Massachusetts Law Review

Volume 101, No. 4 Published by the Massachusetts Bar Association

Massachusetts Law Review

VOLUME 101 NUMBER 4

August 2020

REVISED: October 2020*

IN THIS ISSUE

*CORRECTION: The second paragraph in Case Comment, "A Wage by Any Other Name," included a punctuation error in the mailed version. The second paragraph should properly read: Almost every year, the Massachusetts Supreme Judicial Court (SJC) is tasked with deciding new cases that test the scope of the Act. In the last year and a half, in four separate decisions, the SJC provided additional guidance on what constitutes a "wage" for the purposes of the Act in *Calixto v. Coughlin*;[1] articulated, for the first time, the standard to govern claims reimbursement of attorneys' fees under the Wage Act in *Ferman v. Sturgis Cleaners, Inc.*;[2] outlined a framework for determining whether a volunteer officer could avail himself of charitable immunity to avoid the imposition of individual Wage Act liability in *Lynch v. Crawford*;[3] and shed light on the circumstances under which a commission, conditioned on continued employment, may be deemed a wage for the purpose of the Act even after employment has been terminated before the scheduled payment date in *Parker v. EnerNOC, Inc.*[4]

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

Cover: Middlesex Superior Court-Lowell. Photo by Hon. David S. Ross.

MASSACHUSETTS BAR ASSOCIATION
20 WEST STREET, BOSTON, MA 02111-1204

Massachusetts Law Review (ISSN 0163-1411) is published quarterly by the Massachusetts Bar Association, 20 West Street, Boston, MA 02111-1204. Periodicals postage paid at Boston, MA 02205. Postmaster: Send address changes to Massachusetts Bar Association Member Services Center, 20 West Street, Boston, MA 02111-1204.

Subscriptions are free for members and are available to libraries at $50 and those not eligible for membership in the Massachusetts Bar Association at $75 per calendar year. Single copies are $25.

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18th Century Constitutional Principles Meet 21st Century Technology: Compelling Individuals to Enter Passwords into Electronic Devices under *Commonwealth v. Gelfgatt*, 468 Mass. 512 (2014) and *Commonwealth v. Jones*, 481 Mass. 540 (2019)

By William F. Bloomer

Nemo Tenetur Seipsum Accusare:[1]
"No One is Bound to Incriminate or Accuse Himself."

Introduction

The near omnipresence in today's society of technological devices capable of storing enormous amounts of highly sensitive and private information poses complex challenges to courts seeking to resolve alleged violations of centuries-old constitutional guarantees in connection with searches of those devices by law enforcement. With advancements in software encryption programs, one issue that courts must address with increased frequency is the appropriate showing the government must make to compel a person to enter a password into a media storage device to decrypt data stored in it without violating that individual's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article 12 (art. 12) of the Massachusetts Declaration of Rights.

In *Commonwealth v. Gelfgatt*,[2] the Supreme Judicial Court (SJC) held that a defendant's act of entering his password to unlock an electronic device and decrypt its contents does not amount to self-incrimination under the federal or state constitutions if the government can show that the defendant's knowledge of the device's password is a "foregone conclusion." More recently, in *Commonwealth v. Jones*,[3] the SJC, elaborating on *Gelfgatt*, concluded that under the "foregone conclusion exception" to the privilege against self-incrimination, art. 12 requires the government to establish beyond a reasonable doubt that the defendant knows the password to a cellphone before compelling him or her to enter it into the device. In establishing this exacting standard of proof, the court in *Jones* declined to impose the additional requirement that the commonwealth demonstrate that it knows, with reasonable particularity, the existence and location of relevant, incriminating evidence stored in an electronic device such as a cellphone. The SJC, in so doing, noted

William F. Bloomer is an assistant United States attorney for the District of Massachusetts and an adjunct professor at Boston College. This article is written in his personal capacity and any views expressed are his own and not those of the United States Department of Justice, the United States Attorney's Office for the District of Massachusetts, or Boston College.

1. John Appleton, Rules of Evidence 26 (1860). In 1896, the United States Supreme Court eloquently described what has now become ingrained in the collective subconscious of the national psyche:

> The maxim '*Nemo Tenetur Seipsum Accusare*,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Brown v. Walker, 161 U.S. 591, 596-97 (1896).

