Massachusetts Law Review
Volume 100, No. 1  Published by the Massachusetts Bar Association
IN THIS ISSUE

An Introductory Note
By Thomas J. Carey Jr. 1

Should State Law Enforcement Officials be Required to Develop and Implement Minimization Protocols to Govern the Execution of Digital Search Warrants?
By Patrick Hanley and Widmaier Marcus Charles 5

Case Comments
A Matter of Opinion

Protecting Real Property from MassHealth’s Estate Recovery Claim: Is it Possible?
Daley v. Secretary of the Executive Office of Health and Human Services and Director of Office of Medicaid, 477 Mass. 188 (2017) 19

Book Review
The Taming of Free Speech: America’s Civil Liberties Compromise 24

The Massachusetts Law Review is supported in part by the Massachusetts Bar Association Insurance Agency

Since its founding in 1915, the Massachusetts Law Review became recognized as “one of the best edited legal reviewing periodicals in the country.” The rejuvenated quarterly title has published 99 volumes with at least four issues each. Since the beginning, subscriptions are a benefit of membership. The volume numbers are consecutive, this note does not separately cite to the volume numbers.


Edward F. Hennessey (later chief justice of the Supreme Judicial Court) was admitted to the Massachusetts bar in 1965, and is a member of the Massachusetts Bar Association. Alongside Hon. Christopher J. Koster and Thomas J. Carey Jr., he is the co-author of the LexisNexis Practice Guide Massachusetts Federal Courts published by LeRLexisNexis.

At https://www.massbar.org/publications/massachusetts-law-review, the Massachusetts Law Review is of counsel to the Massachusetts Bar Association and has long been active in the Association’s symposia, the Massachusetts Law Quarterly published a Special Symposium, and commemorated the 200th anniversary of the Superior Court.

Under the guidance and editorship of Frank W. Grinnell until 1960, the Massachusetts Law Review became a quarterly title. It was the first, and is now the old Massachusetts Bar Association’s “scholarly periodical for practicing lawyers.” It was originally named the Massachusetts Law Quarterly. In Volume 100, Number 1, marks a significant milestone for the rejuvenated Massachusetts Law Review.

It was originally named the Massachusetts Law Quarterly. Its role as the Massachusetts Bar Association’s “scholarly periodical for practicing lawyers” is thus a valuable repository of legal scholarship covering more than a century of the commonwealth’s legal history. The pages of the Massachusetts Law Review are a testament to the belief that an understanding of legal history is essential for the legal practitioner. “Legal history broadens our sensibility and even perhaps more than most people, lawyers should understand the uses of history for the legal practitioner. "Legal history ennobles the more mundane aspects of practice." (Brink, Robert J. Brink, Fiat Justitia: A History of the Massachusetts Bar Association, 1960-1985, 28-29 (1987).

The name was changed to the Massachusetts Law Review in 1960. The name was returned to four regular issues in 1981 in Volume 66. Since its founding in 1915, the Massachusetts Law Review has published 99 volumes with at least four issues each, supplementing the website.

It remains true, as Grinnell wrote in 1945, that in the pages of the Massachusetts Law Review one “will find the story of almost all the legal developments in Massachusetts federal courts.” Today, one could expand the statement to include the first two decades of the 21st century.

Here are some examples of the breadth and scope of the materials found in the Massachusetts Law Review:

- At https://www.massbar.org/publications/massachusetts-law-review. Others have served on the Editorial Board in various capacities.


- At https://www.massbar.org/publications/massachusetts-law-review. Others have served on the Editorial Board in various capacities.


- At https://www.massbar.org/publications/massachusetts-law-review. Others have served on the Editorial Board in various capacities.


- At https://www.massbar.org/publications/massachusetts-law-review. Others have served on the Editorial Board in various capacities.
Volume 100, Number 1, marks a significant milestone for the Massachusetts Law Review. Since its founding in 1915, the Review has published 99 volumes with at least four issues each, supplemented by additional special issues. It was the first, and is now the oldest, bar association journal in the country. As has been true from the beginning, subscriptions are a benefit of membership.

Under the guidance and editorship of Frank W. Grinnell until 1960, the Review became recognized as “one of the best edited legal periodicals … in the English language.” Its role as the Massachusetts Bar Association’s “scholarly periodical for practicing lawyers” was reinforced and enhanced after 1960 by the efforts of attorney Edward F. Hennessey (later chief justice of the Supreme Judicial Court) and others who created “a scholarly forum in which the entire Association could participate not only as editors but as original contributors.” The Review’s reputation and influence continued to grow under a succession of dedicated editors. During their tenure, the rejuvenated Review has published more than 14,000 pages. With modern technology, this wealth of information and analysis is now easily accessible to members on the Massachusetts Bar Association website.

The Massachusetts Law Review is thus a valuable repository of legal scholarship covering more than a century of the commonwealth’s legal history. The pages of the Review are a testament to the belief that an understanding of legal history is essential for the believer that an understanding of legal history is essential for the

perhaps more than most people, lawyers should understand the uses of history and “how to use experience, whether remote or recent, in the process of deciding what to do today about the prospect for tomorrow.”

It remains true, as Grinnell wrote in 1945, that in the pages of the Review one “will find the story of almost all the legal developments [in Massachusetts] since the beginning of the [20th] century, and much statutory and constitutional history … which can be found nowhere else.” Today, one could expand the statement to include the first two decades of the 21st century.

Here are some examples of the breadth and scope of the materials to be found in the Review. Among numerous special issues and symposiums, the Review celebrated the tercentenary of the SJC and the 150th anniversary of the Superior Court, published a Special Constitutional Issue for the bicentennial of the United States Constitution, and commemorated the 200th anniversary of the Massachusetts federal courts. In 1917, when there was renewed talk after Grinnell: Edward F. Hennessey; Daniel G. MacLeod; Francis J. Larkin; Raymond J. Kenney, Jr.; James F. Queenan Jr.; Daniel J. Johndis; Philip M. Cronin; Marjorie Heins; Jerry Cohen; Barry Rapech; R. Michael Cassidy; Janet Hetherwick Pumphrey; William J. Meade; Victor N. Baltera; J. Thomas Kirkman; Roger L. Michel Jr.; Eliyn H. Lazar-Moore; and Marc C. Laredo. Many others have served on the Editorial Board in various capacities.


Brink, supra, at 29.


of a constitutional convention that might consider the election of judges, the Review published remarks made at the unveiling of the statue of Rufus Choate by his grandson, who as a boy had witnessed Choate’s famous speech at the Constitutional Convention of 1853, and reprinted Choate’s speech. In defending an independent judiciary for Massachusetts, Choate eloquently described the nature of judicial power and the factors that ought to control the choice of those who will wield it. As recent events confirm, Choate’s speech remains relevant today.

The Review has long been a reliable source of firsthand information on the operations of state courts. Retired Associate Justice of the SJC Francis P. O’Connor, in an article on collegiality in an appellate court, gives invaluable insight into the decision-making process and traditions of the SJC, and highlights the virtue of civility in the work of lawyers and judges, a subject of enduring importance to the profession. In 1938, the Review printed remarks by SJC Associate Justice Henry T. Lummus about the work of the court and about how lawyers should approach their arguments, advice still worthy of consideration by anyone who appears in that court today. One can track in the pages of the Review the history of reforms to our court system, as well as the evolution of the legal profession and standards of professional responsibility.

Book reviews have been a popular feature of the Review. A lawyer looking for a good book to read, or simply wondering whether a book is worth reading, can find guidance in the Book Review section. Reviewed books usually have some connection with the law, but the criteria used in selecting books for review are fairly generous. A surprisingly wide range of books have found their way into the Review, and many regular readers have discovered interesting books to add to the list of books they hope to read someday. In the Superior Court Anniversary issue, for example, James F. McHugh III (then a justice of the Appeals Court and former justice of the Superior Court), used the occasion to review fictional treatments of that great court (all worth reading). Showing that truth can sometimes be stranger than fiction, Dean Mazzone reviewed Robert Bork’s memoir of his days in the Solicitor General’s Office. Before shelling out money for writing advice, one may wish to look at the evaluation by Janet Pumphrey of one set of materials on the market. Peter Elikann reviewed several books on Whitey Bulger. Victor Baltera reviewed a book examining law and justice through Shakespeare’s works. And how could one resist the temptation to add another book to the list after Judge McHugh penned a delightful and enticing review of Sex and the Constitution.

As valuable as all these materials have been, however, the

---

18. 2 Mass. L. Rev. 220 (1917).
19. Id. at 221-45.
mainstay of the Review nevertheless consists of articles and case comments on decisions of the appellate courts on a variety of legal subjects, such as business organizations, contracts, criminal law, torts, property, family law, employment law, equity, evidence, and trusts and estates. As to procedures, the Review has covered administrative law, civil procedure, criminal procedure, trial practice, arbitration and appellate procedure. The Review also publishes comprehensive discussions of major statutory enactments, and gives special attention to decisions interpreting the constitutional protections and civil liberties guaranteed by the Bill of Rights of the U.S. Constitution and the Declaration of Rights in the Massachusetts Constitution of 1780.

In an oft-quoted passage, Justice Holmes wrote, “The life of the law has not been logic; it has been experience.” For more than a century, the Massachusetts Law Review has provided a distinctive forum in which lawyers may share their experience, and thereby contribute to the improvement of our profession and the growth of the law.

51. Oliver W. Holmes Jr., The Common Law I (1881).
52. At https://www.mass.gov/service-details/new-opinions. One can even click on a link to register to have all decisions (or decisions in particular fields) sent to you automatically upon release.
54. At https://www.suffolklaw.edu/sjc.
been volunteer sharing of professional opinion by knowledgeable attorneys. No paywall; no subscription fee. The background of the writer is always available, and any bias or advocacy orientation is quite visible. In many instances, articles and comments are unbiased attempts to advance the legal process by educating the bar as to the implications of decisions, the impact of legislation, or the professional standards they must uphold. In every instance, the Review publishes information useful to practicing lawyers, still true to the original pledge that it “will contain practical information likely to be useful at any time to any member of the bar in his practice ....” The need for such information still exists and the Editorial Board believes that the Review still has a role to play in meeting that need.

To help address the question of how best to fulfill that role, we invite comments and reminiscences from former editors and others about their experiences with the Review, how it came to be such a valuable resource to practicing lawyers, and where it should go from here. We especially invite our readers to let us know how we are doing and to communicate their views and suggestions as to how the Review can best continue to serve the bar in the future.

***

Whatever the future holds, the continued success of the Massachusetts Law Review as “a scholarly forum” for practicing lawyers will depend upon the voluntary participation not only of editors but of original contributors from across the profession. Thus, the request for submissions that appears in every issue is no mere formality but is instead a heartfelt plea for more volunteers to join in this endeavor. Gray hair and seniority are not prerequisites for publication. Contributors may be asked, however, to certify that they are not bots, at least until the Editorial Board itself has been replaced by bots.

For now, the editors cordially invite you to peruse the landmark Volume 100, Number 1, of the Massachusetts Law Review, and hope you enjoy it.

57. Letters may be sent to the Board of Editors, Massachusetts Bar Association, 20 West St., Boston, MA 02111-1204. The author is available by phone (617) 371-1077; email (thomas.carey@bc.edu); or letters addressed to him at Boston College Law School, 885 Centre St., Newton, MA 02459-1163.
I. INTRODUCTION

In Commonwealth v. Molina, the Massachusetts Supreme Judicial Court (SJC) broadly suggested that it would be wise for state law enforcement officials to utilize “minimization protocols” when executing digital search warrants. In the realm of digital search warrants, how a search is conducted, including whether minimization protocols were employed, is gathering considerable attention. In Commonwealth v. Martinez, the SJC expressed the same sentiment when it forewarned that, in an appropriate case, it would consider whether to require “some type of digital search protocol.”

The SJC appeared to backtrack somewhat from that position in the subsequent case of Commonwealth v. Keown, where, in the context of a search that took place more than a decade ago in an entirely different technological landscape, the court expressly stated that the absence of “ex ante search protocols” does not necessarily mean that a laptop computer warrant lacks particularity for purposes of the Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. The SJC’s justification seemed to be, among other things, that it had specifically declined to require search protocols in the earlier case of Commonwealth v. McDermott. Nevertheless, the SJC noted in Keown that “the proliferation of technology over the 10 years since [it] decided McDermott . . . has heightened the concern regarding searches of electronic devices.” The SJC reiterated this concern in Commonwealth v. Dorelas, where, in the context of a digital search warrant authorizing the search of a defendant’s iPhone for evidence of communications linking him to certain crimes then under investigation, the court stated that “[m]ore narrow and demanding standard[s]” are required for searches of electronic devices.

The SJC has since undercut that position somewhat in Commonwealth v. Perkins, where, in the context of a digital search warrant authorizing the search of a defendant’s cellular telephone for evidence related to his alleged drug distribution business, the court

*This article represents the opinions and legal conclusions of its author(s) and not necessarily those of the Office of the Attorney General. Opinions of the Office of the Attorney General are formal documents rendered pursuant to specific statutory authority.

1. Commonwealth v. Molina, 476 Mass. 388, 398 (2017) (flagging its “concern[] about the lack of protocols or formal guidelines for executing search warrants for digital evidence” and suggesting that in future cases, it “may consider whether to require . . . a digital search protocol that would affirmatively demonstrate ‘a high regard for rights of privacy and take all measures reasonable to avoid unnecessary intrusion’”) (quoting Commonwealth v. Vitello, 367 Mass. 224, 262 (1975)).
4. Id. at 240 (citing Commonwealth v. McDermott, 448 Mass. 750, 776 (2007) (“Advance approval for the particular methods to be used in the forensic examination of the computers and disks is not necessary”).
text messages were sufficiently limited in content and scope such that the commonwealth did not capitalize on the lack of particularity in the warrant.8

With the above as background, in this article we acknowledge that the particularity requirement’s protection against unreasonable searches, alone, has so far been sufficient in Massachusetts to guide judicial examination of searches of digital evidence; however, the SJC has flagged that minimization protocols might be appropriate in some cases, which suggests that in the future the reasonableness of a search may be judged not only on the particular description of the evidence that is the subject of the search, but also on the way that the digital examination is conducted to provide boundaries to a search in order to protect against general “exploratory rummaging” in the digitized, Internet Protocol (IP)-based communications environment of the 21st century.

