463 Mass. at 175. See also Thomas v. Page, 837 N.E.2d 483, 494 (Ill. App. Ct. 2005) (privilege applies narrowly to the deliberative process); Kaufman, 535 S.E.2d at 735-36 (privilege narrowly applies to mental processes that judge used in making decisions).
133. See, e.g., Kaufman, 535 S.E.2d at 737 (noting the number of times the litigant seeking the judge’s testimony had attempted to have the judge removed for bias); Cohen, supra note 13 (“No matter where they are, no matter what jurisdiction, prosecutors almost always win their cases. [In the *In re Enforcement* case] when they started losing, they cried foul.”); text supra accompanying notes 73-78 (discussing the extraordinary lengths to which the lawyers in the *Crossen* and *Corry* cases went to disqualify a judge).
CASE COMMENT


The defendant was convicted of raping and indecently assaulting the wheelchair-bound victim in her residential dormitory. He was the one-time boyfriend of the victim’s personal care assistant. Considerable evidence of the defendant’s guilt was adduced at trial. A committed sentence of 15 to 20 years was imposed.

Six years after his convictions were affirmed, and four years after the denial of his motion for a new trial was affirmed, the defendant filed a motion for relief from unlawful sentence pursuant to Mass. R. Crim. P. 30(a). The motion alleged that the trial judge had determined that the defendant had perjured himself at trial, “and then improperly considered his testimony in imposing sentence.” Specifically, the defendant pointed to the trial judge’s statement: “I was also – I’m also affected by the testimony of the defendant himself who told a story that was really not believable at all.” After a hearing in the Superior Court, the defendant’s motion was denied.

The Appeals Court affirmed the denial of the defendant’s motion in a decision pursuant to its rule 1:28. The court began by conceding that, at least in Massachusetts, “a trial judge may not consider a defendant’s alleged perjury in determining a sentence,” citing to Commonwealth v. Coleman which first so held approximately 30 years ago. However, the court then went on to observe that: “[t]he judge’s improper statement … must be viewed in the context of her entire remarks. After the defendant was convicted of an extremely serious offense, which had a profound effect on the victim, the judge held a comprehensive hearing on the issue of sentencing. At the hearing, the judge articulated several reasons for the sentence that was imposed. The judge considered the defendant’s prior record, the very serious nature of the offenses, the breach of trust that facilitated the accomplishment of the defendant’s perpetration of the crimes, and the particular vulnerability of the victim. The judge also concluded, after reviewing the defendant’s record and the nature of the offenses for which the defendant was convicted, that the defendant was unable or unwilling to conform his behavior to the expectations of society. Finally, the judge considered the enormous impact that the defendant’s crimes had on the victim and her family. These considerations articulated by the judge are appropriate considerations in sentencing.”

In applying the foregoing analysis, consistent with the express requirements of the Coleman decision itself, the Appeals Court properly reviewed the defendant’s claim under the standard articulated in Commonwealth v. Freeman for unpreserved errors. Observing that that judge had considered a broad range of factors, and in view of the sentence ultimately imposed, the court concluded that no “substantial risk of a miscarriage of justice” was present. This was the correct result – at least insofar as it fully complied with prior law.

Indeed, Commonwealth v. Coleman made it clear that an inquiry into prejudice is a necessary predicate for reversal where a judge improperly considers a defendant’s perjury in imposing sentence. After concluding that an improper factor had been applied, the court in Coleman then observed: “[i]t is clear from the transcript of the sentencing hearing. The judge stated that he was offended by the defendant’s attempt to ‘kid’ him with his testimony. He cross-examined the defendant regarding his version of the incident, increasing his ire at the defendant’s ‘[o]utrageous conduct’ while the defendant maintained his innocence. Subsequently, the judge told defendant’s counsel that he was considering an increase in the prosecutor’s recommended sentence of from 12 to 20 years for the rape conviction, favoring a sentence of from 15 to 20 years. It is true that the judge ultimately imposed the prosecutor’s recommended term of from 12 to 20 years … [but b]y considering the admitted perjury in deciding the sentence to impose for the convictions, the judge effectively punished this defendant for an offense, without the procedural safeguards of an indictment and trial.” Upon this careful weighing of potential bases for an inference of prejudice, the court in Coleman concluded that the requisite substantial risk of a miscarriage of justice was present and vacated the judgments.