2. 468 Mass. 512 (2014).
3. 481 Mass. 540 (2019).

that in addition to the constitutional guarantee against self-incrimination afforded by art. 12 (and the Fifth Amendment), the Fourth Amendment to the United States Constitution and Article 14 (art. 14) of the Massachusetts Declaration of Rights normally require the police to secure a warrant based upon probable cause from an independent magistrate before searching the device for evidence of the alleged crime. In light of these dual constitutional protections, and because the government sought only to compel the defendant to enter his password into the cellphone, the court declined to impose upon the government the additional burden of having to show the existence and location of inculpatory evidence relevant to the crimes under investigation in the defendant's cellphone.

This article is written for both state and federal practitioners. It focuses primarily on the *Gelfgatt* and *Jones* decisions, but also discusses case law originating from federal and other state courts. The first section of this article examines the historical development of the privilege against self-incrimination as well as the requirements needed to avail oneself of the protective shelter of this constitutional guarantee. It then traces the evolution of the foregone conclusion exception under federal and state case law from the doctrine's emergence in a paper-based world to its continued viability in today's technology-reliant society. The second section of this article focuses on *Gelfgatt* and *Jones*, reciting the differing views and concerns of the majority, dissenting and concurring opinions. The final section of this article looks to the future. It analyzes the impact of *Gelfgatt* and *Jones* moving forward and explores, among other things, the potential limitations to the foregone conclusion exception as well as the constitutionality of the compelled use of biometric features to unlock electronic devices, including whether, and in what circumstances, the foregone conclusion exception might apply when biometric features fail to unlock such a device. This publication concludes with an observation that will become self-evident: while resolving Fifth Amendment and art. 12 challenges to the compelled entry of passwords into electronic devices poses significant analytical challenges to even the most learned jurists, the SJC nevertheless managed to crystalize the somewhat amorphous concept known as the foregone conclusion exception, and provided much-needed guidance to lower courts and parties in resolving contested "*Gelfgatt* motions."

Legal Backdrop

The Fifth Amendment to the United States Constitution provides in part: "No person … shall be compelled in any criminal case to be a witness against himself."[4] Its counterpart in the commonwealth is art. 12 of the Declaration of Rights of the Massachusetts Constitution, which provides in part: "No subject shall … be compelled to accuse, or furnish evidence against himself."[5] The privilege against self-incrimination has been trumpeted as "an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'"[6]

> Historically, the privilege [against self-incrimination] was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber — the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion. At its core, the privilege reflects our fierce 'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,' that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.[7]
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> ***
>
> By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of invdividual feeling and thought and proscribes state intrusion to extract self-condemnation … the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth.[8]

Although their specific language differs, both the federal and the state constitutional provisions protect individuals from incriminating themselves through their own compelled testimonial communications.[9] The test to determine whether the privilege against self-incrimination applies in specific instances is generally threefold. An