II. BACKGROUND

The Fourth Amendment to the United States Constitution provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”9 Article 14 of the Massachusetts Declaration of Rights, moreover, provides that:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause of foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.10

In addition, Massachusetts General Laws (G.L.) c. 276, § 2, requires that “search warrants shall designate and describe the building, house, place, vessel or vehicle to be searched and shall particularly describe the property or articles to be searched for.”11 The dual purpose of these constitutional and statutory particularity requirements is “(1) to protect individuals from general searches and (2) to provide the commonwealth the opportunity to demonstrate, to a reviewing court, that the scope of the officers’ authority to search was properly limited.”12 A related purpose of the particularity requirement is to provide necessary information to an individual whose property is being searched or seized.13 Thus, in the context of executing digital search warrants, which, as discussed below, is ordinarily divided into two stages, “[i]f officers must be clear as to what it is they are seeking on [electronic storage devices], and they must conduct the search in a way that avoids searching files of types not identified in the warrant.”14

A. Current Safeguards to Prevent General “Exploratory Rummaging” in the Execution of Digital Search Warrants

In digital evidence cases, “[t]he normal sequence of ‘search’ and then selective ‘seizure’ is turned on its head; first the government seizes the property, then it searches it.”15 The law regulating this process should, as Kerr opines, address three major questions:

First, during the physical search stage, what limits an officer’s ability to seize physical storage devices for later analysis? Second, during the electronic search stage, what limits an officer’s ability to comb through the electronic files for evidence? And third, after the electronic search stage, what limits an officer’s ability to use information discovered during the electronic search stage?16

For practical reasons, it is easy to understand why courts are generally deferential to law enforcement during the physical search stage. A place to be searched can contain many electronic storage devices, and the electronic search stage can be extremely time-consuming given the massive storage capacity of cellular telephones and computers; therefore, state law enforcement officials are left with virtually no choice but to seize all electronic storage devices at the physical search stage for subsequent forensic analysis off-site.17 To date, the SJC has not identified substantive limits to this permissive approach.18

Although the commonwealth can “overseize” at the physical search stage out of necessity, privilege protocols, akin to minimization protocols, in Massachusetts are required to protect against searches of privileged communications between a defendant under indictment and his lawyer.19 Basically, the commonwealth may seek to seize emails of a defendant under indictment by means of an ex parte search warrant.20 However, due to the sensitive nature of such a seizure, “only a Superior Court judge may issue a search warrant seeking emails of a criminal defendant under indictment.”21 Also, the

8. Commonwealth v. Holley, 478 Mass. 508, 524-25 (2017); see also Commonwealth v. Sheppard, 394 Mass. 381, 390 (1985) (exclusion not warranted where record demonstrated that officers did not exploit defect in warrant and properly limited scope of their search such that defendant was not prejudiced by lack of particularity).
9. U.S. CONST. Amend. IV.
10. Mass. Const. art XIV.
13. Id. at 567 (citing Katz v. United States, 389 U.S. 347, 356 (1967)).
17. Id. at 7.
18. See, e.g., Commonwealth v. Molina, 476 Mass. 388, 396-97 (2017) (explaining that “[w]here evidence of child pornography could thus have existed on any or all electronic devices at the location associated with the target IP address, the seizure of over a dozen electronic devices found in the apartment did not exceed the warrant’s scope”).
19. Preventive Med. Assocs. v. Commonwealth, 465 Mass. 810, 823 (2013) (“Given the constitutional command of reasonableness and in light of the risk involved to the integrity of a defendant’s attorney-client privilege . . . the commonwealth must present to a Superior Court judge and obtain the judge’s approval of the search protocol to be used and specifically the procedures proposed to protect against searches of privileged communications between [a] defendant [under indictment] and his attorneys” before any search of the defendant’s emails seized pursuant to a search warrant may take place).
20. Id. at 821.
21. Id. at 822.
affidavit submitted in support of the warrant application must inform the judge at the outset that the target of the email search is under indictment and must explain the nexus, if any, between the indictment and the search warrant being sought. Finally, the affidavit must explain why a search warrant is necessary to obtain the emails as opposed to a rule 17(a)(2) summons for the production of documentary evidence. In cases involving the Stored Communications Act, for example, the SJC has suggested that a search warrant, rather than a rule 17(a)(2) summons, is necessary to obtain a defendant’s emails.

Against this backdrop, the SJC permits the use of a “taint team” to screen out privileged email communications prior to review by the pertinent investigator or a prosecutor. A “taint team” is a group of attorneys or agents employed by a government office who have not at any time been involved in the investigation and/or prosecution of the defendants, and who will not be assigned to any such investigation or prosecution in the future; the team sorts the defendant’s communications into privileged and unprivileged items so that the latter group may be investigated by the government without inappropriately piercing a defendant’s attorney-client privilege. To pass constitutional muster, the “taint team” procedures must comply with each of the following requirements:

1. The members of the taint team must not have been and may not be involved in any way in the investigation or prosecution of the defendants subject to indictment — presently or in the future; (2) the taint team members are prohibited from (a) disclosing at any time to the investigation or prosecution team the search terms submitted by the defendants, and (b) disclosing to the investigation or prosecution team any emails or the information contained in any emails, subject to review until the taint team process is complete and in compliance with its terms; (3) the defendants must have an opportunity to review the results of the taint team’s work and to contest any privilege determinations made by the taint team before a Superior Court judge, if necessary, prior to any emails being disclosed to the investigation or prosecution team; and (4) the members of the taint team must agree to the terms of the order in writing.

On the one hand, despite “widespread skepticism” about the ability of government agents to properly review privileged communications without affecting attorney-client privilege, the SJC has concluded that it can “offer adequate protection to the Commonwealth’s citizens” if the previously mentioned requirements are met. On the other hand, the SJC has expressed concern that a search of digital files could be “joined with the plain view doctrine to enable the Commonwealth to use against defendants incriminatory evidence . . . even though such evidence may not actually fit within the scope of the search warrants obtained.” This prospect is worrisome because searches of digital information tend to require law enforcement to delve into, and carefully sift through, immense stores of data.

In Preventive Med. Assoc. v. Commonwealth, the SJC elected to “leave for another day the question whether use of the plain view doctrine as a justification for admission of evidence should be precluded or at least narrowed in the context of searches for electronic records.” Thus, it is an open question whether application of the plain view doctrine to searches of digital media would violate the constitutional prohibition on general searches. As discussed below, “[t]he day when courts will be called upon to determine more precisely when and how the plain view exception applies to digital searches is likely close at hand.”

Given the pervasive nature of technology and the vast amount of personal information stored in laptop computers and cellular telephones, the SJC’s call for minimization protocols to govern the execution of digital search warrants certainly has appeal. Indeed, some scholars have urged the practice of placing, ex ante, specific conditions on how computer warrants are executed as the best way to limit computer searches. The fundamental question is whether the limits should be recognized by reviewing courts exercising ex post judicial review, as recommended by Kerr, rather than by individual judges imposing search restrictions, ex ante.

B. Ex Ante Search Restrictions vs. Ex Post Judicial Review

There are two basic strategies for regulating and narrowing the invasiveness of digital searches to ensure the adequate protection of privacy rights guaranteed under the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights: ex ante search restrictions and ex post judicial review. The ex ante strategy seeks to regulate computer searches by requiring warrants to articulate within the body of the warrant the precise steps that forensic analysts may take when they conduct their review during the electronic search stage. According to Kerr, “[t]he ex ante strategy is deeply flawed” in that “[i]t wrongly assumes that prosecutors and magistrate judges have the knowledge needed to articulate search strategies before the search begins,” when, “[i]n truth, the forensic process is too contingent and unpredictable for judges to establish effective ex ante rules. The better approach, according to Kerr, is to impose

22. Id.
23. Id.
24. Id. at 819 n.17 (citing 18 U.S.C. § 2703(a) (2018)).
26. Id. 824-25.
27. Id. at 828.
28. Id. at 826-27.
29. Id. at 831-32.
32. Dorelas, 473 Mass. at 513 (Lenk, J., dissenting) (citations omitted).
33. Id. at 514.
37. Id. at 572 (emphasis added).
use restrictions applied ex post to govern the admissibility of non-responsive data seized and observed in the course of the government’s permitted search for responsive data, which, Kerr explains, “would end up imposing rules of reasonableness on all warrants, not just on those individual warrants that happen[] to have a particular restriction imposed by [a] judge.”

A review of Supreme Court case law on the role of the magistrate judge in the execution of search warrants exists that existing Fourth Amendment doctrine contemplates a surprisingly narrow role for magistrate judges. Viewed in isolation, as Kerr opines, individual cases like Lo-Ji Sales, Dalia, Grubbs and Richards do not definitively rule out the lawfulness of ex ante restrictions on the execution of computer warrants. Taken together, however, it is plausible that these four cases undercut the lawfulness of such restrictions (i.e., Lo-Ji Sales, Dalia, Grubbs and Richards emphasize that the reasonableness of a digital search warrant should be assessed ex post rather than ex ante).

In Massachusetts, however, there is no ready test for determining the reasonableness of a search and seizure other than by balancing the need to search or seize against the harm to privacy that the search or seizure entails. Therefore, the strategy employed to regulate and narrow the invasiveness of digital searches may necessarily vary according to the circumstances and digital technology involved. For example, wiretapping, notwithstanding many criticisms and objections, is fundamentally different from computer searches in important respects that bear on the viability and reasonableness of utilizing a prescribed minimization protocol.

1. Minimization Protocols in the Wiretapping Context in Contrast to Current Practice for Digital Searches

In the context of electronic surveillance conducted pursuant to the federal wiretap statute, 18 U.S.C. §2510 et seq., commonly referred to as Title III, and the Massachusetts wiretap statute, G.L. c. 272, §99, the wiretap order requires ex ante minimization of the intrusions of privacy that occur during the execution of the warrant. Title III provides, in pertinent part, that a federal wiretap order “shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III].” Although the Massachusetts wiretap statute has no express equivalent, the SJC has held that every order issued under the statute “must fully ensure that the surveillance is limited to proper objectives, and protective of rights of privacy.” Furthermore, “[t]he directive of the order and the instructions given therewith should be clear and unambiguous so that the executing officers are aware of and abide by the limitations of the order.”

Conversely, digital search warrants for electronic devices are by their nature highly technical; therefore, as the SJC explained in McDermott, no advance approval is required for computer search methods because the magistrate issuing the warrant “likely does not have the technical expertise to assess the propriety of a particular forensic analysis.” Furthermore, just as “few people keep documents of their criminal transactions in a folder marked crime records, computer files can be misleadingly labeled, particularly if the owner of those files is trying to conceal illegal materials[,]” Justice Barbara A. Lenk said it best, however, when she stated that, “creating particularized limitations beforehand for a search of a device capable of storing hundreds of thousands of files is difficult[,] but it is not impossible.”

Reconciling the practical realities of modern criminal investigations with the particularity required of search warrants is difficult, but the unavoidable implication is that law enforcement would be wise to seek search warrants with ex ante search protocols whenever feasible.


The basic idea, as Kerr explains, is that judges and magistrates issuing search warrants can control the reasonableness of searches ex ante by imposing restrictions on how warrants are executed. The restrictions require the government to comply with the magistrate’s or judge’s required way of executing the warrant. The magistrate or judge might withhold approval of the post-seizure search, even though the government has established particularity and probable cause, until the magistrate or judge has satisfied himself that the search will be executed in a reasonable way. In the case of In re Search of 3817 W. W. End, for example, the government applied for a warrant to search a suspect’s home and seize her computers to search for electronic devices containing evidence of child pornography without naming the target apartment appeared to be the residence of multiple individuals. On the morning of April 4, 2012, State Police Sergeant Matthew Murphy showed downloads and uploads of child pornography files in progress on the defendant’s computer. Delcid’s computer yielded no files consistent with child pornography.

On March 12, 2012, State Police Sergeant Matthew Murphy, indicat

8 / Massachusetts Law Review
disks, and then met with the magistrate to discuss the search protocol. The government argued that the magistrate lacked any authority to restrict the government’s search of the seized computer, but the magistrate concluded that such a protocol was necessary to ensure that the warrant was executed reasonably. The magistrate then gave the government 21 days to submit a search protocol, with the warning that if the government did not do so it would have to return the computer unsearched. For reasons discussed below, ex ante restrictions on the execution of computer warrants have gained the attention of the SJC and seemed to be viewed by the court as an attractive way to balance privacy and security interests. Law enforcement would be wise to consider such protocols in cases where the search of digital evidence might be challenged as boundless and insufficiently particular.

III. ANALYSIS AND DISCUSSION

In Molina, as noted previously, the SJC flagged its “concern[] about the lack of protocols or formal guidelines for executing search warrants for digital evidence” and suggested that in future cases, it “may consider whether to require . . . a digital search protocol that would affirmatively demonstrate ‘a high regard for rights of privacy and take all measures reasonable to avoid unnecessary intrusion.’” The SJC expressed the same sentiment in Martinez when it forewarned that, in an appropriate case, it would consider whether to require “some type of digital search protocol.” Although the SJC has stopped short of requiring the development and implementation of search protocols at this time, law enforcement officials would be wise to utilize them preemptively because “[w]hat might have been an appropriate limitation [on searches] in the physical world becomes a limitation without consequence in the virtual one.”

A. The SJC’s Call for Minimization Protocols

1. The Molina Decision

In Molina, the defendant did not squarely challenge the scope or reasonableness of the search of his electronic devices or his digital files once police had seized the devices, nor did he suggest that police should be required to develop and implement a minimization protocol to govern the execution of any such digital search. On the record before the court, nothing indicated that execution of the search in the case was unreasonable. Nevertheless, the fact that the target apartment appeared to be the residence of multiple individuals is significant.

56. Id. at 956.
57. Id. at 957.
58. Id. at 963.
63. Id.
64. Id.
65. Id. at 390.
66. Id.
67. Id. at 390-91.

a. Factual Background of Molina

On March 12, 2012, State Police Sergeant Matthew Murphy (Murphy) was investigating the use of “peer-to-peer” file sharing programs to possess and distribute child pornography. His investigation indicated that a computer associated with the IP address 108.49.7.93 might be sharing child pornography files via the Ares network. By connecting directly to that computer, Murphy was able to view and download two files depicting child pornography.