However, the Supreme Judicial Court (“SJC”), upon further appellate review in Gomes, departed sharply from the approach it had articulated in Coleman, and effectively elevated the improper consideration of a sentencing factor to structural error (i.e., error that mandates reversal even in the absence of any showing of prejudice) – even as it somewhat confusingly paid lip-service to the continued vitality of the substantial risk standard in such cases. The SJC began in the same place as the Appeals Court, noting that, per Coleman, “[o]ur common law forbids a judge from considering a defendant’s perceived perjured trial testimony in determining the punishment imposed for a criminal conviction.” Then the court went on to state that: “[c]onsideration at sentencing of such testimony is error that creates a substantial risk of a miscarriage of justice.” On this basis – which certainly appears to set out a rule of presumptive error – the court vacated the defendant’s sentences and remanded the matter for resentencing.

1. The views expressed herein are exclusively those of the author, who acted as appellate counsel for the Commonwealth in the defendant’s final appeal before the SJC.
11. 352 Mass. 556, 564 (1967) (unpreserved errors may provide a basis for relief only where they pose a “substantial risk of a miscarriage of justice”).
12. 390 Mass. at 810 (emphasis added).
In point of fact, amid the specific facts of *Gomes*, it would be difficult – if not impossible – to conclude that relief was indicated under anything other than a finding of structural error. Certainly, the conception of what constitutes a “miscarriage of justice” has evolved over the years since Justice Cutter penned *Freeman*. The precise authority the *Freeman* case described was exceedingly rarely used before *Freeman* (as the court observed in *Freeman* itself14), and was sparingly used in the decade following that decision.16 In the intervening decades, however, it has sometimes been difficult to discern the difference between *Freeman* review and the ostensibly lower standard of mere “prejudicial error.” However, regardless of how the conception of *Freeman* has evolved, the words still retain their plain meaning. Moreover, the power described in *Freeman* still derives from the court’s inherent equitable authority to correct gross injustice.17

Accordingly, it would be very difficult to say that imposing a sentence that lies somewhere near the median of the recommendations of the prosecutor and defense counsel (defense counsel recommended 7-10 years while the Commonwealth recommended 19-20 years) risks a true “miscarriage of justice.” Likewise, it is very difficult to call a 15-20 year sentence – fairly typical for any serious sexual assault case where a defendant has a prior criminal history – for the rape and separate indecent assault of a wheelchair-bound victim a possible “miscarriage of justice.” Significantly, there was no indication whatsoever in *Gomes* of any of the personal animus between judge and defendant so strongly reflected in the record of *Coleman*. Finally – and perhaps most important – the judge supported her sentence on the basis of multiple factors with no suggestion that an improper factor had predominated as was clearly the case in *Coleman*.

In short, there was simply no evidence of prejudice in *Gomes* – and certainly none that amounted potentially to a miscarriage of justice. In the end, therefore – and despite the SJC’s insistence that the error in *Gomes* was tested against the *Freeman* standard – the outcome can only be explained by the court’s characterization of the judge’s misstep as structural error. Indeed, no traditional formulation of *Freeman* supports the relief granted. *Gomes*, therefore, reflects a narrow but significant change in the law.

Continuing Vitality of *Coleman*.

If, in fact, *Gomes* may be interpreted as an effort by the SJC to enlarge the protections provided by *Coleman*, the court is rejecting a distinct national trend. In *United States v. Grayson*,18 the Supreme Court determined that the right to due process under the Constitution of the United States does not prohibit a sentencing court from considering reliable evidence that a defendant testified dishonestly. Likewise, virtually every state that has considered the matter also permits a defendant’s veracity to be considered in fixing sentence. In addition, current federal sentencing guidelines actually require a sentencing judge to enhance a defendant’s penalty for perjured testimony at trial. As the dissent in *Coleman* observed: “[t]he court today has held that a trial judge may not consider perjury committed by a defendant, who has elected to take the witness stand, as a factor in his sentencing. The result is disturbing. Every jurisdiction that has considered the issue (there are 12) holds to the contrary, i.e., a trial judge may consider a defendant’s perjury, among other things, as a factor in assessing his character and disposition for rehabilitation.”19

Thus, Massachusetts now stands virtually alone on this issue. However, quite apart from whether it makes sense generally for Massachusetts to hew to a different standard than the overwhelming majority of other jurisdictions, there are also strong policy considerations favoring rejecting *Coleman* and permitting judges to rely on a defendant’s veracity when imposing sentence. These factors are especially relevant to a case like *Gomes*.