4. U.S. Const. amend. V.

5. Mass. Const. art. 12

6. Ullmann v. United States, 350 U.S. 422, 426 (1956) (quoting Erwin N. Griswold, The Fifth Amendment Today 7 (1955)).

7. Pennsylvania v. Muniz, 496 U.S. 582, 595-96 (1990) (citations omitted).

8. Couch v. United States, 409 U.S. 322, 327 (1973).

9. *See* Fisher v. United States, 425 U.S. 391, 409 (1976) (Fifth Amendment protects a person from incriminating himself through compelled testimonial communications); Commonwealth v. Burgess, 426 Mass. 206, 218 (1997) (privilege against self-incrimination under art. 12 protects "[o]nly that genre of evidence having a testimonial or communicative nature.") (quoting Attorney Gen. v. Colleton, 387 Mass. 700, 796 n.6 (1982)). Such was not always the case. In 1886, the Supreme Court issued an opinion that befuddled future generations regarding the application and scope of both the Fourth and Fifth Amendments. In Boyd v. United States, 116 U.S. 616, 634-35 (1886), the Court held that the government could not compel a criminal defendant by subpoena to produce his or her private papers without running afoul of the Fourth and Fifth Amendments. The Court in *Boyd* stated, "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd*, 116 U.S. at 633. Subsequent decisions of the Court also interpreted Boyd to prohibit the government from seizing, under authority of a warrant or otherwise, materials purely for evidentiary value, prohibiting their admission in evidence at trial over the defendant's Fourth and Fifth Amendment objections. Fisher, 425 U.S. at 407 (citations omitted). Though not explicitly overruled, *Boyd* certainly has fallen into disrepute. *See Fisher,* 425 U.S. at 407 (several of *Boyd's* express or implicit declarations have not withstood test of time and many of its underpinnings have been "washed away"); Andresen v. Maryland, 427 U.S. 463, 472 (1976) (rejecting petitioner's reliance on *Boyd*, stating "the continued validity of the broad statements contained in some of the Court's earlier cases [has] been discredited by later opinions."); *see also* Samuel A. Alito Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27 (1986) (discussing widespread criticism of Boyd and potential problems arising from *Fisher* and its progeny).

oral or written statement, and in some cases a nonverbal act, must be: (1) compelled, (2) incriminating, and (3) testimonial.[10] First, the Fifth Amendment protects only compelled communications. For example, no Fifth Amendment violation occurs when a subject makes incriminating statements to an undercover agent because the element of compulsion is lacking.[11] Similarly, the Fifth Amendment right against self-incrimination does not extend to an individual who voluntarily submits an application form[12] or voluntarily prepares business documents.[13] Nor does the privilege encompass documents related to the preparation or contents of tax returns,[14] or records pertaining to governmentally regulated activity.[15]

Second, the privilege applies only to compelled testimony that is self-incriminating. The Supreme Court has interpreted the element of self-incrimination liberally, stating "[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[16] A violation of the privilege therefore occurs if the compelled testimony, even if not inculpatory in and of itself, may lead to incriminating evidence.[17] The privilege not only applies to individuals involved in criminal matters, but it also embraces civil as well as any formal or informal proceeding in which answers to questions might incriminate the declarant in a future criminal proceeding.[18] On the other hand, it is not without its limits. The Supreme Court has cautioned, "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."[19] The Fifth Amendment also offers no protection to compelled testimony that might become incriminating through future conduct.[20]

The third and final requirement for asserting the privilege is that the compelled communication must be testimonial in nature.[21] This is where the rubber meets the road in cases such as *Gelfgatt* and *Jones*. The privilege only applies in circumstances where the defendant is compelled to testify against himself or to furnish the government with testimonial or communicative evidence.[22] "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself."[23] The burden of showing that a communication is testimonial rests on the party asserting the privilege.[24]

The Fifth Amendment not only protects natural individuals against the compelled production of self-incriminating oral and written testimony, but also nonverbal acts of production that have a communicative aspect to them.[25] Whether an act of production is testimonial generally turns on whether the government seeks to compel a defendant to use the "contents of his own mind" to communicate, explicitly or implicitly, a statement of fact.[26] However, the privilege does not protect against compelled production of "real or physical" evidence. As Justice Oliver Wendell Holmes Jr. stated in *Holt v. United States*,[27] "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Under this guiding principle, the government has successfully overcome Fifth Amendment challenges against compelling

10. *See Muniz*, 496 U.S. at 595-96; *see also* United States v. Hubbell, 530 U.S. 27, 34-37 (2000).

11. Illinois v. Perkins, 496 U.S. 292, 296 (1990); United States v. Hornsby, 666 F.3d 296, 310 (4th Cir. 2012).

12. Selective Serv. Sys. v. Minn. Pub. Interest Grp., 468 U.S. 841, 856-57 (1984).

13. United States v. Doe, 465 U.S. 605, 612 (1984). It is important to note, however, that the act of producing voluntarily prepared documents may trigger protection under the Fifth Amendment. *See id.* at 612-14 (act of producing voluntarily prepared papers in response to subpoena tantamount to defendant admitting existence, control and authenticity of documents); In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988) (act of producing notebooks in possession of defendant's wife entitled to Fifth Amendment protection because act of production was testimonial in nature).