In order to identify the account holder associated with the IP address, the Essex County district attorney, at Murphy’s request, sent an administrative subpoena to Verizon Internet Services Inc. (Verizon) pursuant to G.L. c. 271, § 17B. Verizon responded, indicating that the IP address 108.49.7.93 was associated with a subscriber named Hermes Delcid (Delcid) at a certain address in Revere, Massachusetts (apartment). The police conducted physical surveillance of the apartment and observed outside the house a mailbox with five names on it, including Delcid’s name and the defendant’s name.

Based on this information, on April 2, 2012, the police applied for and obtained a warrant to search the apartment for electronic devices containing evidence of child pornography without naming any person to be searched. The police executed the search warrant on the morning of April 4, 2012. Inside the apartment, the police found Delcid, his wife, and a small child. An onsite “preview” of Delcid’s computer yielded no files consistent with child pornography. In a bedroom later identified as the defendant’s, officers observed the Ares program operating on an open laptop computer that showed downloads and uploads of child pornography files in progress from and to other computers. The police seized numerous electronic devices from the apartment, including the defendant’s laptop and desktop computers and his external hard drive. The laptop and desktop computers and the external hard drive revealed more than 100 files containing suspected child pornography.

On Aug. 27, 2012, the defendant was indicted on one count of possession of child pornography with the intent to disseminate, in violation of G.L. c. 272, § 29B; one count of dissemination of child pornography, in violation of G.L. c. 272, § 29B; and three counts of possession of child pornography, in violation of G.L. c. 272, § 29C. The defendant was found guilty of all charges. The SJC accepted the defendant’s application for direct appellate review and affirmed his convictions.

69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
75. Id. at 392.
76. Id.
77. Id. at 393.
78. Id.
79. Id.
b. Ex Ante Minimization Protocols Protect the Privacy Rights of Innocent Bystanders Who May Come in Contact with the Target of an Investigation

According to Kerr, as mentioned previously, the reasonableness of executing warrants must be determined by judicial review ex post rather than ex ante. A close reading of Molina seems to suggest otherwise; that is, digital warrant searches in Massachusetts are likely to be deemed unreasonable as executed if not conducted pursuant to ex ante search protocols:

[W]here, as the search warrant return in [Molina] indicated, multiple electronic devices that may well belong to multiple individuals are seized and searched, the reasonableness of the undertaking will be judged, at least in part, by whether the searches of those devices are conducted in a manner that seeks to limit the scope of the search as much as practicable in the particular circumstances.

In Molina, as noted by the SJC, the police knew from the surveillance they conducted before applying for the search warrant that the target apartment had a mailbox with five different names on it, and when the police entered the apartment, it may be inferred from the text that it was quite obvious that individuals other than Delcid and his immediate family members were living there. Although “[t]he police and associated personnel conducting the search promptly, and commendably, screened and excluded at least Delcid’s computer from further search or seizure[,]” the SJC explained that “[a]dditional guidance at the present time would be very useful concerning ways that those conducting digital searches can minimize intrusions into the private electronic files of individuals who may have no connection at all with the child pornography or other suspected criminal activity being investigated.” Thus, law enforcement officials seeking search warrants for digital evidence are on notice that they may be required to execute such warrants pursuant to some sort of ex ante search protocol.

2. The Martinez Decision

In Martinez, the SJC concluded that the search warrant affidavit sufficiently established probable cause to search the target apartment for evidence related to the suspected possession or distribution of child pornography, even though the named subscriber was neither listed as, nor confirmed to be, living in the target apartment, and even though police had no information before the search linking the defendant to the residence. Additionally, the SJC acknowledged the threat of internet “joyriding” and cautioned that police should (as they did in Martinez) connect a target IP address with a physical address through a reliable method, such as an administrative subpoena to the internet service provider, rather than relying solely on a potentially unreliable service, such as certain IP address mapping services. The defendant, moreover, did not challenge the reasonableness or scope of the search of his digital files once police had seized his computers, nor did he raise the related issue of whether courts should require police to develop minimization techniques to govern the execution of a digital search. Accordingly, the SJC did not address those issues in reaching its decision. Nevertheless, the fact that the manner of execution involved a two-stage computer search is significant because, as mentioned above, it is an open question whether application of the plain view doctrine to searches of digital media would undermine the constitutional prohibition on general searches.

a. Factual Background of Martinez

On March 9, 2012, State Police Sergeant Michael Hill (Hill) was investigating the use of “peer- to-peer” file sharing programs to possess and distribute child pornography. His investigation indicated that a computer associated with the IP address 65.96.142.191 and displaying the username “datflypapi@Ares” was sharing suspected child pornography via the Ares network. By connecting directly to that computer, Hill was able to view and download four video files depicting child pornography.

In order to identify the account holder associated with the IP address, the Berkshire County district attorney sent an administrative subpoena to Comcast Cable (Comcast). Comcast responded, indicating that the IP address 65.96.142.191 was associated with a subscriber named “Angel Martinez” at a certain address in Fall River (apartment). The police conducted physical surveillance of the apartment and discovered that Maria Avilez leased the apartment. On April 3, 2012, the police sought and received a warrant to search the apartment for computers and related items connected to the suspected possession and distribution of child pornography. The police executed the search warrant on April 5, 2012. Inside the apartment, the police encountered the defendant’s girlfriend holding her infant child. Both Maria Avilez and Angel Martinez, the defendant’s cousin, arrived at the apartment while the police were conducting the search, but the defendant was not present.

During the search, the police noticed two laptop computers underneath a basket of laundry. After some initial testing, which was not described in detail in the trial record, the police seized the two computers and brought them back to the police station. Upon further inspection at the station, officers discovered five video files of child pornography on one of the defendant’s laptop computers. It was not clear from the record whether any of these video files

82. Molina, 476 Mass. at 397-98.
83. Id. at 397 n.11.
84. Id. at 398.
86. Id. at 421, 422-23.
87. Id. at 422 n. 11.
88. Id.
91. Id.
92. Id.
93. Id. at 412-13.
94. Id. at 13.
95. Id.
97. Id.
98. Id.
99. Id.
100. id.
101. Id.
were among those observed by Hill during his Ares surveillance on March 9, 2012.103

The defendant was charged with one count of distribution of material depicting a child engaged in a sexual act, in violation of G.L. c. 272, § 29B(b), and one count of possession of child pornography, in violation of G.L. c. 272, § 29C.104 The defendant was convicted on the possession charge; the commonwealth filed a nolle prosequi on the distribution charge.105 The defendant appealed from his conviction, and the SJC, on its own motion, transferred the case to itself from the Massachusetts Appeals Court and affirmed the defendant’s conviction.106

b. Ex Ante Minimization Protocols Limit the Commonwealth’s Ability to Use Information Discovered During Electronic Search Stage

According to Kerr, courts should construe the seizure power to impose use restrictions, applied ex post, to govern the admissibility of nonresponsive files, seized and observed in the course of the government’s authorized search for the otherwise responsive files; this, Kerr explains, would ensure that computer warrants are not executed in ways that resemble general warrants.107 This approach, which Kerr dubs the “ongoing seizure” approach,108 has considerable merit. Nevertheless, where, as here, the two-stage computer search involves sifting through data that might implicate individuals who may have no connection at all with the suspected criminal activity being investigated, the reasonableness of the “ongoing seizure” may be judged by whether the search was conducted pursuant to ex ante minimization protocols that would safeguard against searching beyond the evidence prescribed by the search warrant.

In 

Martinecz, the police discovered five video files of child pornography on one of the defendant’s laptop computers.109 It was not clear from the record whether any of these video files were among those observed by Hill during his Ares surveillance on March 9, 2012.110 Imagine instead that the police came across nonresponsive data implicating Maria Avilez or Angel Martinez (e.g., evidence of tax fraud, human trafficking, illegal gambling activities or other crimes); they may want to use it. Perhaps they will use it by copying the already-seized data for use in a separate criminal case. Perhaps they will use it to obtain a second warrant to justify searching the computer for more related evidence. And perhaps they will simply remember what they observed and use it for new leads. These potentialities raise serious questions about whether use of the plain view doctrine as a justification for admission of evidence should be precluded or at least narrowed in the context of digital warrant searches.

Subsequent use in the manner hypothesized above enables every computer warrant that is narrow in theory and on paper to become general in fact and as executed, which, according to Kerr, renders the ongoing seizure of the nonresponsive data constitutionally unreasonable.111 The extension of this logic is that instead of relying on reviewing courts that may or may not impose ex post use restrictions, the reasonableness of the “ongoing seizure” should be assessed by whether the search was conducted pursuant to ex ante minimization protocols in order to more certainly protect against general “exploratory rummaging” by the police through an individual’s electronic belongings.

B. Does the Particularity Requirement Adequately Protect Against “Exploratory Rummaging” in the Digitized, IP-based Communications Environment of the 21st Century?

In 2005, Kerr opined that “[t]he particularity requirement no longer serves the function in electronic evidence cases that it serves in physical evidence cases.”112 That statement is even clearer today, as demonstrated by the cases discussed below, given the massive storage capacity of cellular telephones and computers in 2018. Basically, if the place to be searched can store thousands of devices, each device can store libraries of information, and there are no limits on where the evidence might be, the particularity requirement no longer does significant work in limiting the scope of digital searches.113 The SJC, moreover, has stated that despite a warrant’s technical violation for lack of particularity, exclusion of evidence does not necessarily follow.114 For these reasons, particularity alone may not provide sufficient limits on computer warrant searches. The important question, as Kerr opines, is whether the description of digital items to be seized can be sufficiently narrow so that the specific description limits the scope of the search for that evidence.115 That is, can officers make definitive assessments of whether particular evidence will be (if it exists at all), and thus limit their searches to only those places or services on the storage devices?116 The facts presented in 

Dorelas, as outlined on the next page, suggest that the answer is “yes.”117 In such cases, law enforcement should consider seeking, because reviewing courts may ultimately demand, that the manner of execution should be conducted pursuant to an ex ante minimization protocol. In particular, in those cases where such limits are not likely in practice, as was the case in 

Perkins, and where the description of property to be seized is necessarily general in nature, as was the case in 

Keown, similar future cases may call out for an ex ante minimization protocol. Since the exclusionary rule does not necessarily and in all cases require the exclusion of evidence obtained in violation of the Fourth Amendment, Article 14 or G.L. c. 276, § 2, for lack of particularity in the warrant,118 the SJC in some case may limit the scope of the commonwealth’s investigative authority by mandating the use of ex ante minimization protocols or suppressing evidence when law enforcement does not employ them.

103. Id. at 414.
104. Id.
105. Id.
106. Id. at 414, 424.
108. Id. at 24.
110. Id. at 414.
114. Commonwealth v. Valerio, 449 Mass. 562, 570 (2007); see also Commonwealth v. Sheppard, 394 Mass. 381, 390-91 (1985) (exclusion not warranted where record demonstrated that officers did not exploit defect in warrant and properly limited scope of their search such that defendant was not prejudiced by lack of particularity).
116. Id.
118. Id. at 500 n.8.

Digital Search Warrants / 11
1. The Dorelas Decision

In Dorelas, the defendant argued on appeal that the warrant authorizing the search of his iPhone lacked particularity as to the items to be seized and the places to be searched. Where these arguments were not made in the trial court, the SJC did not consider them on appeal. The SJC concluded, moreover, that where the police obtained a warrant supported by probable cause authorizing them to search the defendant’s iPhone for evidence of threatening communications linking the defendant to a shooting, the subsequent search of the photograph files on his iPhone was reasonable because evidence of threatening communications could be stored in photographic form in the photograph files.

As discussed below, however, the fact that the police could have made definitive assessments of where particular evidence would be on the defendant’s iPhone, and, therefore, could have limited their search to only those places on the storage device, is noteworthy because it demonstrates the practicality of ex ante search restrictions.

a. Factual Background of Dorelas

On July 3, 2011, Boston police responded to the scene of a shooting in the Hyde Park neighborhood of Boston and found a man named Michael Lerouge (Lerouge) suffering from gunshot wounds to his back. Witnesses reported that Lerouge and another man, later identified as the defendant, Denis Dorelas (Dorelas), exchanged gunfire in the street. Witnesses said that the other shooter wore “a green-colored shirt or jacket with writing on it,” and pointed the police in the direction which the other shooter fled. The police soon found Dorelas suffering from gunshot wounds to his leg and wearing a green jacket with emblems on it. When police found the defendant, he was with one Jamal Boucicault (Boucicault).

The police subsequently interviewed Boucicault, who explained that earlier in the day he was at the defendant’s apartment when the defendant received a telephone call, argued with the caller, and left the apartment. A short time later, Boucicault said he heard what sounded like gunshots, went outside and found the defendant suffering from a gunshot wound.

The defendant’s brother later told police that the defendant said he “was receiving threatening telephone calls and threatening text messages on his telephone.” The defendant’s brother said he did not know who was threatening the defendant. The police also spoke to the defendant’s cousin, who said that the defendant “had been getting a lot of telephone threats because he owes money to people.”

b. The Practicality of Ex Ante Search Restrictions

Interestingly, the majority agreed with the dissent that the warrant was awkwardly written, conflating, at least in part, the items and places to be searched. Nevertheless, the majority concluded that it was reasonable for the police to search the photograph files because “communications can come in many forms including photographic.” The dissent, however, stated that “[a]llowing the police to search a broad variety of categories of files, many of which were at most tangentially related to the communications described in the affidavit, was an ‘end run’ around the particularity requirement.” According to Kerr, the forensic process is too contingent and unpredictable for judges to establish effective ex ante rules. This argument proves too much. As the dissent aptly pointed out, “[c]reating particularized limitations beforehand for a search of a device capable of storing hundreds of thousands of files is difficult[,] but it is not impossible.” Where, as here, officers can make definitive assessments of where particular evidence will be, and thus can limit their searches to only those places or services on the storage devices, the court may ultimately rule that ex ante search protocols should be utilized.