In the first instance, there is little question that where a defendant denies culpability for the offense of which he is convicted, his prospects for rehabilitation are impaired. In the present case, for example, the defendant’s unwillingness to accept responsibility for his offenses would, under current DOC rules, preclude his participation in the core treatment phase of sex offender treatment. Indeed, no bona fide sex offender treatment program will allow participation by an offender who denies his offense. More broadly, a judge can properly consider whether any defendant can fully participate in rehabilitative programming without taking responsibility for his offenses.20

Further, the rule announced in *Coleman* frustrates meaningful appellate review of sentencing hearings by discouraging judges from accurately memorializing the bases for their judgments. The reality is that most judges do, in fact, consider a defendant’s trial testimony when determining a sentence, and they should be permitted openly to concede as much. “To hold otherwise would … only deter judges from articulating their reasons for a particular sentence fully and prevent correction when the sentencing judge relied on information which was truly unreliable, inaccurate or patently wrong. Trial judges ought not be reprimanded for acknowledging on the record the impact of information they have gained in the plea bargaining or sentencing processes unless the use of such information confounds reason and a just result.”21

Finally, the repudiation of *Coleman* would encourage defendants, at least those who choose to appear on their own behalf, to testify truthfully in accordance with their oaths. While a criminal defendant certainly has a right to testify, he by no means has the right to commit perjury. As the dissent observed in *Coleman*: “[t]he court says that to permit a sentencing judge to consider a defendant’s perjury chills the defendant’s right to testify in his own behalf. The short answer to this is that he has no right to commit perjury and if his predisposition to commit perjury is chilled, so much the better for the administration of justice. The right of the defendant is instances this court has and will exercise the power to set aside a verdict or finding in order to prevent a miscarriage of justice”.


16. The power was initially reserved for situations that “shock judicial conscience and result in a palpable miscarriage of justice.” Commonwealth v. Andrews, 247 Mass. 580, 582 (1924). Suffice it to say, it is no longer confined to those rarified precincts, as a case like *Gomes* amply illustrates.

17. See Commonwealth v. Conroy, 333 Mass. 751, 756-57 (1956) (“while, in a proper case, we have said that a defendant cannot raise a question of law for the first time in a brief filed in this court . . . we have also said that in appropriate


to testify truthfully in accordance with the oath taken by all witnesses.\textsuperscript{22}

As for the view that consideration of a defendant’s dissembling on the stand deprives him of “the procedural safeguards of an indictment and trial [for perjury]” … [a] sentencing judge may consider hearsay evidence of the defendant’s ‘character, family life, and employment situation,’ and ‘indictments or evidence of similar or recurrent criminal conduct if it is relevant in assessing the defendant’s character and propensity for rehabilitation … ’ [T]hese factors are hardly more reliable as indices of the defendant’s prospects for rehabilitation than his commission of perjury in the judge’s presence … Further, [it is beyond dispute that] a sentencing judge may consider the evidence presented at trial and the demeanor of the defendant at trial.\textsuperscript{23} This is merely an extension of that existing rule.

Indeed, overruling Coleman would be consistent with the usual rules governing the nature of evidence that may be considered by a sentencing court. “Generally, due process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial. Rather, judges may consider a wide variety of information. … Consistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person’s life and circumstances … It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come … As long as the sentencing judge has a reasonable, persuasive basis for relying on the information that he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion.”\textsuperscript{24} So too in a case like Gomes.

—Roger Michel

\textsuperscript{22} Commonwealth v. Coleman, 390 Mass. 797, 812 (1943) (Nolan, J., dissenting).

\textsuperscript{23} Id. at 811 (Nolan, J., dissenting). See also Grayson v. United States, 438 U.S. 41, 52 (1978).

\textsuperscript{24} State v. Pena, 301 Conn. 669, 682 (2011). See State v. Coleman, 242 Conn. 523, 544, 700 A.2d 14 (1997) (“evidence adduced at trial detailing the nature and extent of the offenses charged, as well as the defendant’s conduct during the trial and his veracity as a witness, are among the considerations that the sentencing court may take into account in deciding whether to deviate from the original sentence”). See also United States v. Tucker, 404 U.S. 443, 446 (1972); Williams v. Oklahoma, 358 U.S. 576, 584 (1959); United States v. Robelo, 596 F.2d 868, 870 (9th Cir. 1979).
The Hanging Judge, by Michael A. Ponsor (Massachusetts Continuing Legal Education 2013) 374 pages.