14. United States v. Hubbell, 167 F.3d 552, 567 (D.C. Cir. 1999), aff'd, 530 U.S. 27 (2000); *see* Commonwealth v. Burgess, 426 Mass. 206, 217 (1997) (contents of defendant's tax returns are not privileged under Fifth Amendment). The Supreme Court also has held that a taxpayer's Fifth Amendment rights were not violated by enforcement of a summons issued to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. Couch v. United States, 409 U.S. 322, 328-29 (1973) (noting that privilege adheres to the person, not to information that may incriminate him).

15. *See* United States v. Chen, 815 F.3d 72, 78-79 (1st Cir. 2016) (Required Records Doctrine prevents individual from resisting, under Fifth Amendment, production of records whose creation and maintenance is required as condition of voluntarily engaging in highly regulated activity).

16. Hoffman v. United States, 341 U.S. 479, 486 (1951).

17. Doe v. United States, 487 U.S. 201, 208 n.6 (1988).

18. Minnesota v. Murphy, 465 U.S. 420, 426 (1984); Emery's Case, 107 Mass. 172, 183 (1871).

19. Marchetti v. United States, 390 U.S. 39, 53 (1968).

20. *See* United States v. Apfelbaum, 445 U.S. 115, 130 (1980) (Fifth Amendment did not preclude use of defendant's immunized testimony at subsequent prosecution for making false statements before grand jury); United States v. DeSalvo, 26 F.3d 1216, 1221 (2d Cir. 1994) (Fifth Amendment does not permit witness to invoke the privilege against self-incrimination on the ground that he anticipates committing perjury in future).

21. *See* United States v. Hubbell, 530 U.S. 27, 34-36 (2000) (only testimonial statements are protected from compulsion under the Fifth Amendment).

22. Pennsylvania v. Muniz, 496 U.S. 582, 588-89 (1990); Schmerber v. California, 384 U.S. 757, 761 (1966).

23. Doe v. United States, 487 U.S. 201, 210 (1988).

24. United States v. Bright, 596 F.3d 683, 691 (9th Cir. 2010).

25. Fisher v. United States, 425 U.S. 391, 410 (1976). Only individuals, not artificial entities like corporations, may assert the right against self-incrimination. *See* Braswell v. United States, 487 U.S. 99, 102-03 (1988) (privilege does not extend to artificial entities); Amato v. United States, 450 F.3d 46, 49 (1st Cir. 2006) (only natural individuals, not corporations, enjoy the Fifth Amendment right against self-incrimination).

26. *Doe*, 487 U.S. at 210 & n.9. For example, a compelled act of production that is a tacit admission of the existence, authenticity, and possession or control of the evidence demanded may constitute a "testimonial" communication. *Hubbell*, 530 U.S. at 36 & n.19.

27. 218 U.S. 245, 252-53 (1910).

individuals to provide real or physical evidence in a variety of situations, including furnishing fingerprints,[28] urine specimens,[29] blood samples,[30] handwriting exemplars[31] and voice exemplars;[32] submitting to teeth and gum examinations;[33] participating in a lineup;[34] reenacting a crime;[35] donning clothes;[36] displaying a tattoo;[37] providing DNA samples;[38] and reading verses from a publication at trial.[39] "[T]he privilege [is] not implicated … because the suspect [is] not required 'to disclose any knowledge he might have,' or 'speak to his guilt.' It is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-incrimination Clause."[40]

Even assuming a nonverbal act of production is communicative in nature, the analysis does not abruptly end there. Under the foregone conclusion exception to the privilege against self-incrimination, an act of production is not "testimonial" if the information conveyed is already known to the government such that the defendant "adds little or nothing to the sum total of the Government's information…."[41] In cases in which the exception applies, the Supreme Court has concluded, "no constitutional rights are touched. The question is not of testimony but of surrender."[42] In other words, what is otherwise testimonial in nature is rendered non-testimonial under the foregone conclusion exception, as the government already knows the facts sought through a judicial compulsion order.