In Dorelas, the police had information that the defendant had

119. Id.
120. Id. at 497.
121. See id. at 504.
122. Id. at 497.
124. Id.
125. Id.
126. Id. at 498.
127. Id.
128. Id.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id. at 497, 504 n.14.
136. Id. at 504.
137. Id. at 499.
138. Id.
139. Id. at 500.
140. Id. at 500, 505.
142. Id. at 503.
143. Id. at 510-11 (Lenk, J. dissenting).
144. Id. at 511 (Lenk, J., dissenting).
145. Kerr, supra note 36, at 572.
146. Dorelas, 473 Mass. at 511 (Lenk, J., dissenting).
147. Id. at 498.
recently been receiving threats.\footnote{148} Therefore, “[t]he warrant could have limited the search only to the iPhone’s call records and text message files — the categories of files most likely to provide evidence of the ‘threatening phone calls and threatening text messages’ that preceded the shooting.”\footnote{149} “The warrant also could have limited the search of any image files temporarily to include only images stored on the device in the days or weeks leading up to the shooting.”\footnote{150} “Restrictions of this sort would prevent forensic investigators from exercising greater discretion than Article 14 and the Fourth Amendment allow.”\footnote{151}

2. The Perkins Decision

In Perkins, the SJC concluded that where there was probable cause to believe that a defendant had used a cellular telephone to arrange a drug sale and had used cellular telephones to arrange drug transactions on other occasions, the subsequent seizure of nine telephones found in the defendant’s apartment was proper because the warrant affidavit established a sufficient nexus between the defendant’s participation in a specific drug transaction and his residence to permit a search for the cellular phone used to arrange the sale.\footnote{152} Although the SJC appropriately acknowledged that “[t]he police were not authorized to rummage through the entirety of the defendant’s cellular telephones, and were confined by the plain terms of the warrant affidavit to call activity and contact lists,” the SJC may in the future hold that particularity alone may not provide sufficient limits on digital warrant searches.

a. Factual Background of Perkins

The defendant was indicted on charges of trafficking in 200 or more grams of cocaine in violation of G.L. c. 94C, § 32E(b)(4), possession of ammunition after three or more criminal convictions in violation of G.L. c. 269, §§ 10(h), 10G(c), and possession of an electrical weapon in violation of G.L. c. 140, § 131.\footnote{153} The indictments stemmed from a wiretap investigation by the Massachusetts State Police and the Framingham Police Department of a drug distribution network operating in Framingham, Natick, Worcester and Boston.\footnote{154}

Based on intercepted telephone conversations between the defendant’s alleged middleman and a street-level distributor of cocaine, police surveillance of a suspected drug transaction, and other information, a Suffolk County Superior Court judge issued a warrant authorizing police to search the defendant’s residence for “[c]ellular telephones used to facilitate narcotics transactions, including [a] telephone with unidentified call number, showing evidence of contact with [a specific telephone number] (‘Nasean Johnson Phone’)” and “[p]ersonal contact lists or telephone directories, in paper or electronic form, which reflect the names or nicknames of parties associated with telephone numbers, including the electronic contact lists of cellular telephones.”\footnote{155} When the warrant was executed, officers seized three bags of cocaine, a scale, two ice cube trays, a bottle of Inositol powder, paper containing white powdery residue, $1,000 in cash, nine cellular telephones, an Apple iPAD brand tablet computer, one round of ammunition, a stun gun, a container for a “concealed carry deep cover holster,” a checkbook in the names of the defendant and his girlfriend, one white circular pill, and miscellaneous paperwork.\footnote{156}

On appeal, the SJC concluded that the warrant affidavit established probable cause to believe that the defendant, acting through a middleman, sold cocaine to a street-level dealer on the date alleged.\footnote{157} It also established a sufficient nexus between the defendant’s participation in that transaction and his residence to permit a search for the cellular telephone used to arrange the sale and the sweatshirt he wore while conducting the transaction.\footnote{158} Agreeing with the motion judge’s determination, however, the SJC found that the affidavit did not provide sufficient particularized information to allow a general search of the apartment for other “drug-related” evidence.\footnote{159} Accordingly, the SJC remanded the matter to the Superior Court for a determination, after appropriate proceedings, whether the search exceeded the permissible scope of the warrant.\footnote{160}

b. Particularity in Theory vs. Particularity in Reality

On the one hand, as Kerr explains, “[i]f descriptions of what the agents are looking for are so limited that the electronic stage search only reveals a small amount of information on the device, then perhaps the particularity of the items sought will result in narrow searches.”\footnote{161} On the other hand, if such limits are not likely in practice, then the particularity requirement alone is insufficient.”\footnote{162}

In Perkins, the SJC concluded that the warrant established probable cause to search the call logs of the nine seized telephones to determine which, if any, had contacted the telephone number belonging to Johnson.\footnote{163} In addition, the police were authorized to search the telephone contact lists to determine whether there was evidence that the defendant was associated with Johnson.\footnote{164} The police were not authorized to rummage through the entirety of the defendant’s cellular telephones and were confined by the plain terms of the warrant affidavit to call activity and contact lists.\footnote{165} Although this sounds promising in theory, it may not work in practice.

If state law enforcement officials are looking for a telephone showing evidence of contact with a specific telephone number, as here, they could limit their search to call activity and contact lists.
If they find evidence of contact with the specific telephone number quickly, the search can be terminated, and it will have been a limited search indeed. The problem is that if the evidence is not there, the officers cannot know with certainty that the evidence is not on that device or is simply stored in such a way that their limited authorization will not find it. Evidence of contact with a specific telephone number can be found in ways other than call activity and contact lists. Maybe concealing the communication will be easy or maybe it will be hard. But it can always be done. As a result, failure to find evidence of contact with a specific telephone number through call activity and contact lists does not offer complete assurance that the evidence is not there. Therefore, ex ante search protocols should be utilized to prevent the type of rummaging that the Fourth Amendment and Article 14 are designed to prevent.

3. The Keown Decision

In Keown, the defendant claimed that the warrant authorizing the search of his laptop computer lacked particularity in general, and also that it was an impermissible general warrant because it contained a typographical error and lacked an articulated search protocol. The SJC disagreed and concluded that the warrant authorizing the search of the laptop computer adequately established probable cause, was sufficiently particularized, and was executed reasonably. Nevertheless, the fact that “the [forensic] examiners used a list of 50 search terms that [were] supplemented along the way by 19 additional terms” is significant.

a. Factual Background of Keown

On Sept. 4, 2004, the defendant took his wife, the victim, to Newton-Wellesley Hospital (hospital), where she lapsed into a coma from which she would never recover; the victim died after being removed from life support on Sept. 8, 2004. The medical examiner concluded that the cause of death was both acute and chronic ethylene glycol (EG) poisoning. EG is a transparent liquid that is used in a variety of different solvents, including antifreeze.

Not long after the victim’s death, the defendant abandoned his home in Massachusetts and moved to Missouri at some point in late 2004. He left behind many personal effects and computer equipment but brought a Sony VAIO laptop computer (laptop computer) with him. The defendant remained in Missouri until he was arrested in November 2005.

Following the arrest, the defendant’s mother obtained the laptop computer and mailed it to the defendant’s attorney in Massachusetts. A warrant was issued that authorized the examination of the contents of the laptop computer. The search, which was performed by a computer forensics investigator, yielded important evidence in the commonwealth’s case against the defendant. The defendant was convicted of murder in the first degree on a theory of deliberate premeditation for poisoning his wife. On appeal, the SJC concluded that where the examiners used a list of 50 search terms that were supplemented along the way by 19 additional terms (e.g., murder, death benefit, antifreeze and widower, along with a number of names of potential poisons), the search of the defendant’s laptop computer was conducted reasonably because those search terms were squarely related to the categories of evidence that were articulated in the affidavit, and also because the examiner only looked closely at approximately 325 files of the nearly 400,000 found on the laptop computer.

b. Ex Ante Search Restrictions Prevent Forensic Examiners from Going Beyond the Scope of the Warrant

In Perkins, as discussed previously, the manner of execution of the search warrant demonstrated that even a narrow description of evidence sought in the warrant cannot rule out the need for a more comprehensive search because an unsuccessful query cannot rule out that the evidence is there but not found by the narrow query. This point is intuitive with physical searches. As Kerr explains:

Imagine agents are looking for a 2010 tax record in a suspect’s file cabinet. They find a folder marked “2010 Tax Records.” Agents will likely look in that folder first. If the record sought is in the file cabinet, there’s a good chance it is in that folder. But if the agents don’t find the record there, they won’t call off the search. The record might be in another folder, either accidentally or by design. Because the legal authority to search the file cabinet extends to the whole cabinet, not just the one folder that is likely to contain the record sought, agents will continue searching. The same principle applies to computer searches. Even evidence that can be described very specifically might be anywhere on the storage device.

The problem is even greater when, as here, the description of property to be seized is necessarily general in nature. In Keown, the scope of the search authorized by the warrant included electronic files on the laptop computer related to the health or death of the victim; other prominent poisoning cases; EG or other poisons; and the financial records, life insurance plans, and wills of the victim and the defendant. When descriptions are more general, as they often are, the search is not done when agents find one responsive file. If anything, as Kerr explains, finding one responsive file suggests that other responsive files are likely elsewhere on the storage device if agents can figure out how to find them, which explains why “the [forensic] examiners [in Keown] used a list of 50 search terms that [were] supplemented along the way by 19 additional terms.” For these reasons, particularity alone is unlikely to provide sufficient limits on computer warrant searches. One option that the SJC has

167. Id. at 239-42.
168. Id. at 241.
169. Id. at 234.
170. Id.
171. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
179. Id. at 241-42 and n.8.
181. Id.
184. Id.
continued to reference as a potential solution to the fear of limitless searches is to employ ex ante search restrictions.

4. The Holley Decision

In Holley, the SJC stated that the warrant to search the defendants’ cellular telephone records was hardly a model of particularity and did not sufficiently limit the scope of the search so as to prevent “exploratory rummaging.” The SJC concluded, however, that the defendant suffered no prejudice because the text messages were sufficiently limited in content and scope such that the commonwealth did not capitalize on the lack of particularity in the warrant. Nevertheless, the fact that police found other incriminating information in one of the defendant’s text messages, beyond the fact of his identity, is significant.

a. Factual Background of Holley

On the morning of Oct. 17, 2012, the victim, Alfonso Rivas (Rivas), was in his apartment building anticipating a sale of marijuana to the defendant, Reginald Holley (Holley), when Rivas was fatally shot in the head. Holley and Oasis Pritchett were convicted of felony-murder in the first degree, armed robbery and possession of a firearm without a license, as joint venturers, in connection with the victim’s death. Prior to trial, both defendants had moved unsuccessfully to suppress text messages obtained from their cellular service provider. The text messages, which were introduced at trial, contained incriminating statements involving the defendants’ plan to steal marijuana from the victim on the morning of the shooting. The warrant to search Holley’s cellular telephone records sought “all stored contents of electronic or wire communications and stored files” from Oct. 1 through Oct. 18, 2012.

During the course of the search, the police found other incriminating information in Holley’s text messages. The only stored communications used at trial consisted of Holley’s text messages, which the commonwealth had redacted so that only the content relevant to the crime under investigation was presented to the jury. The redacted text messages were all sent or received in the two days before the shooting, when the drug transaction was arranged; on the day of the shooting, when the crime was carried out; or on the day after the shooting, when Holley discussed the disposition of the proceeds of the armed robbery. Accordingly, the SJC found that Holley suffered no prejudice because the text messages were sufficiently limited in content and scope such that the commonwealth did not capitalize on the lack of particularity.

b. The Exclusionary Rules Do Not Necessarily Guarantee the Exclusion of Evidence

On the one hand, it seems excessive to hold that a single police misstep should taint evidence accumulated through prior, legitimate actions. On the other hand, a strong deterrent may be needed to prevent the police from engaging in dragnets designed to link suspects to pre-existing stores of incriminating data. In Massachusetts, the exclusionary rule serves the twin purposes of deterring unlawful conduct by law enforcement officials “through the preclusion of the fruits of that conduct” and protecting “judicial integrity through the dissociation of the courts from unlawful conduct.” Rigid adherence to a rule of exclusion is unnecessary in situations where these purposes are not furthered. As a result, courts either do or do not suppress evidence based on their own views of good policy. A better approach would turn away from deterrence and focus instead on the scope of the government’s investigative authority.

In Holley, the police did not take advantage of the other incriminating information found beyond the scope of the warrant. Minimization protocols would certainly protect privacy, but they could lead investigators to miss valuable evidence in criminal cases that they otherwise could lawfully obtain absent a minimization protocol.

IV. CONCLUSION

Molina, Martinez, Dorelas, Perkins, Keown and Holley exemplify the SJC’s wrestling with issues of transposing Fourth Amendment and Article 14 protections in digital contexts. Let us be clear about what we are not saying. We are not suggesting that the traditional warrant requirements of probable cause, scope, and particularity that historically have underpinned the review of search warrants, including warrants for digital evidence, cannot adequately protect against unlawful seizures and searches in certain circumstances. Rather, we are suggesting that courts will continue to struggle to incorporate electronic search and seizure law into the existing paradigm of Fourth Amendment and Article 14 reasonableness absent the development and widespread implementation of minimization protocols to govern the execution of such search warrants. Their time, we believe, is coming.

Given this legal landscape, the SJC may ultimately rule that a minimization protocol is required either ex ante or during the execution of search warrant. Therefore, it may be good police practice, where possible, to incorporate a minimization protocol into the application for a search warrant, or if not possible, to use one during the execution of the search warrant and document that one was used. It seems clear that the SJC is not only concerned that digital search warrants detail what police are looking for with particularity, but is also considering reasonableness in terms of how police conduct their searches. Rather than a hindrance to law enforcement, in advance of the SJC mandating ex ante protocols, law enforcement may find that implementing them may be the best way to safeguard against intruding upon privacy while still gathering valuable evidence that may be gleaned during the search of digital evidence and protecting it from suppression.

187. Id. at 525, 28.
188. Id. at 523 n.20.
189. Id. at 509.
190. Id.
191. Id.
193. Id. at 524.
194. Id. at 523 n.20.
195. Id. at 525.
196. Id.
197. Id. at 525-26.
CASE COMMENT

A Matter of Opinion


Scholz v. Delp1 is worthy of comment — not because it makes groundbreaking defamation law, but because it is a useful judicial explication of what, for purposes of measuring statements as defamatory, is a statement of fact or a statement of opinion. The oscillating conclusions that emerged as the case progressed through the Superior Court, the Appeals Court and the Supreme Judicial Court (SJC) illustrate that the fact/opinion dichotomy is more easily stated than sorted out in a particular case.