Judge Michael A. Ponsor does not state any purpose for writing The Hanging Judge, his first novel, until the acknowledgements section near the end of the book.1 Because the novel is about a death penalty trial and is uniquely written primarily from the judge’s perspective,2 one can assume that he wanted to write an entertaining story that would inform readers about how judges think. If that was all he had set out to do, he would have done a remarkable job.

But with two pages left, the reader learns that Judge Ponsor had at least one other purpose: to an extent, he wanted to provide a “fictional version” of an “excellent” critique of the death penalty written by the late Yale Law School Professor Charles L. Black, Jr., Capital Punishment: The Inevitability of Caprice and Mistake, a book “central” to Judge Ponsor’s efforts.3 As one review put it, Black’s essential argument in Capital Punishment is that the entire death penalty process, from “the decision to charge through pursuit of post-conviction remedies and clemency proceedings,” is so “riddled with arbitrariness and opportunity for mistake” that no legislative or judge-made standards can provide a defendant the due process required to take his life.4 For that reason, the death penalty should be abolished.5 To prove this thesis, Judge Ponsor’s story is full of unexpected events, dishonest people, and vexing issues of law that call into question whether the defendant is getting a fair trial and ultimately committed the crime.

Under those circumstances, constructed from Judge Ponsor’s imagination and experience as a judge, it is hard to justify putting the particular defendant in his novel to death. But considering that Black’s book has been around for almost 40 years, and the death penalty is still used in most states and the federal courts,6 it appears most of American society, or at least most members of Congress and a majority of state legislators in most states, are willing to tolerate this level of risk in the death penalty process. Why? Do the risks that are part of the process outweigh the benefits to society? Judge Ponsor leaves these questions unaddressed, and so The Hanging Judge is incomplete.7

But what Judge Ponsor does explore with great ability is what it is like to be a judge with someone’s life weighing in the balance, and his exploration is informed by his own experiences. Judge Ponsor has been a United States District Judge in Springfield, Massachusetts since 1994, and before that he was a United States Magistrate Judge.8 He assumed senior status in 2011.9 Judge Ponsor went to Harvard College, taught in Kenya, was a Rhodes Scholar, and then graduated from Yale Law School.10 He practiced civil and criminal law in Amherst, Massachusetts before becoming a magistrate judge.11

In October, 2000, Judge Ponsor began presiding over the first death penalty trial in Massachusetts in over 50 years.12 The defendant in that case, Kristen Gilbert, was a nurse who ultimately was convicted of four counts of murder and two counts of attempted murder for intentionally injecting patients with overdoses of adrenaline, a substance that caused the patients’ hearts to race out of control.13 She was eligible for the federal death penalty because the murders happened at the Veterans Affairs Medical Center in Northampton, Massachusetts, a federal facility.14 The jury decided not to impose the death penalty, and she was sentenced to life in prison.15

The facts of United States v. Hudson, the case in The Hanging Judge, are quite different from the Gilbert case. In Hudson, a drive-by shooting in Holyoke, Massachusetts leaves one gang member and a bystander dead.16 A policeman catches the driver, but does not get a good look at the shooter.17 The driver eventually signs a plea agreement with the prosecutor and, at the same time, identifies the shooter as Clarence “Moon” Hudson, a twice-convicted drug dealer known to have a grudge against the dead gang member.18 Moon then is arrested during an early morning raid of his house outside Holyoke.19 Because gangs are involved, the United States Attorney General’s office in Washington directs the United States Attorney in Massachusetts, Buddy Hogan, over his and his assistant prosecutor’s recommendation to the contrary, to charge Moon with violating the federal RICO20 statute so the government can seek the