The exception had its murky genesis in *United States v. Fisher*,[43] and evolved over the last four-plus decades through a series of cases into a more intelligible, but still somewhat amorphous, concept. In *Fisher*, the Internal Revenue Service (IRS) issued summonses seeking voluntarily prepared materials such as tax returns and accountant work papers that the defendant taxpayers had turned over to their attorneys.[44] The attorneys resisted production, claiming, among other things, that the act of producing the documents would violate their clients' rights against self-incrimination.[45] Enforcement actions followed.[46] The Supreme Court, after granting certiorari,[47] considered whether the acts of production were testimonial in nature such that they were entitled to protection under the Fifth Amendment. The Court initially rejected the contention that the Fifth Amendment protected the attorneys from being compelled to produce the documents because the element of personal compulsion upon the defendant taxpayer was lacking.[48] After analyzing the application of the attorney-client privilege in this case, the Court considered whether the documents transferred to the attorneys could have been obtained by a summons issued directly to the taxpayer while the materials were in his possession without violating the taxpayer's Fifth Amendment privilege against self-incrimination.[49] The Supreme Court noted that the act of producing evidence in response to a subpoena, separate and aside from the contents of the papers produced, may be testimonial in nature in that it tacitly concedes the existence of the materials sought, the taxpayer's possession and control over the items, and the taxpayer's belief that the papers produced are responsive to the subpoena.[50] Nonetheless, the Court stated that the taxpayer's act of producing the accountant's work papers, however incriminating they might be, would not involve testimonial self-incrimination.[51] The Court went on to set forth the primer for the foregone conclusion doctrine:

> The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the returns of his client. Surely the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents. … The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.[52]

28. United States v. Thomann, 609 F.2d 560, 562 (1st Cir. 1979).
29. Hess v. Ables, 714 F.3d 1048, 1053 (8th Cir. 2013).
30. Schmerber v. California, 384 U.S. 757, 764-65 (1966).
31. Gilbert v. California, 388 U.S. 263, 266-67 (1967).
32. United States v. Dionisio, 410 U.S. 1, 5-7 (1973).
33. United States v. Maceo, 873 F.2d 1, 5-6 (1st Cir. 1989).
34. United States v. Wade, 388 U.S. 218, 221-23 (1967).
35. Avery v. Procunier, 750 F.2d 444, 448 (5th Cir. 1985).
36. Holt v. United States, 218 U.S. 245, 252-53 (1910).
37. United States v. Velasquez, 881 F.3d 314, 338 (5th Cir. 2018). Conversely, at least one federal court has intimated that a defendant may display a physical characteristic to a jury without waiving his or her Fifth Amendment privilege or exposing himself or herself to cross-examination. United States v. Williams, 461 F.3d 441, 448 (4th Cir. 2006) (finding Fifth Amendment violation where trial court required defendant to submit to cross-examination if defendant demonstrated to jury that fanny pack did not fit).
38. United States v. Zimmerman, 514 F.3d 851, 855 (9th Cir. 2007).
39. United States v. Williams, 704 F.2d 315, 317-20 (6th Cir. 1983).
40. Pennsylvania v. Muniz, 496 U.S. 582, 594 (1990) (citations omitted).
41. Fisher v. United States, 425 U.S. 391, 411 (1976).
42. *Id*.
43. 425 U.S. 391 (1976).
44. *Id*. at 394-95.
45. *Id*. at 395.
46. *Id*.
47. *Fisher* actually involved two consolidated cases, one from the Fifth Circuit reversing the enforcement order and the other from the Third Circuit, affirming the enforcement order. Fisher v. United States, 425 U.S. 391, 394-95 (1976). The Supreme Court granted *certiorari* to resolve the inter-circuit conflict. *Id*. at 395-96.
48. *Fisher*, 425 U.S. at 398.
49. *Id*. at 405.
50. *Id*. at 410.
51. *Id*. at 411.
52. *Id*.

The Court also dismissed the argument that the act of production in response to the subpoena might authenticate the work papers.[53] The Court observed that the defendant taxpayer could no more authenticate the accountant's work papers and reports by responding to the subpoena than if he attempted to authenticate those same documents through oral testimony.[54] Ultimately, the Supreme Court held that no Fifth Amendment violation occurred in the circumstances of this case.[55]