Brad Delp (Brad), the lead singer in a rock band led by Donald Scholz (Scholz), committed suicide on March 9, 2007.2 During interviews with two reporters from the Boston Herald (Herald), Brad’s former wife, Micki, said, in effect, that Scholz had caused Brad’s suicide.3 On March 16, 2007, the Herald ran a front page story headlined, “Pal’s snub made Delp do it: Boston rocker’s ex-wife speaks.”4 What followed in the article was this text: “Boston lead singer Brad Delp was driven to despair after his longtime friend Fran Cosmo was dropped [by Scholz] from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman’s suicide,” Delp’s ex-wife said.5

Scholz brought two separate defamation actions in Superior Court. The first was against Micki, complaining that the statements by her as reported in the newspaper articles insinuated, falsely, that Scholz was responsible for Brad Delp’s suicide.6 Scholz later brought a second action against the Herald for defamation and intentional infliction of emotional distress.7

The Superior Court judge who heard the action against Micki entered summary judgment in her favor on various grounds.8 On review of that judgment, the Appeals Court reversed.9 It decided that the reported statements raised a “genuine dispute [of fact] between Micki and the Herald writers as to precisely what Micki said that resulted in the publication of the article in question, a dispute that cannot be resolved as a matter of law.”10 The opinion proceeded on the assumption that if Micki had been correctly quoted, her statements were defamatory, i.e., they were statements of fact.11 The SJC granted further appellate review.12

In the action against the Herald, a different Superior Court judge entered summary judgment in favor of the Herald because he concluded that what it had reported were statements of nonactionable opinion.13 The SJC took that case on direct appellate review, paired it for argument with Micki’s case, and disposed of both cases in a single opinion.14 It came to a distinctly different conclusion than the Appeals Court, and affirmed the summary judgments entered in the Superior Court, holding that the Micki Delp/Herald statements were not of fact, but of nonactionable opinion.15

The distinction between fact and opinion has significance as a matter of the common law of Massachusetts, as well as state and federal constitutional law.16 “Statements of pure opinion are constitutionally protected.”17 As to false statements of fact, however, there is no constitutional protection.18

In sorting out the fact/opinion puzzle, a court “must consider all the words used, not merely a particular phrase or sentence.”19 Factors to be considered include “the specific language used; whether the statement is verifiable; the general context of the statement; and the broader context in which the statement appeared.”20

2. Id. at 245.
3. Id. at 246-47.
4. Id. at 247.
5. Id.
6. Id. at 243.
7. Scholz v. Delp, 473 Mass. 242, 243 (2015), cert. denied, 136 S. Ct. 2411 (2016). That the Herald and its reporters did not originate the words claimed to have been defamatory but only published what Micki Delp had said, does not get them off the libel hook. “[O]ne who republishes a [defamatory statement] is subject to liability just as if he had published it originally,” Giancii v. New Times Pub. Co., 639 F.2d 54, 60-61 (2d. Cir. 1980); see Restatement (Second) of Torts § 578 (1977).
9. Id.
10. Id. at 594
11. Id. at 597-98.
12. Id.
14. Id.
The court’s application of those principles in Scholz begins with the observation that, ordinarily, ascertaining the reason or reasons a person has committed suicide would require speculation; although a view might be expressed as to the cause, rarely will it be the case that even those who were close to the individual will know what he or she was thinking and feeling when the final decision was made. While we can imagine rare circumstances in which the motivations for suicide would be manifestly clear and unambiguous, this is not such a case.23

“The statements at issue could not have been understood by a reasonable reader to have been anything but opinions regarding the reasons Brad [Delp] committed suicide.”24 The Delp stories “did not express objectively verifiable facts, but, rather, were defendant’s ‘theory’ or ‘surmise’ as to decedent’s motives in taking his own life.”25 Factors to consider in making the fact/opinion distinction include “the specific language used; whether the statement is verifiable; the general context of the statement; and the broader context in which the statement appeared.”24 Cautionary terms in an article, such as “may have” and “reportedly,” relay to the reader that the authors were “indulging in speculation.”25

As to context, the court thought it significant that “[t]he most extreme language appeared in the headline, which a reasonable reader would not expect to include nuanced phrasing.”26 The court also took into account that the Herald article “appeared in an entertainment news column.”27

The articles in Scholz are only one example of what may constitute nonactionable opinion. Criticism also enjoys the opinion umbrella. For example, the following are all opinions: “[M]y partner is robbing me blind,”28 “This city is a jungle,”29 and “[T]he food is fine, the people who run it are PIGS.”30 It is the employment of a critic to express an opinion — of a musical performance, the merit of a painting, or the quality of the writing, for example. However, the criticism as opinion defense is not impenetrable.31 In a case involving the magazine Consumer Reports, the magazine had reviewed new loudspeaker systems.32 It wrote of a Bose system: “[W]orse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander around the room.”33 That comment was disparaging but are not critiques often so? Yet, the court concluded the comment “tended to wander” masqueraded as a fact and provided the basis for a libel action.34

Satire also falls in the opinion category. Toward the end of a calendar year, Boston Magazine designates the “best and worst” in various categories. In its September 1976 issue, the magazine chose James D. Myers Jr. as the worst sports announcer in Boston and added that he was “enrolled in a course for remedial speaking.” Myers argued that the quoted material bore the sting of illegality: It wasn’t so (Myers was enrolled in no such course) and writing that he was held Myers up to scorn and ridicule. At face value, the statement was defamatory. The SJC, however, wrote that, “The reasonable reader could only approach the article with a measure of skepticism and an expectation of amusement.”35

Introducing a statement with “in my opinion” does not automatically qualify the statement for the “opinion” defense if the statement creates a reasonable inference that the “opinion” is justified by knowledge of existing facts.36 That would be the case with “in my opinion Jones is a liar.”37 As Justice Kaplan wrote, “if I write, without more, that a person is an alcoholic, I may well have committed a libel, prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic.”38 The Scholz opinion has a detailed discussion of this category of statement that while “[c]ast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based and thus may be actionable,” but holds that the statements at issue in Scholz did not run afoul of the principle.39

“[W]here a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words “I think.”40 In Milkovich v. Lorain Journal Co., a local newspaper published a column under the headline “Maple beat the law with the big lie.”41 The body of the column said, “[a]nyone who attended the [wrestling] meet . . . knows in his heart that Milkovich [the wrestling coach] and Scott [former superintendent of schools] lied at the hearing after each had given his solemn oath to tell the truth.”42 After a bow to the importance in a democracy of scope for newspapers to report about public figures (see Gertz v. Robert Welch Inc.),43 the court concluded that what the newspaper published was nothing less than a statement of fact that

21. Id. at 251.
22. Id.
23. Id.
27. Id.
29. Id.
32. Id. at 487.
33. Id. at 488.
34. Id. at 490.
37. R. Sacks, Sacks on Defamation: Libel, Slander and Related Problems, § 4.1, n. 52 (5th ed. 2013); see Restatement (Second) of Torts § 566, comment c. (1977).
41. Id. at 5.
coach Milkovich and former superintendent Scott had committed perjury. That was actionable. Other examples of opinion that are surely insulting, but, because opinion, not actionable, are offered in Sacks on Defamation: Libel, Slander and Related Problems: The plaintiff was “a very poor lawyer,” a securities trader was a “sucker, fool & frontman,” and a city official who took his wife on a city business trip was “really a thief” for doing so. Figurative speech also qualifies as opinion. To employ the epithet “bastard” directed at her son is in common usage an insult and not actionable as an assault on his mother’s chastity. What is fact or opinion may vary with the times. In Perkins v. Taylor, an English decision from 1607, the court held actionable, “Thou art a leprous knave,” reasoning, “[t]hey are as well actionable as if he had said, ‘Thou wast laid of the pox,’ wherefore, without argument, it was adjudged for the plaintiff.” Were the words said now, those words, while insulting and meant to be so, would hardly be thought a statement of fact. The “pox” is not in contemporary vocabulary and “leprous” is an extinct adjective.

What remains constant in defamation law, however, is that the fact/opinion distinction survives as one of the most complex issues in defamation cases, and Scholz has not laid it to rest. In particular cases, the correct classification of a given statement as fact or opinion remains a matter of opinion on which judges may differ.

— Rudolph Kass

44. Milkovich, 497 U.S. at 8.
45. Id. at 9.
46. R. Sacks, Sacks on Defamation: Libel, Slander and Related Problems, § 4.3.5 (5th ed. 2013).
47. Id. at § 4.2.4.
**CASE COMMENT**

**Protecting Real Property from MassHealth’s Estate Recovery Claim: Is it Possible?**

*Daley v. Secretary of the Executive Office of Health and Human Services and Director of Office of Medicaid, 477 Mass. 188 (2017)*

**INTRODUCTION**

In order to qualify for Medicaid benefits in Massachusetts, MassHealth requires that an individual have $2,000 or less of countable assets owned by or available to the individual or $3,000 or less of countable assets owned by or available to a couple living together. Some individuals attempt to transfer or otherwise dispose of what few assets they do have prior to needing long-term care so that, if and when the need arises, they may be under the asset limit and therefore qualify for Medicaid benefits. This type of planning often involves transferring assets to irrevocable trusts, thereby relinquishing control over the assets and sheltering them from MassHealth. For years, transferring assets to an irrevocable income-only trust, where the grantor was not eligible to receive principal distributions, would enable an otherwise ineligible candidate to qualify for MassHealth benefits. Over the last few years, however, MassHealth has been scrutinizing these trusts and determining that assets held in an irrevocable trust are, in fact, countable.

Often, the biggest asset owned by clients who embark on this type of planning is their principal residence. Many practitioners have been particularly wary of advising their clients to transfer a principal residence to an irrevocable trust because MassHealth has been quick to deem the assets held in such a trust countable for Medicaid purposes. An individually owned principal residence is not deemed to be a countable asset for purposes of applying for MassHealth benefits, but MassHealth will attach a lien to a decedent’s personal residence, and upon the applicant’s death, recover the costs of the applicant’s benefits through this estate recovery procedure. In other words, the individual may qualify for MassHealth benefits regardless of the value of the applicant’s home, but on the applicant’s death, MassHealth recovers the costs of the individual’s benefits up to the value of the home. A Medicaid planning tactic, therefore, has been to transfer a principal residence to an irrevocable trust such that the applicant no longer owns the property when he or she applies for MassHealth benefits. The individual or couple usually retains a right to live in the property either through the right to use and to occupy any residence held in the trust or through retaining a life estate in the property upon deeding the property to an irrevocable trust. The goal would be to enable the individual to qualify for MassHealth benefits, shelter the residence from MassHealth’s estate recovery procedure, and ensure the residence passes to the trust’s remainder beneficiaries (presumably, the applicant’s children) upon the applicant’s death.

Recently, MassHealth has been concluding that trust assets held in an irrevocable trust are available, and thus “countable,” to applicants who transfer their homes to an irrevocable income-only trust and retain the right to use and to occupy the residence or retain a life estate in the property. As a result, these applicants are being denied MassHealth benefits. Two recent cases, Daley and Nadeau, which were combined in the Massachusetts Supreme Judicial Court (SJC) decision titled *Daley v. Secretary of the Executive Office of Health and Human Services and Director of Office of Medicaid,* were two examples of situations where an applicant transferred a primary residence to a trust for purposes of MassHealth qualifications and subsequently was denied benefits. There has been no consistency in MassHealth’s determinations when it comes to transferring real estate to irrevocable income-only trusts. As a result, estate planners are left questioning whether it is no longer possible to protect an individual’s primary residence from MassHealth by way of irrevocable income-only trusts. Most often, the only asset these clients have is their primary residence, and yet without the use of irrevocable income-only trusts or other Medicaid planning techniques, these clients will even lose their home to MassHealth upon their death. The recent SJC decision adds clarity to the inconsistent and uncertain world that estate planners have encountered when it comes to MassHealth’s determinations with respect to real estate held in irrevocable trusts. The SJC’s ruling makes it clear that transferring a residence to an irrevocable income-only trust, while retaining the right to use and occupy the residence or while retaining a life estate in the property, does not render the trust assets countable for MassHealth eligibility purposes.

---

1. Massachusetts Medicaid (MassHealth) pays for health care for certain low and medium income people living in Massachusetts. *See* [https://www.mass.gov/topics/masshealth](https://www.mass.gov/topics/masshealth).
5. 130 CMR 515.011 (2014).
BACKGROUND

In 1996, the SJC held that the principal of an irrevocable trust in which the trustee had total discretion to make distributions to the settlor was a countable asset for Medicaid eligibility purposes.7 Cohen was the first case in Massachusetts to set forth the laws surrounding MassHealth eligibility with respect to an irrevocable trust. The Cohen court held that if the trustee had so much as a “peppercorn of discretion [to distribute trust principal], then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility.”8

There are two substantial constraints on Medicaid planning when it comes to transferring assets into an irrevocable trust.9 The first constraint is what is referred to as the “look-back” rule, which imposes a penalty for any asset transferred for less than fair market value by an individual within five years of the individual’s application for Medicaid benefits.10

The second constraint is referred to as the “any circumstances test” and provides that where an applicant has created an irrevocable trust and transferred assets to that trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payments from that portion of the corpus or income, (I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual.11

If, under the “any circumstances test,” the amounts that may be paid to the applicant come only from income of the trust, those income payments do not render the principal of the trust available as an asset; rather, they are treated as income that may affect the amount of Medicaid benefits to be received, but not the applicant’s eligibility for such benefits.12

As described above, although an applicant’s individually owned primary residence is not a countable asset for Medicaid eligibility purposes, federal law requires that MassHealth attempt to reclaim the costs of long-term care benefits provided to a nursing facility resident from such resident’s estate after his or her death.13 When the home or former home of a nursing facility resident or spouse held in an irrevocable trust is “available” to an applicant according to the terms of the trust, it is a countable asset for purposes of Medicaid eligibility.14 The question thus comes down to the definition of “availability.”