5. See id. at 1343-44.
7. Judge Ponsor wrote in an Author’s Note at the beginning of the novel that, because he is a sitting federal judge who has presided over a death penalty trial and may do so again, “no one should presume that the opinions expressed or implied in this novel by various fictional characters regarding the American justice system in general, or the death penalty in particular, are necessarily mine.” Michael A. Ponsor, The Hanging Judge Author’s Note (2013).
8. 1 Almanac of the Federal Judiciary 1st Cir. 30 (2013).
10. 1 Almanac of the Federal Judiciary 1st Cir. 30 (2013).
11. Id. at 1st Cir. 31.
12. Id. at 1st Cir. 30; see United States v. Gilbert, CR-98-30044-MAP (D. Mass.).
14. Id.
15. Id.
17. Id. at 10-12.
18. Id. at 26.
19. Id. at 39-48.
death penalty (Massachusetts having abolished the death penalty long ago).21
Enter Judge David Norcross, the United States District Judge in Springfield, Massachusetts who has been a judge for only two years.22 He was in the Peace Corps, went to Harvard Law School, and then joined a large Boston law firm.23 Norcross is nerdy and a little awkward,24 but his older brother just happens to be the former governor of Wisconsin and the current Secretary of Commerce, so when Norcross's wife died of cancer and Norcross became a workaholic to cope, his brother arranged for his appointment to the bench so Norcross could be saved from himself.25 Yet even as a judge, Norcross focuses on his work too much.26 In fact, he obsesses about the death penalty trial that has been thrust upon him, even at the most inappropriate of times.27

Sadly, most lawyers who read this novel will relate, at least a little, to the obsessive way Norcross thinks. What lawyer has not been caught thinking about an upcoming hearing or trial while trying to have a nice dinner out? Everyone does it, at least a little, including other characters in the novel. Lydia Gomez-Larsen, the long-time Assistant United States Attorney tasked with prosecuting Hudson, worries about how the trial will affect her family and public image;28 Bill Redpath, Hudson's lawyer, a chain-smoking veteran of both the Korean War and the death penalty defense bar, is frustrated trying to piece together Hudson's alibi;29 and Eva, one of Norcross's two law clerks, struggles to make the jury instructions perfect for her demanding boss.30 But not all of the people grappling with Hudson's trial are lawyers: besides Hudson himself and his family, Alex Torrielli, the policeman who caught the driver, faces pressure from both his brother and the higher-ups in the Holyoke police department to put Hudson at the scene of the crime.31

One of these issues - crafting appropriate jury instructions - Black surely would think is so “riddled with arbitrariness and opportunity for mistake” that the entire death penalty process should be scrapped.32 But Judge Ponsor presents other vexing legal questions in the novel as well, not all of which are death penalty related. Although not part of the Hudson case, in the first chapter Norcross regretfully sentences a defendant with two prior convictions (one for dealing marijuana, another for beating a man in a fight over his girlfriend) to life in prison without the possibility of parole after he was found guilty of dealing crack cocaine.33 Congress left Norcross virtually no discretion in the matter.34 Yet Norcross would have found the defendant not guilty had he decided to argue his case to Norcross rather than to a jury, which was his choice.35 Later, in the middle of the Hudson trial, Redpath moves for a mistrial because of an off-hand remark Norcross makes about a testifying witness in front of the jury.36 And, of course, the United States Attorney General decides to overrule the recommendation of his Massachusetts prosecutors and put the death penalty on the table in the first place, but more about that later.37

Judge Ponsor describes these and many other troubling issues within a fast-paced, engaging story sprinkled with humor and romance, and containing one near-death scene that is perhaps the best this writer has ever read (it is not who you think).38 Through this story, he shows significant aspects of the death penalty process that may be unfair to the defendant. Yet the knowledge that judges, jurors, and lawyers can sometimes act arbitrarily and make mistakes, or even that the criminal justice system allows this to happen to an extent, is not news. The criminal justice system is run by people, after all, and people are not perfect. So, to complete the argument - to provide an answer to the question “so what?” - Judge Ponsor needs to address why most states and the federal government still have the death penalty, and whether the risks of unfairness he identifies outweigh the benefits of having the death penalty, assuming there are benefits.