From that decision a series of Supreme Court cases sprang forth addressing, at least inferentially, what eventually became known as the foregone conclusion exception to the privilege against self-incrimination. In *United States v. Doe (Doe I)*,[56] the government issued five subpoenas to the respondent compelling, among other things, the production of bank statements and canceled checks of bank accounts in the Grand Cayman Islands pertaining to a business owned solely by the respondent.[57] After finding that the contents of the records were not privileged, the Court found that the act of producing those documents nevertheless might be testimonial and incriminating.[58] The Court observed that enforcement of the subpoena would compel the respondent to admit the existence, possession and authenticity of the records.[59] It also concluded in a footnote that, "[t]his is not to say that the Government was foreclosed from rebutting respondent's claim by producing evidence that possession, existence, and authentication were a 'foregone conclusion.' In this case, however, the Government failed to make such a showing."[60] The Court in *Doe I* held that the Fifth Amendment protected the respondent against the compelled act of producing the bank account records absent a statutory grant of use immunity.[61]

In *Doe v. United States (Doe II)*,[62] decided four years later and unrelated to *Doe I*, the government obtained an order compelling the target of a grand jury investigation to sign a consent directive that authorized foreign banks to disclose records of any and all accounts over which the target had a right of withdrawal.[63] The target resisted compliance on Fifth Amendment grounds but was found in civil contempt for failing to comply with the District Court's order.[64] After granting *certiorari*, the Supreme Court held that compelling the target/petitioner to sign the consent directive did not implicate Doe's Fifth Amendment privilege against self-incrimination.[65] Noting that the act of signing the form clearly was compelled and assuming it would have an incriminating effect, the Court trained its sights on whether the act of executing the consent form was testimonial in nature.[66] The Court reiterated that, "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[67] Responding to an oft-quoted analogy penned by Justice John Paul Stevens in his dissenting opinion, the majority stated,

> [w]e simply disagree with the dissent's conclusion that the execution of the consent directive at issue here forced the petitioner to express the contents of his mind. In our view, such a compulsion is more like 'be[ing] forced to surrender a key to a strongbox containing incriminating documents' than it is like 'be[ing] compelled to reveal the combination to [petitioner's] wall safe.'[68]

The Court found that neither the form itself, nor its compelled execution, communicated any explicit or implicit factual assertion or provided any information to the prosecution.[69] Addressing the language of the directive itself, the Court noted that the government still had to locate hidden accounts or other relevant, incriminating information through its independent efforts and without regard to the truth-telling of the signed directive to show the existence of and petitioner's control over the bank records.[70] The consent form itself did not acknowledge the existence of any bank accounts or other information pertaining to the defendant, and it clearly stated that the defendant signed the form pursuant to a court order.[71] By

53. Fisher v. United States, 425 U.S. 391, 412-13 (1976).
54. *Id*. at 413.
55. *Id*. at 414.
56. 465 U.S. 605 (1984).
57. *Id*. at 607.
58. *Id*. at 612.
59. *Id*. at 613-14 & n.11.
60. *Id*. at 614 n.13 (citation omitted).
61. *Id*. at 617; *see* 18 U.S.C. §§ 6002, 6003 (addressing use immunity for potentially incriminating evidence).
62. 487 U.S. 201 (1988).
63. *Id*. at 203-05.
64. *Id*. at 205-06.
65. *Id*. at 206.
66. *Id*. at 207.
67. Doe v. United States, 487 U.S. 201, 210 (1988).
68. *Id*. at 210 n.9. Justice Stevens' now-famous quotation reads,

> can [a defendant] be compelled to use his mind to assist the prosecution in convicting him of a crime? I think not. He may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe — by word or deed.

Doe, 487 U.S. at 219 (Stevens, J., dissenting). In a footnote, the majority in *Doe II* retorted, "it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence by someone else offends the privilege." *Id*. at 213 n.11.

69. *Id*. at 215.
70. *Id*. The Supreme Court in *Doe II* quoted *Fisher* liberally in explaining its reasoning without explicitly mentioning the foregone conclusion exception. *See, e.g., id.* (repeating *Fisher's* reasoning: "Surely, the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information…." Fisher v. United States, 425 U.S. 391, 412 (1976) (citation omitted)).
71. *Doe*, 487 U.S. at 215-16.

executing the form, the Court stated, Doe made no statement whatsoever about the existence of any foreign bank account, his control over any such account, or the authenticity of records produced by a third party.[72] Consequently, the Court determined that the consent directive was not testimonial for Fifth Amendment purposes and affirmed the judgment of the Fifth Circuit Court of Appeals, which held that the compelled execution of the directive did not violate the petitioner's privilege against self-incrimination because it did not have testimonial significance.[73]