For years, MassHealth has argued that an applicant’s ability to use and to occupy a residence, or retaining a life estate in a trust, is a form of receiving a principal distribution from the trust in the form of non-cash assets.15 It points to the Health Care Financing Administration (HCFA)16, which states that a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as non-cash or property disbursements, such as the right to use and occupy real property.17

MassHealth argues that “available” means also “to benefit from” the property held in the trust, not only property that is actually distributed to a beneficiary.

MassHealth also has argued that a trustee’s ability to sell a residence within a trust and then use the proceeds to purchase an annuity renders the trust assets countable.18 It has concluded that the trustee could deem the annuity to be income and distribute all of the proceeds to the applicant. Thus, MassHealth’s viewpoint has been that because an individual’s principal residence could be sold and invested into an annuity, which could then be deemed to be income, there is a peppercorn of discretion that principal could be paid to the applicant.19

Finally, MassHealth also has argued in certain situations that trust assets are available to an applicant where there is a possibility that trust assets could be distributed to the trust beneficiaries, such as the applicant’s children, who could then turn around and distribute property to the applicant.

In 2009, the Doherty decision came out in favor of MassHealth where the court upheld MassHealth’s denial of benefits to an applicant based on an irrevocable income-only trust.20 The trust in Doherty was a typical revocable trust turned irrevocable income-only trust, and therefore had some provisions that should not have been included in a typical Medicaid-qualifying trust. Essentially, it was a poorly drafted trust that made for “bad law,” but MassHealth nevertheless began denying almost all applicants who had transferred property to an irrevocable income-only trust more than five years prior to the application in an effort to ensure the applicant did not “have her cake and eat it too.”21 Massachusetts’s estate planning and elder law practitioners began to notice that nearly all applicants who had an irrevocable trust were denied benefits.

8. Id. at 413.
14. See Daley, 477 Mass. at 191; 130 CMR 520.007(G)(2) or (G)(8) (2014).
16. The Centers for Medicare and Medicaid were previously known as the Health Care Financing Administration until 2001. This is a federal agency that works in partnership with state governments to administer various programs, including Medicaid.
17. Health Care Financing Administration Transmittal 64, § 3259.1(A)(8).
19. Id. at 314.
Since Doherty, quite a few cases have found their way out from MassHealth’s case workers and hearing officers and instead in front of judges at Massachusetts’s various court levels. Of particular relevance here are the cases that involved the transfer of real estate to an irrevocable income-only trust. In O’Leary v. Thorn, for example, the applicant transferred her primary residence into an irrevocable trust and applied for MassHealth benefits outside of the five-year look-back period. MassHealth denied the applicant from receiving Medicaid benefits, focusing on one provision in the trust that stated that any portion of the income or principal of the trust “could be paid for the benefit of a beneficiary instead of directly to the beneficiary.” MassHealth concluded that, because of this provision, principal was within the applicant’s control and created a circumstance under which principal could be made available or used for the applicant’s benefit.22 MassHealth ignored the fact that the trust stated explicitly that principal could not be paid to the applicant and, as a result, the provision that allowed a trustee to pay principal “for the benefit of any beneficiary” was irrelevant with respect to the applicant. The court held that, in reading the trust in its entirety to discern the intent of the settlor, the trust made it clear that only income could be made available to the applicant and that the trustee would be bound by the clause prohibiting distributions of principal to the applicant.23

In Heyn v. Dir. of Office of Medicaid, the applicant established an irrevocable trust, deeded her primary residence into the trust, and retained a life estate in the deed.24 Eight years later, the applicant applied for nursing home care and was initially approved for MassHealth benefits.25 In 2013, however, the applicant received notice that the agency was now deeming the trust assets to be countable because of the applicant’s ability to sell the trust assets and purchase an annuity with the proceeds.26 The Heyn court concluded that this analysis “misapprehends the nature of annuity payments.”27 It reasoned that annuity payments are comprised of distinct constituent parts: One part is a return of a portion of the principal investment in the annuity itself, and the other part is a portion of the investment income earned on the principal investment.28 The court went on to point out that federal law and the IRS distinguish between these two parts, and the trustee must act in accordance with reasonable accounting principles and practice, as well as state law, when determining what shall belong and be chargeable to principal and what shall belong and be chargeable to income.29

MassHealth also focused on the applicant’s ability to appoint the trust property, by exercising her power of appointment to her children, who could then use the distributions to pay for the applicant’s benefit.30 The court rejected this argument, stating that a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such a person when she created the trust, rather than placing it in trust.31 The court made it clear that if the trust prohibits any distribution of principal to the applicant, then the assets held in the irrevocable trust should not be deemed countable.

**FACTS — NADEAU**

Plaintiff Lionel C. Nadeau (Mr. Nadeau) and his wife (Ms. Nadeau) deeded their primary residence to their daughter as sole trustee of an irrevocable trust (Nadeau trust).32 The trustee was authorized to pay to Mr. and Ms. Nadeau, or on their behalf, income in any amount in her discretion necessary for their “care and well-being,” but they were to have no access to trust principal until the termination of the trust, which was to occur on the death of the survivor of them or when the trustee determined that the trust should be terminated.33 Mr. and Ms. Nadeau were, however, given a power of appointment over all trust property to one or more charitable or nonprofit organizations over which they had no controlling interest, and the trustee was authorized to distribute principal to Mr. and Ms. Nadeau “to the extent that the income of the trust generates a tax liability.”34 The terms of the trust also granted Mr. and Ms. Nadeau “the right to use and occupy any residence” that is held by the trust.

Thirteen years after deeding their principal residence into the Nadeau trust and after the passing of his wife, Mr. Nadeau was admitted to a skilled nursing facility and applied for MassHealth benefits.35 Mr. Nadeau had only $168.15 in assets, and the value of his residence held by the Nadeau trust was $173,700.36 MassHealth denied Mr. Nadeau’s application based on its finding that the home held in the Nadeau trust was a “countable asset” and, thus, Mr. Nadeau’s assets were over the $2,000 asset limit.37

**FACTS — DALEY**

On Dec. 19, 2007, Mary E. Daley (Ms. Daley) and her husband (Mr. Daley) deeded their primary residence to their children as trustees of an irrevocable trust (Daley trust), but retained a life estate in the property.38 The trustees were authorized to pay to the Daleys so much of the net income of the trust as either of them requested, but the trustees had no authority or discretion to distribute principal of the trust or for the benefit of Mr. or Ms. Daley (with the exception of any tax obligation arising from the payment of income to Mr. and Ms. Daley).39

---

23. Id. at 4.
25. Id.
26. Id.
27. Id. at 313.
28. Id. at 317.
29. Id. at 317 and 318; see also 42 U.S.C. § 1396p(e)(2)(B) (2012).
31. Id.
33. Id. at 197.
34. Id.
35. Id.
36. Id.
37. Id.
39. Id.
Six years later, Mr. Daley was admitted to a nursing facility and he applied for MassHealth long-term care benefits.\textsuperscript{40} At the time, he had $18,176 (held in Ms. Daley’s sole name) in a bank account, and the principal of the Daley trust had a value of $150,943.\textsuperscript{41} MassHealth denied Mr. Daley’s application for Medicaid benefits, claiming that the assets held in the Daley trust were countable.\textsuperscript{42} The determination was appealed, and the hearing officer agreed with the case worker, concluding that the home was “available” to the applicant because of the applicant’s ability to reside in the home.\textsuperscript{43}

**Analysis**

The SJC analyzed whether the equity in a home that is part of the corpus of an irrevocable trust is a countable asset where the grantor of the trust retains the authority to reside in or otherwise enjoy the use of the home.\textsuperscript{44} Under the applicable Massachusetts regulation, “[t]he home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset.”\textsuperscript{45} The Daleys argued that because they could only reside in the home but could not reach any of the equity in the home under the trust, the equity should not be countable as an asset because it may not be paid to them.\textsuperscript{46} MassHealth claimed that interpretive guidance from the Health Care Financing Administration (HCFA), in its State Medicaid Manual, which provides instruction to state officials in applying the provisions of Federal Medicaid Law, indicates that a right to use and to occupy real property could be a form of “payment” to a Medicaid applicant.\textsuperscript{47}

The SJC first noted that where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment to the grantors in the amount of the fair rental value of that property.\textsuperscript{48} In other words, if the grantors transferred a home to an irrevocable trust, rental income generated by the home to a third-party could be distributed to the grantors with no effect on the grantors’ Medicaid eligibility. The ability to use and to occupy a residence, and the resulting right to forgo that rental income by residing in the home themselves, is treated as if the fair market value of the rent that otherwise would have been earned and treated as actual trust income is deemed paid to the grantors.\textsuperscript{49} This payment, however, is not payment from the corpus of the trust but rather payment from the income of the trust. Such payments, the SJC concluded, should therefore not affect an applicant’s eligibility for Medicaid long-term care benefits.\textsuperscript{50}

The SJC also explained that had the trust granted the trustee the unlimited discretion to sell the grantors’ home and distribute the proceeds to them, the residence would without a doubt be a countable asset for Medicaid eligibility purposes. The SJC, however, emphasized that this was not the case here; it stated that a mere right to use and to occupy the residence did not give the trustee the power to sell the home and to distribute the proceeds to the grantor. The SJC disagreed with MassHealth, and stated that “By declaring the equity in a home owned by an irrevocable trust to be actually available to an applicant where the trustee has no power to sell the home and distribute the proceeds to the applicant under any circumstance, MassHealth is effectively conjuring a fictional resource (the applicant’s home) by imputing financial support from a person who has no authority to furnish it (the trustee).”\textsuperscript{51} The SJC therefore concluded that the home in the Nadeau trust was not available to Mr. Nadeau.\textsuperscript{52}

The SJC approached the Daley case differently because the Daley trust did not own the home in fee simple; rather, the trust owned only a remainder interest in the property.\textsuperscript{53} Mr. and Ms. Daley’s continued residence in the home, therefore, could not be deemed putative income received from the trust through a right of use and occupancy because the trust had no property interest in the home during the lifetimes of the Daleys.\textsuperscript{54} Instead, the SJC concluded that the life estate was an asset of the Daleys that could be sold, mortgaged, or leased. Furthermore, if the property were sold to a third-party, the life tenants, in this case the Daleys, would have a right to a portion of the sale proceeds.\textsuperscript{55} However, the SJC observed that MassHealth does not consider a life estate in an applicant’s primary residence to be a countable asset for Medicaid eligibility purposes.\textsuperscript{56} Where the irrevocable trust does not own the life estate in the applicant’s primary residence, the continued use of the home by the applicant pursuant to his or her life estate interest does not make the remainder interest in the property owned by the trust available.

\textsuperscript{40} Id. at 198.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. An applicant first applies through a MassHealth case worker and, if denied, can within 30 days appeal the decision and request a fair hearing in front of a hearing officer (who works for the Office of Medicaid). A decision by a hearing officer can be appealed to the Superior Court by way of a 30A appeal.
\textsuperscript{44} Daley v. Sec’y of the Exec. Office of Health and Human Serv. and Dir. of Office of Medicaid, 477 Mass. 188, 199 (2017).
\textsuperscript{45} 130 CMR 520.023(C)(1)(D) (2014).
\textsuperscript{46} Daley, 477 Mass. at 199.
\textsuperscript{47} Daley at 200. The court noted that “[t]he transmittals contained in the manual do not carry the force of regulations and are not entitled to the deference that we give to regulations that reflect an agency’s interpretation of a statute it is obliged to enforce. . . . However, we consider such guidance carefully for its persuasive power.” Id.
\textsuperscript{48} Daley, 477 Mass. at 201.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 202.
\textsuperscript{51} Id.
\textsuperscript{52} The court did remand the application to MassHealth to evaluate whether the assets were countable because of the power of appointment to charitable or nonprofit organizations (noting that about one-quarter of nursing homes in Massachusetts are operated by nonprofit organizations) or because the trust is intended to be construed as a “grantors” trust for tax purposes.
\textsuperscript{53} Daley, 477 Mass. at 203.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 204.
\textsuperscript{56} Id. (referencing Heyn v. Dir. of the Office of Medicaid, 89 Mass. App. Ct. 312, 313 n.3 (2016), where MassHealth declared in its brief that it is “a correct statement of law” that retention of a life estate in a primary residence does not make an individual ineligible for Medicaid benefits).
to the applicant. The SJC therefore concluded that the Daley residence was not a countable asset for Medicaid eligibility purposes.

Thus, neither the grant in an irrevocable trust of a right of use and occupancy in a primary residence, nor the retention of a life estate in an applicant’s primary residence, makes the equity in the home owned by the trust a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits.

**Where do we stand now?**

If a married couple who owns no primary residence but has substantial liquid assets engages in Medicaid planning, they could create an irrevocable trust and transfer all of their assets to that trust. As long as there are no circumstances in which the trustee could pay them any amount of trust principal, and as long as the married couple complies with the five-year look-back rule, the applicant would be eligible for Medicaid benefits because the assets would not be countable as his or her assets. Why should the transfer of a residence, where the applicant retains no control over or interest in the property other than a right to use and to occupy the residence or a retained life estate, have a different result? In most cases, the primary residence is the only asset the applicant owns.

The decisions in Nadeau and Daley clarify that a use and occupancy provision or a retained life estate in a home held in an irrevocable income-only trust does not render the assets in the trust available to the applicant and thus countable for Medicaid eligibility purposes. The decision solidifies what we saw in Heyn and O’Leary. The inclusion of the primary residence among the assets transferred to the irrevocable trust allows the grantor to avoid the estate recovery claim against his or her primary residence that would occur had the grantor obtained Medicaid long-term care benefits and continued to own the home until it was transferred to his or her heirs as part of the probate estate.

As stated by the court in Doherty, which initially caused this spiral of denials in MassHealth benefits, “self-settled trusts, if so structured, can so insulate trust assets that those assets will be deemed unavailable to the settlor.” Although there remain risks with respect to Medicaid planning and many unresolved issues with MassHealth, such as an applicant’s power to appoint principal to a charitable or non-profit organization or a trust’s ability to use trust principal to pay taxes on behalf of the grantors, among others, these decisions make it clear that transferring a principal residence to an irrevocable income-only trust while retaining a right to use and occupy the residence or retaining a life estate, should not render the assets in the irrevocable trust countable for Medicaid eligibility purposes.