Here Judge Ponsor misses an opportunity. One can assume that he believes the criminal justice system on the whole is just, even with all the opportunities for mistakes, because he is a former criminal defense lawyer and remains a sitting federal judge who presides over criminal proceedings.39 Even so, all the significant characters in his story think the death penalty is more trouble than it is worth. Norcross,40 Gomez-Larsen,41 and Redpath42 all find the death penalty very troubling, as do several minor characters, including Hogan,43 Norcross's law clerk,44 the chief judge of the district court,45 and even an uncle of one of the victims, who also happens to be a police captain in Holyoke.46 But no one provides a full-throated defense of the death penalty and why it should remain part of the criminal justice system. This may (for better or worse) accurately reflect the prevailing opinion of the Massachusetts legal community, but may not reflect the prevailing opinion of Massachusetts residents as a whole. After all, Governor Mitt Romney filed a bill in 2005 to reintroduce the death penalty to Massachusetts,47 a bill supported by 65 percent of Massachusetts residents at the time it was introduced,48 and most

23. Id.
24. See id. at 121-25.
25. Id. at 22.
26. See id. at 121-25.
28. Id. at 68.
29. Id. at 69-77, 156-61.
30. Id. at 312-13.
31. Id. at 27-28, 115-17.
34. Id. at 8.
35. Id. at 6.
36. Id. at 256-59.
37. Id. at 67.
39. 1 Almanac of the Federal Judiciary 1st Cir. 30-31 (2013).
41. Id. at 89-90.
42. Id. at 86-88.
43. Id. at 67.
44. Id. at 81.
46. Id. at 53, 57.
recently the families of Boston Marathon bombing victims have been split over whether one of the bombers, Dzhokhar Tsarnaev, should face the death penalty in Massachusetts federal court. A good defense of the death penalty, somewhere in the novel, would have challenged the characters to consider the reasons behind the death penalty and not only the perils embedded in the process.

In fact, at least two policy justifications for the death penalty today have been around for centuries, a fact made relevant by Judge Ponsor’s discussion of a Western Massachusetts case from the early 1800s involving two men, Dominic Daley and James Halligan, who were almost certainly wrongfully convicted and hanged for murder because they were Catholic and not because they were guilty. Judge Ponsor provides parts of their history at the end of each of the four parts of his novel to show parallels between the dangers in the death penalty process then and now, but what he really shows, perhaps inadvertently, is how far the legal system has developed to provide fairer trials. Among other things, Daley’s and Halligan’s lawyers were only given two days to prepare for trial and thus could not even view the scene of the crime or contact potential witnesses, while Redpath had months to prepare. Indeed, modern developments in the death penalty process allow the death penalty to be applied more equitably in an attempt to support two goals: deterrence (how well the death penalty deters other potential murderers) and retribution (the idea that the death penalty is a moral imperative such that when someone murders another, death is what he or she deserves). Neither concept is addressed in any depth by Judge Ponsor’s characters, and that limits the persuasiveness of the novel.

In fact, at least one place in the novel begs for a discussion of these concepts. When the United States Attorney General’s office instructs Hogan and Gomez-Larsen to bring a death penalty case over their objections, the reader is not given any of the reasons why, other than that the Hudson case is part of an initiative to bring the death penalty to non-death penalty states. But why would the Justice Department want to bring the death penalty to non-death penalty states? There must be policy reasons behind this move, and perhaps someone from the Justice Department could have explained them to Hogan and Gomez-Larsen.

All in all, Judge Ponsor has written an entertaining novel that provides much for lawyers and the general public to consider. He knows from experience where the flaws are in the death penalty process. But should Judge Ponsor decide to address the death penalty again in his next work, he should go further and analyze why most American jurisdictions have the death penalty in the first place. This would complete his otherwise excellent critique.

—Brian P. Bialas

52. Id. at 198; see generally id.
54. See id. at 282-83.

We think of the conflict between the rule of law (including elements of humanity) and military necessity as a modern dilemma. But it goes back much earlier, to the years before the founding of our country. It was asserted that George Washington, as a junior officer in the French and Indian War, allowed troops under his command to kill a French ambassador. The incident, and resulting criticism, haunted him. As Commander-in-Chief of the Continental Army, he tried to be an exemplar of propriety, banning plunder and forcing his hard-pressed troops to apply the long extant rules of humane treatment of prisoners. When the British treated captured colonial soldiers as terrorists rather than soldiers, Washington threatened retaliation but could not bring himself to follow through on that threat and continued to apply the elevated standards of the Laws of War.

Lincoln’s Code is an objective, heavily detailed look at the international development of the Laws of War. It begins with the above Washington history and passes through an early 19th century period of ups and downs of adherence (or not) to the Laws of War in the War of 1812 and the Mexican War. It then focuses in on its core portion of the development of standards to govern the waging of the Civil War, including a code of conduct commissioned by President Lincoln. It concludes with the history of latter 19th century battles with Indians, the Spanish-American War, and the occupation of the Philippines.