— Rebecca Tunney

57. Daley, 477 Mass. at 204.
58. The court did remand the application to MassHealth to evaluate whether the assets were countable because the trust is intended to be construed as a “grantors” trust for tax purposes.
60. Id. at 195.
BOOK REVIEW

The Taming of Free Speech: America’s Civil Liberties Compromise
by Laura Weinrib (Harvard University Press) 2016, 461 pages

In August 2017, a group of white nationalists held a rally in Charlottesville, Virginia, to protest the removal of a statue of Robert E. Lee and the renaming of Lee Park to Emancipation Park. Several days earlier, the city of Charlottesville had directed that the event be moved from Lee Park, in the center of town, to a larger, open area in a more remote location. The American Civil Liberties Union (ACLU), on behalf of the rally organizers, obtained an injunction against the move in federal court. The rally proceeded at Lee Park. Violence ensued, and a woman was killed when a rally sympathizer intentionally drove over her with a car. In the aftermath, the ACLU came under intense criticism for supporting purveyors of racist hate speech. A similar uproar had greeted the organization some 40 years earlier when it supported the effort of a group of Nazis to parade in the heavily Jewish community of Skokie, Illinois. In each instance, the ACLU responded to its critics by emphasizing freedom of expression for all viewpoints, even those the state or society deemed offensive or dangerous.

Charlottesville and Skokie are a long way from the ACLU’s roots. The organization was founded to advance the interests of organized labor. The ACLU sought to secure the right for workers to organize, picket, protest and engage in other forms of expression with the ultimate goal of reshaping the economic structure of the United States. How did an organization which began by focusing on class warfare and advocating for the economically-disadvantaged come to be a champion of — indeed the driving force behind — the modern view of free speech as a marketplace of ideas? How did freedom of expression become a goal in its own right for the ACLU and not simply a tool to wage labor’s battles? And how did the courts become the arbiter of individual liberties?

Laura Weinrib, an assistant professor at the University of Chicago Law School, explores these questions in her book, The Taming of Free Speech. The title refers to the evolution of our national understanding of free speech from a right of labor to “agitate” — a weapon to advance its cause — into a right enjoyed by all persons to participate in a neutral marketplace of ideas. The book covers the start of the 20th century to the late 1940s with a brief epilogue that considers some present-day ramifications. It traces the evolution of free speech from a limited right in the 19th century to the modern consensus that freedom of expression is a bedrock foundation of both liberty and democracy that is superior to other rights. As a key part of the story, Weinrib describes the changing attitudes of both business and labor towards the judiciary and other branches of government and how those attitudes affected the concept of civil liberties. The role of the ACLU and its predecessor organization, the National Civil Liberties Board (NCLB), is central to this story.

In the 1800s, freedom of speech was viewed as a prohibition on prior restraint; it did not protect against subsequent penalties for “improper” speech. Speech was not unfettered. Indeed, “liberty” was distinguished from “license.” Weinrib invokes University of Chicago Professor Ernst Freund to the effect that free expression was “subject[] to restraints in the interest of good order or morality.” Other restrictions were tolerated as well. Thus, in Commonwealth v. Davis, the Massachusetts Supreme Judicial Court, in an opinion by Justice Holmes, upheld the conviction of a man who had violated a city of Boston ordinance by preaching on the Common without a permit. In the court’s view, it “does not appear to us open to doubt” that the ordinance was constitutional. Because the legislature, as representative of the public’s ownership of the Common, could forbid, absolutely, speaking on the Common, it could likewise limit speech by requiring a permit.

During the 19th and early years of the 20th centuries, the concept of “civil liberty” (singular) was deployed to protect property and contract from government interference. By World War II, however,
the modern view of free speech was firmly established and the term “civil liberties” (plural) had attained its current meaning as protecting individual personal rights from majority power. Economic concerns of property and contract no longer came within its ambit.

As Weinrib notes, the traditional view of historians is that modern concepts of free speech and civil liberties generally began in reaction to government-backed suppression of dissenting speech during World War I through prosecutions under the Espionage Act.\textsuperscript{14} To Weinrib, however, this view misses much of the story by ignoring the compromises made by the ACLU and its allies that allowed business and conservative thinkers to buy in to the modern free speech model. Instead, she places the source of our current understanding of free speech in a combination of “state-skeptical … labor radicalism, grafted onto a conservative legal tradition of individual rights.”\textsuperscript{15} Early advocates of free speech were not seeking to establish constitutional protection for minority anti-war viewpoints. To Weinrib, a more important period came with the post-World War I battles over the meaning of civil liberties and a change in popular attitudes towards the institutions of government.

Weinrib starts her analysis with the labor strife of the late 1800s and early 1900s, a time of much worker unrest. Class antagonism was strong and violence not uncommon. The judiciary was hostile to employee rights. This was the heyday of \textit{Lochner},\textsuperscript{16} when civil liberty meant the protection of property rights and freedom of contract. “Civil liberty shielded property rights and ‘free competition,’ not personal freedom.”\textsuperscript{17} Courts generally sided with business and the propertied classes on constitutional claims. Union organizing was often viewed as a violation of individual (i.e., employer) rights to freedom of contract. As a result, labor and its progressive allies saw the courts and the constitution as obstacles to their efforts to ameliorate harsh working conditions created by a rapidly industrializing economy. As workers battled to gain economic power, they and their intellectual supporters argued for a right of agitation, including the power to coerce with strikes, picketing and secondary boycotts. The goal of many reformers was to reshape the economic order. To them, speech was simply one tool to advance the cause of labor. Given the judicial support for property and contract, however, unions looked to state and local legislatures to advance worker rights. Labor remained leery of the judiciary, which it saw as an enemy. In contrast, business interests relied on courts to uphold constitutional protection of property and sanctity of contract by nullifying legislative efforts to regulate working conditions. Courts willingly obliged and readily issued injunctions against strikes and other labor actions.

For their part, progressives were generally hostile to the federal courts. They disapproved of claims of constitutional rights as promoting the individual over the public welfare.\textsuperscript{18} Although they applied this disapproval to freedom of contract and property rights, they also disliked claims of other personal rights. Thus, during World War I, many felt that claims by conscientious objectors of a right to be exempted from military service threatened society.\textsuperscript{19} Progressives sought to balance the “individual interest in free belief and opinion . . . with the social interest in the security of social institutions and the interest of the state in its personality.”\textsuperscript{20} While suspicious of the judiciary, they had great faith in bureaucratic expertise and trusted in legislatures and the democratic process. Early 20\textsuperscript{th} century progressives saw the hallmark of liberty as “voluntary sacrifice of self for the common life.”\textsuperscript{21} To address social problems, they urged moderate steps to reform the legal system by enacting legislation and amending the constitution. They deferred to the democratic process and looked askance at tactics like labor strikes.\textsuperscript{22}

Over time these attitudes changed, thanks in large measure to the litigation strategy of the ACLU. Weinrib believes the great mystery of the modern civil liberties movement is not how or why its leaders came to champion free speech. Rather, it is how the most prominent critics of a hypocritical judiciary came to promote the courts as the last best hope for the class struggle as well as individual rights.\textsuperscript{23}

It is here that the Espionage Act prosecutions were important in beginning to change attitudes towards the different branches of government. During the war, the government vigorously clamped down on dissent through numerous prosecutions under the Espionage Act. The rigidity of the federal administration in suppressing opponents and advancing the war effort led the NCLB, and later the ACLU, to question the viability of reliance on the executive and legislative branches and made them more willing to look to the courts. Weinrib argues that the mass suppression of speech during the war and thereafter made many progressives open to the idea of judicial review of state action. These new attitudes, however, were not universally adopted. Many progressives remained supportive of the federal government even if it meant limiting minority viewpoints. As one such progressive stated, “[I]t would be a good thing for all of us if we emphasized a little more our duties as citizens and were less concerned about insisting on our ‘rights.’”\textsuperscript{24}

Flexibility was a hallmark of the NCLB and ACLU in their efforts to advance radicalism. These organizations would try any approach they believed would enhance labor’s right to organize and eventually redistribute economic and political power.\textsuperscript{25} They also showed great savvy in dealing with allies in government, and in choosing cases and arguments with an eye towards public relations, by focusing on the ones that would best resonate with the general populace.

Even before the war, the NCLB urged the need to protect unpopular minorities from majority rule and worked to make civil liberties a concept that promoted radicalism and unions rather

\begin{footnotes}
\footnotetext[15]{\textit{Id.} at 5.}
\footnotetext[16]{\textit{Lochner v. New York}, 198 U.S. 45 (1905).}
\footnotetext[17]{Weinrib, \textit{ supra} note 5, at 73-74.}
\footnotetext[18]{\textit{Id.} at 21}
\footnotetext[19]{\textit{Id.} at 62.}
\footnotetext[21]{\textit{Id.} at 61 (quoting Eldon J. Eisenach, \textit{The Lost Promise of Progressivism}, 189 (1994) (quoting Samuel Zane Batten)).}
\footnotetext[22]{\textit{Id.} at 62.}
\footnotetext[23]{Weinrib, \textit{ supra} note 5, at 52.}
\footnotetext[24]{\textit{Id.} at 66 (quoting letter from Joseph Byers to Roger Baldwin).}
\footnotetext[25]{\textit{Id.} at 54, 81.}
\end{footnotes}
than the rights of property owners. It challenged the approaches of traditional progressives and questioned the value of administrative expertise. Supporters sought a peaceful revolution (in contrast to later events in Russia) to help workers through any means short of physical violence. Thus, the "right of agitation," they believed, included not only free speech, but also organizing workers, picketing, boycotts, and dissuading strikebreakers. Likewise, the early ACLU aimed to "reorganize[e] ... economic and political life" and to fight for "the rights of minorities and individuals attacked by the forces of reaction." To the ACLU, the right of agitation could avert violence by peacefully improving workers' lives. In this view, civil liberties were a part of an economic contest based in power rather than legal principles — liberties not derived from the government but rather arising solely out of class conflict.

During the interwar period, the ACLU held steadfast to its goal of advancing the power of labor, but it was flexible in its approach. Although differences within the organization developed, the ACLU began to argue for the protection of minority viewpoints without explicit emphasis on labor rights. Moreover, the group worked to improve its standing in public opinion and sought nontraditional allies by appealing to general principles of mutual free speech.

Outside events shaped the popular view of the ACLU and its own approach to the judicial system. At the start of the 1920s, labor unrest and the Red Scare led much of the general public to support the government in suppressing speech and stifling union activity. However, with improving economic conditions and the concomitant decline of labor strife, by mid-decade few strikes were occurring. The ACLU thus changed its focus to other issues, particularly the cause of academic freedom. In particular, the so-called "Scopes Monkey Trial" was in many ways a turning point in the popular view of the ACLU. The organization supported the defense of John Scopes, a high school teacher prosecuted for teaching evolution in violation of a Tennessee statute. The ACLU rightly recognized the case as an excellent opportunity to increase its profile and credibility and, by extension, its donor base. It expressly disclaimed that its position was anti-religion, but instead emphasized that the case was about academic freedom. No mention was made of defending radicalism. But even the fight for academic freedom reflected economic concerns. To the ACLU, the concept of academic freedom was designed to protect professors who espoused radical economic theories from retaliation by conservative university boards commonly comprised of businessmen.

Indeed, it was an academic freedom dispute that showed the ACLU that education issues had popular support. In the early 1920s, New York State enacted legislation designed to weed out disloyal (i.e., socialist) teachers, and that required licensing of private schools contingent on their not teaching the overthrow of the government. Loyalty oaths were imposed and secret commissions persecuted teachers, eventually engraving the public and leading to repeal of the legislation. Prior to repeal, however, the state brought an enforcement action against the Rand School, a private school with a socialist focus. In its defense, the school relied on the due process clause of the Fourteenth Amendment and a right to property to urge limits on the state's ability to regulate. The school's argument used Lochner and its ilk and, although unsuccessful, showed that civil liberty claims could be applied in untraditional ways.

In another prominent education case, Pierce v. Society of Sisters, the ACLU made common cause with conservatives in its goal to protect radical education from majority control. Pierce involved a successful Supreme Court challenge to an Oregon statute designed to end private education and aimed specifically at parochial schools. Although the statute was supported by anti-immigrant groups, it also had the support of many progressives who thought it would improve the quality of education generally to the benefit of all students by incentivizing parents to support public funding for education. Nevertheless, the ACLU opposed the statute. Although the ACLU board's concern was to protect radical schools from government control, it publicly argued that the statute impinged on the rights of parents and freedom of worship. It also noted that the statute applied to all private schools, including those frequented by the wealthy. This public stance gained support from groups not traditionally receptive to the ACLU's radical labor ideology.

Throughout the decade, the ACLU advanced its arguments in education cases to expand protections for dissenting ideas and hoping to establish precedents for labor. It emphasized that diverse viewpoints would lead to social progress. Progressives agreed, and conservative thinkers worried about the growth of intolerance were also receptive to this approach.

Eventually, academic freedom cases spilled over into other areas of social rights with arguments against the state's intrusion into all aspects of personal liberty. For example, the ACLU successfully attacked censorship of the mails and backed the dissemination of sex education materials. These efforts were often popular and brought new voices into the organization. With this increase in topics considered as civil liberties, there began to be a shift in theory. Indeed, as the ACLU defended obscenity and hate groups, it stopped asserting that all ideas had value. Rather, the ACLU argued that freedom of speech must be protected because it exposed bad ideas to debate, thereby allowing them to be debunked.

By the end of the 1920s, the ACLU clearly preferred judicial to administrative resolution of disputes on liberty. It saw the courts as better able to respond to attacks on new ideas than legislatures.

---

26. Id. at 54.
27. Id. at 87-88.
28. Id. at 128-29.
29. Weinrib, supra note 5, at 128-29.
30. Id. at 147.
31. Id. at 147-49.
33. Weinrib, supra note 5, at 151-53.
34. 268 U.S. 510 (1925).
35. Weinrib, supra note 5, at 154-55.
36. Id. at 156.
37. Id. at 163-64.
38. Id. at 175.
39. Id. at 176.
Given life tenure, judges were able to follow elite opinion even if not reflecting majority views, whereas legislatures were subject to democratic sentiment, and vulnerable to lobbies and special interest groups.\(^40\) As the ACLU began to win in court, it viewed civil liberties as rights that could be enforced by the judiciary.\(^41\) Realizing that many supporters of free speech did not back labor radicalism, the ACLU’s use of civil liberties began to become more than a means to economic redistribution. As Weinrib notes, the overthrow of capitalism cannot be listed as an organizational aim.\(^42\) In other words, civil liberties were undermined when tied to labor rather than simply to a right to speak.