The book tells the story of the adoption of Lincoln’s code and its specific Civil War context. Initially, the hostilities were called a rebellion by Lincoln and he treated the rebels as criminals, not enemies. He wanted no part of recognizing the Confederacy as a foreign nation or of applying the Laws of War to it. However, there were two impediments to that line of reasoning. First, the blockade of Southern ports instituted in early 1861 required a conflict between sovereign foes to gain recognition under international law by third parties trading through the Southern ports, notably Great Britain. A blockade in violation of international law might trigger Britain’s entry into the war on the side of the Confederacy. Lincoln’s Cabinet sought to call the blockade a “port closure” but that was not a viable alternative. Ultimately, Lincoln characterized the conflict as a war for purposes of invoking a legitimate blockade and a rebellion for other purposes, including continued treatment of Confederacy commissioned privateers as pirates. The legal strategy proved viable in court and in Congress. There was a second prod to embracing the Laws of War as applicable to this conflict. The first major set piece battle of the Civil War at Bull Run (Manassas) went badly for the Union and hundreds of Union soldiers were captured by the Confederate army. If Lincoln were to treat captured Confederate soldiers as criminals (even terrorists) then the captured Union soldiers might be treated similarly by the Confederacy. General Halleck, then chief of staff but ultimately General-in-Chief of the Armies (until replaced by Ulysses Grant in 1864), adopted a distinction between men commissioned or enlisted in the Confederate Army and those in self-organized guerilla bands, the former subject to humane, civilized treatment laws of war, the latter not.

Operating well below the President’s level was an interesting character, Francis Lieber, an immigrant who had been in the Prussian Army fighting Napoleon at Waterloo and dwelt in the antebellum South (even owned slaves), but ultimately moved to New York to teach law at Columbia University. He gained recognition as a renowned scholar of international law and also came to condemn slavery. He was a key advisor to Halleck in forming his approach to classifying enemy soldiers. Halleck and Lincoln asked Lieber to draft what became the Lincoln Code and General Order No. 100. Lieber’s insights included norms of restraint with ample precedence in United States and European history but he also had a hard edge of arguing for the waging of a “war in earnest” (quoting Clausewitz) free of limitations of “mawkish social conventions,” particularly because the war was one pitting a free people against slavery—this in early 1862 prior to the creation and issuance of the Emancipation Proclamation.

The author of this book, Professor John Fabian Witt, shows that Lincoln was trying to avoid the issue of slavery, preferring to describe the rebellion-cum-war as a battle to preserve the Union. He knew of the long American history of protecting slavery from war’s ravages and Thomas Jefferson’s Virginia Constitution of 1776 indicting King George for causing negroes to rise in arms against colonists. An 1861 book on international law by General Halleck had explained why private property (including slaves) was exempt from seizure or confiscation. Above all, Lincoln had to keep still-loyal border states (all slaveholding states) within the Union. Lieber’s drafting of a code of conduct included Articles 32, 42 and 43:

1. 370 footnotes showing a depth of research and clear-eyed analysis.
3. The book’s Appendix includes the code that Lincoln commissioned and distributed throughout the Union Army as General Order No. 100, “Instructions for the Government of Armies of the United States in the Fields” with 157 articles addressing martial law and military necessity, protection of property and persons; deserters, prisoners, hostage and booty, partisans; safe conduct, spies, traitors, messages and flags of truce; armistice and capitulation, assassination, and, tellingly for today’s readers, insurrections and terrorism.
4. Id. at 354-363 (including a discussion of military intelligence using the “water cure,” a precursor of the modern waterboarding tool of ‘enhanced intelligence’).
5. Id. at 142.
6. Id. at 145.
7. Id. at 146.
8. See The Prize Cases, 67 U.S. 635 (1863) (5-4 decision upholding the blockade).
9. Witt, supra note 2 at 146.
10. Id. at 192.
11. In the Civil War, he had one son serving in the Confederate Army and one son in the Union Army, Id. at 171-73 and 180. In 1862, the son in the Confederate Army was killed in action, Id. at 193.
12. He also was a key advisor to Secretary of War Edwin Stanton, Id. at 193.
13. Id. at 196 (Clausewitz, On War, trans. J.J. Graham (London: N. Trebner 1871)).
14. Id. at 196.
16. Id. at 199-200. Halleck, a West Point graduate and a captain in the Mexican War, had been a prominent lawyer, had helped draft California’s Constitution, and had been president of the Atlantic and Pacific Railroad. He was a military
limiting freeing of slaves to these tenets:

- "A victorious army, by the martial power inherent in the same," may suspend, change, or abolish, as times the martial power extends to a broader basis (Article 32);
- "Slavery, complicating and confounding the idea of property (that is of a thing) and of personality (that of humanity) exists according to municipal law or local law only. The law of nature and nations has never acknowledged it … " (Article 42); and
- "Therefore, in a war between the United States and belligerent which admits of slavery, if a person held in bondage by that belligerent be captured or come as a fugitive under the military favor of the United States, such person is undoubtedly entitled to the rights and privileges as a free man. To return such person into slavery would amount to enslaving a free person, and neither the United States or any other under their authority can enslave any human being." (Article 43).

The years 1861 and 1862 were marked with the failures of Lincoln's generals, great loss of life in the Union Army, and a once-conceived-of quick war had turned into a seemingly endless one. In July 1862, Lincoln came to the conclusion that emancipating the slaves was a military necessity for the salvation of the Union. He reasoned through the necessity and rationale to marshal support and defect criticism, drafted the Emancipation Proclamation, awaited a Union victory which came at Antietam in the fall of 1862, gave the Confederacy 100 days to end the rebellion or face issuance of the proclamation, and then issued it on January 1, 1863. Even now, churches with African-American congregations read the proclamation aloud on New Year's Day.

The military code that Lieber drafted was guided and approved by Halleck and approved by Lincoln in late 1862 and issued in March 1863 as General Order No. 100. It expressed a view of military necessity balanced with restraints of humanity which coincided with Lincoln's independent thinking. The code and the process of drafting it reinforced the view that the Laws of War inherently freed slaves in conquered territory since natural law allowed no differentiation based on skin color. It was widely circulated, served to restrain savagery in the Union Army, and became a building block for the Geneva Conventions. Illustrative of the code's balance and workability is the fact that Sherman's March through Georgia destroying all property within a sixty-mile wide swath of land over the 250 mile distance from Atlanta to Savannah did not per se violate it.

Other reviews of this book have characterized it as, e.g., "choked full of truly novel insights … a great book … " and an "important address to the ever-growing movement to our greatest and most complex national leader." The New York Times review pointed out the balance of the book and quoted Prof. Witt himself saying the book is "an equal opportunity offender." But the best summation is in the Epilogue of the book itself: "The success of Lincoln's and Lieber's 1863 code and its promulgation around the World, lies in this: since it helped constrain U.S. Presidents a Century and a half later, presidents who find themselves in a multilateral legal world even as the United States is (for now anyway) the World's only military superpower." This refutes the timeless notion of laws falling silent in time of war. The book concludes:

- Lincoln's General Order aimed to establish a framework salient of both of war's twin imperatives: resolve and humility. All too often Americans have failed to live up to the example Lincoln set. How could we not? But what is equally striking … is that men and women have worked ever since to preserve the framework he helped to establish.

This book stimulates a renewal of interest in Lincoln's code and its role in shaping the substance and procedure of international law development and of unilateral restraint. The code and this book's thorough exposition of its history, context and import will have influence for those grappling today and in the future with eternal issues of genocide; torture as a means of enhanced military intelligence; irregular detentions at Guantánamo Bay and elsewhere, acceptable and unacceptable levels of collateral damage to civilians by manned and unmanned weapons systems and economic sanctions; assassination in the absence of war; and even in domestic controversies. The world is indebted to Lincoln, Halleck, and Lieber for showing how to create a set of rules providing a framework for dealing with some of these eternal issues and to Professor Witt for enhancing understanding of that framework.

—Jerry Cohen

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and Presidential Power in the Age of Terror (W.W. Norton & Co. 2010) and former United States Solicitor General and Justice of the Supreme Judicial Court.

23. Id.
24. Id. at 372.
25. Marcus Tullius Cicero, inter arma silent leges (Cicero 17).
27. Witt, supra note 2 at 373.
28. Disclosure: This reviewer has been involved in defense of detainees at Guantánamo Bay and written about it, e.g., A Patent Lawyer at Guantánamo and former United States Solicitor General and Justice of the Supreme Judicial Court.

23. Id.
24. Id. at 372.
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