Developments came to a head with the economic policy of the New Deal. By this point, labor was ascendant and business on defense. The administrative state had triumphed, at least in the executive branch. Much academic and popular opinion now approved of a strong role in the economy for the federal government. Two controversies illustrate the change in approach by business interests. Disputes over President Roosevelt’s court packing plan and the implementation of the Wagner Act brought the role of free speech to the fore. In each instance, it was conservatives, not the ACLU, who trumpeted free speech.

Faced with a conservative judiciary that struck down many New Deal economic initiatives as running afoul of constitutional rights to property and freedom of contract, Roosevelt proposed a scheme to increase the number of Supreme Court justices. He hoped this would allow him to “pack” the court with appointees sympathetic to his views. The conservative organized bar (in particular, the American Bar Association [ABA]) attacked Roosevelt’s proposal as a danger to free speech and the rights of minorities. For its part, the ACLU took no position on the plan. Ironically, the ABA adopted the ACLU’s vision of civil liberties as an important control on the state and a safeguard of personal rights. Weinrib claims that this change of approach by the ABA, which previously had opposed many of the ACLU’s free speech arguments, is missing from the traditional view of the development of civil liberties.\(^43\) She maintains it “played a crucial role in linking the judicial enforcement of civil liberties to American constitutional liberalism.”\(^44\) As defense of property rights went out of fashion, business interests relied on First Amendment claims that the ACLU had advanced throughout the 1920s.

The Wagner Act\(^45\) brought new protections to workers, requiring employers to negotiate with unions and shielding employees from retaliation for union activities. The right to strike was affirmed. With the passage of the act in 1935, the National Labor Relations Board (NLRB) was set to aggressively preside over the battle between employers and labor. The NLRB was solicitous of unions and clamped down on many employer activities seen as anti-labor.

Debate over the Wagner Act generated much disagreement within the ACLU between more radical leadership that was skeptical of government-based solutions and newer members who believed the state could intervene in the economy to help labor. This latter view, which was the basis for the act, ran contrary to the traditional ACLU belief that the right of agitation was hostile to state power. But the organization’s positions in numerous cases had eschewed reliance on agitation and emphasized the risk of government control of speech and other personal rights. This approach had attracted new members who did not want a restructuring of the economic order or share the more radical leadership’s antagonism to the state. Ultimately, the ACLU took no position on the Wagner Act prior to enactment.\(^46\)

Interestingly, Weinrib points out that when the Supreme Court upheld the Wagner Act in *In re Ford Motor Co. v. Jones & Laughlin Steel Corp.*,\(^47\) it used language suggesting a right of agitation. The court’s decision declared employees’ ability to self-organize as a fundamental right equivalent to the right of an employer to organize its business.\(^48\) The leadership of the ACLU was heartened by the opinion as evidence that the judiciary could advance progressive goals.\(^49\)

The NLRB’s implementation of the act led to a battle over employer rights to expression and brought to the forefront the question whether free speech was a tool to support labor or a right allowed to all regardless of their viewpoints. A pivotal case arose out of the so-called “Battle of the Overpass.” In 1937, agents of the Ford Motor Company violently attacked union organizers on public property on a highway overpass near a Ford plant in Michigan. The United Auto Workers filed a complaint with the NLRB alleging various unfair labor practices, including distribution of anti-union statements designed to discourage union membership.\(^50\) In a cease and desist order to Ford, the NLRB included a prohibition on “circulating, distributing or otherwise disseminating among its employees statements or propaganda disparaging or criticizing labor organizations or advising its employees not to join such organizations.”\(^51\) In response to the agency’s request for judicial enforcement of its order, Ford defended on First Amendment grounds. In arguing its position, the NLRB relied in part on anti-labor judicial precedents, such as cases that had held activities like picketing not to be protected speech.\(^52\) Ford denounced these decisions as contrary to the First Amendment and accused the NLRB of matching past injustices to employees with new injustices to employers. The company asserted that free speech was crucial to informed exercise of rights. In contrast, the NLRB believed that anti-union speech by employers hurt employees’ rights to organize under the Wagner Act, and it customarily investigated press accounts of employer speech directed at dissuading unionism.\(^53\) On review, however, the Sixth Circuit Court of

\(^{40}\) *Id.* at 178.

\(^{41}\) *Weinrib, supra* note 5, at 179.

\(^{42}\) *Id.* at 181-82.

\(^{43}\) *Id.* at 183-84.

\(^{44}\) *Id.* at 184.


\(^{46}\) *Weinrib, supra* note 5, at 202-04.

\(^{47}\) 301 U.S. 1 (1937).

\(^{48}\) *Id.* at 33.

\(^{49}\) See *Weinrib, supra* note 5, at 220.

\(^{50}\) *Id.* at 270, 283, 284.

\(^{51}\) *Id.* at 286. The NLRB’s order in the “Overpass” case was not unusual. See, e.g., *In re Ford Motor Co. & United Automobile Workers*, 19 NLRB 732, 748 (1940) (relating to alleged anti-union statements at Ford’s plant in Somerville, Massachusetts).

\(^{52}\) *Weinrib, supra* note 5, at 297; see *e.g.*, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 436-37 (1911).

\(^{53}\) *Id.* at 297.
Appeals saw things Ford’s way and struck from the cease-and-desist order the prohibition on Ford’s disseminating propaganda among its employees.\textsuperscript{54}

The Ford case exposed tensions between free speech and the right to organize and resulted in a split on the ACLU board.\textsuperscript{55} Previously, the ACLU had supported the right of disfavored minorities to advocate for social change through a right to speak. Now, however, the ACLU’s arguments defending free speech had been turned around, thereby threatening labor’s gains. To some on the ACLU board (and to the NLRB), industry’s economic power made anti-union statements “coercive per se.”\textsuperscript{56} To them, the right to join unions was a civil liberty that trumped free speech. Under this view, civil liberties were a tool of social progress that was more important than any individual right to speak. Thus, they distrusted free competition in the marketplace of ideas and wanted to increase the strength of weaker (i.e., employee) voices.\textsuperscript{57} Although the NLRB continued to examine employer speech for coercion (with the approval of the courts), by the 1940s, its position was not generally supported and, in 1947, the Taft-Hartley Act\textsuperscript{58} provided that employer expression of views, arguments, and opinions did not constitute unfair labor practices in the absence of a threat of reprisal or the promise of a benefit. Weinrib notes that, after the Ford case, the ACLU firmly supported the idea that government should remain neutral between employers and employees.\textsuperscript{59}

The book contains a perceptive epilogue which considers what modern free speech has meant. In Weinrib’s view, by the 1940s, the First Amendment, like Lochner before it, was employed to thwart police power.\textsuperscript{60} Free speech provided industry a weapon against state control of business. The right of agitation had been replaced by the marketplace of ideas. The ACLU believed radicalism would win in that marketplace, but employers recognized that those with better resources would prevail.\textsuperscript{61} Money controls which ideas are heard.

The tension between labor rights and free speech continues to resonate today, as the recent Supreme Court term shows. In Janus v. American Federation of State, County and Municipal Employees,\textsuperscript{62} the court struck down an Illinois law requiring non-union public employees to pay an “agency fee” to the public workers’ union to cover costs for collective bargaining and related activities. By a five-to-four majority, the Court held that the law violated the free speech rights of non-union members. In so doing, it overruled well-established precedent.\textsuperscript{63} Justice Kagan’s vigorous dissent accused the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”\textsuperscript{64} She seems to have little doubt whom such intervention will favor.

Weinrib touches on some other recent issues. Should speech be unfettered? Should free speech be the core civil liberty superior to all other considerations? Should commercial speech and hate speech be entitled to protection? Or would society be better off with some restrictions? Similarly, should the government work to ensure that weaker voices are heard? Weinrib’s “civil liberties compromise” would say no.

The book is heavily footnoted and well researched. It is clearly written and the author’s arguments are easy to follow. A strength of the book is the portraits it paints of the people involved in the civil liberties struggle, both lawyers and others, in and outside the ACLU. Moreover, it convincingly places the story within the background of larger historical forces, such as World War I, the Red Scare, the rise of totalitarianism and changing economic times — and shows how these and many other events shaped academic and popular opinion on speech, ultimately affecting judicial decisions. Weinrib reviews tensions within the ACLU on strategy and goals, highlighting the question whether social progress through advancing the power of labor was more important than free speech for all. She describes significant legal cases and controversies, explaining the strategies involved and noting how they could result in unexpected outcomes. The response of mainstream groups to the labor battle and the developing free speech jurisprudence is also highlighted, including the evolving position of the ABA as it went from a free speech skeptic to a champion of civil liberties. In short, The Taming of Free Speech provides a fascinating look at the social, intellectual, and economic forces at work in the early 20th century, shaping the relationship of the economic classes to each other and to the government and resulting in the modern understanding of civil liberties.

— Victor Baltera

55. Weinrib, supra note 5, at 281.
56. Id. at 290.
57. Id. at 290-91.
58. 61 Stat. 136 (1947), (29 U.S.C. ch. 7 §§ 141-197 (2012)).
59. Weinrib, supra note 5, at 310.
60. Id. at 320.
61. Id. at 327.
63. Id. at 2460, 2486 (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).
64. Id. at 2501 (Kagan, J. dissenting); see also National Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2381 (2018) (Breyer, J. dissenting) (“[e]ver since this Court departed from the approach it set forth in Lochner . . . ordinary economic and social legislation has been thought to raise little constitutional concern.”)
The tension between labor rights and free speech continues to resonate today, as the recent Supreme Court term shows. In Janus v. Illinois AFSCME Council 31, the Court struck down an Illinois law requiring non-union public employees to pay an "agency fee" to the public workers' union to cover costs for collective bargaining and related activities. By a five-to-four vote, the Court held that the law violated the First Amendment rights of non-union members. In so doing, it overruled well-established precedent.

The question of whether labor unions should be allowed to use public funds to finance collective bargaining and related activities has been a source of controversy for decades. The decision in Janus was significant because it was the first time the Supreme Court had ruled on this issue in nearly 40 years. The decision was also notable for the way in which it limited the scope of the First Amendment's establishment clause, which normally prevents the use of public funds to support religious or political entities.

In a dissenting opinion, Justice Kagan wrote that the majority's decision "will favor."

The book contains a perceptive epilogue which considers what new constitutional and political horizons are likely to emerge from the post-Janus labor scene. The author, a veteran of the modern free speech movement, explores the implications of the Janus decision for the future of American democracy. The book provides a fascinating look at the social, intellectual, and economic tensions within the ACLU on strategy and goals, highlighting the book's value for anyone interested in the history of civil liberties and free speech in America.
### 13. Publication Title

### 14. Issue Date for Circulation Data Below

- **Aug. 1, 2018**

### 15. Extent and Nature of Circulation

<table>
<thead>
<tr>
<th>a. Total Number of Copies (Net press run)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)</td>
<td>10,807</td>
<td>10,878</td>
</tr>
<tr>
<td>(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b. Paid Circulation (By Mail and Outside the Mail)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(2) Free or Nominal Rate In-County Copies Included on PS Form 3541</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>c. Total Paid Distribution [Sum of 15b (1), (2), (3), and (4)]</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10,807</td>
<td>10,878</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(2) Free or Nominal Rate In-County Copies Included on PS Form 3541</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)</td>
<td>Ø</td>
<td>Ø</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ø</td>
<td>Ø</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>f. Total Distribution (Sum of 15c and 15e)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10,807</td>
<td>10,878</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>g. Copies not Distributed (See Instructions to Publishers #4 (page #3))</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>h. Total (Sum of 15f and g)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10,907</td>
<td>10,978</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>i. Percent Paid (15c divided by 15f times 100)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

*If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.*
16. Electronic Copy Circulation

<table>
<thead>
<tr>
<th></th>
<th>Average No. Copies Each Issue During Preceding 12 Months</th>
<th>No. Copies of Single Issue Published Nearest to Filing Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Paid Electronic Copies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. Percent Paid (Both Print &amp; Electronic Copies) (16b divided by 16c × 100)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

☐ I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.

17. Publication of Statement of Ownership

☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Nov. or Dec. 2018 issue of this publication.

☐ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner

Kelsey J. Sadoff

Date 9/28/18

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).
IS YOUR FIRM FULLY COVERED?

SECURE YOUR PRACTICE
by calling the
MBA Insurance Agency.

Insurance for lawyers, by lawyers.

For more than 20 years, the MBA Insurance Agency has offered comprehensive coverage and unmatched client service — with policies specifically designed to protect lawyers who practice in Massachusetts.

BOSTON (617) 338-0581 • SPRINGFIELD (413) 788-7878
Insurance@MassBar.org • www.MassBarInsurance.com
INNOVATION COMES STANDARD

Fastcase is one of the planet’s most innovative legal research services, and it’s available free to members of the Massachusetts Bar Association.

Learn more at www.massbar.org
Massachusetts Bar Association members can now search every past issue of the *Massachusetts Law Review* online through a partnership with HeinOnline.

The *Massachusetts Law Review* is the longest continually published law review in the nation. Now, MBA members can view every issue, starting with the *Massachusetts Law Quarterly* (the original name of the *Massachusetts Law Review*) Vol. 1, No. 1, from November 1915, through the most recent *Massachusetts Law Review*, Vol. 98, No. 3. Using the HeinOnline search function, users can type in a search term (e.g., “eminent domain”) to find all of the *Massachusetts Law Review* articles over the past 100 years, where that term has appeared.

Previously, the MBA website included only the most recent issues of *Massachusetts Law Review*, and older issues had to be looked up on microfiche. There was also no way to search past issues by keyword.

Log in under the “Publications” tab on www.MassBar.org for easy access to the law review’s articles, case comments and book reviews, using an online, searchable database. This service is provided to MBA members as a free member benefit.

The *Massachusetts Law Review* archive on HeinOnline also works seamlessly with the MBA’s recently introduced Fastcase benefit. In many cases, citations to Massachusetts appellate court opinions that appear in the law review articles will hyperlink directly to the opinion itself.