Approximately 12 years later, in *United States v. Hubbell*,[74] the Supreme Court once again addressed the issue of whether the Fifth Amendment protected a witness from compelled disclosure of potentially incriminating evidence in the business records context. The case against Webster Hubbell arose as part of the "Whitewater" investigation by Independent Counsel Kenneth Starr in the 1990s.[75] During that investigation, Hubbell pleaded guilty pursuant to a written plea agreement to tax evasion and mail fraud charges arising from his billing practices as a member of an Arkansas law firm.[76] The agreement contained a cooperation provision requiring him to provide "full, complete, accurate, and truthful information" in the Whitewater investigation.[77] The independent counsel's attention subsequently turned to whether Hubbell had breached his promise to cooperate fully in the investigation.[78] While incarcerated, Hubbell received a grand jury subpoena from the independent counsel compelling the production of 11 categories of documents. He appeared before the grand jury and invoked his Fifth Amendment privilege.[79] The independent counsel thereafter produced an immunity order directing Hubbell to respond to the subpoena.[80] Hubbell, in turn, delivered more than 13,000 pages of documents and testified that the materials, with few exceptions related to attorney-client communications and attorney work product, constituted the universe of documents in his possession or control that were responsive to the subpoena.[81] These documents provided the information needed to secure a second indictment charging Hubbell with additional tax-related and fraud crimes.[82] The District Court dismissed the second indictment based in part on its opinion that the independent counsel's use of the subpoenaed materials violated the immunity statute because all of the evidence to be introduced at trial derived, either directly or indirectly, from the testimonial and immunized act of producing the documents.[83] However, the District of Columbia Court of Appeals vacated the judgment and remanded the matter, concluding that the trial court should have considered the extent of the prosecution's independent knowledge concerning the existence and authenticity of the subpoenaed materials as well as Hubbell's possession or control of them.[84]

The Supreme Court granted *certiorari*. The Court reiterated that Hubbell could not avoid responding to the subpoena simply because the contents of the documents were incriminating.[85] The Court, however, noted that the nonverbal act of producing materials responsive to the subpoena may implicitly communicate a statement of fact, i.e., an admission by the witness of the papers' existence and authenticity and his possession or control over them, and therefore could qualify as being testimonial in nature.[86] It explained that collecting and producing the materials demanded were essentially asking the witness to disclose the existence and whereabouts of specific documents that matched the broad descriptions contained in the subpoena, making it the "functional equivalent" of preparing a response to a detailed interrogatory or answers to questions at a discovery deposition.[87] In rejecting the government's position that its possession of the documents resulted from a physical act of production, the Court stated that it was "unquestionably necessary for [Hubbell] to make extensive use of the 'contents of his own mind' in identifying hundreds of documents responsive to the requests in the subpoena."[88] Putting forth the mirror image of the distinction made in *Doe II*, the Court stated, "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender a key to a strongbox."[89]

Turning its focus to the foregone conclusion exception, the

72. *Id*. at 215-16.
73. Doe v. United States, 487 U.S. 201, 205, 219 (1988).
74. 530 U.S. 27 (2000).
75. *Id*. at 30.
76. *Id*.
77. *Id*.
78. *Id*. at 30-31.
79. *Id*. at 31.
80. United States v. Hubbell, 530 U.S. 27, 31 (2000).
81. *Id*.
82. *Id*.
83. *Id*. at 31-32.
84. *Id*. at 32-33.
85. *Id*. at 36.
86. United States v. Hubbell, 530 U.S. 27, 36 (2000). The Court also noted that a keeper of the records who answers questions under oath related to whether he or she produced everything in response to a subpoena, in addition to producing the records themselves, may communicate information about existence, possession or control, and authenticity of the materials, but the question of whether the contents of those documents may be privileged is separate and apart. *Id.* at 37.
87. *Id.* at 41.
88. *Id*. at 43 (citations omitted).
89. *Id*. (citation omitted).

Court addressed the government's argument that Hubbell's act of production fell outside the protection of the Fifth Amendment because the existence and possession of business records by "any businessman" is a foregone conclusion under *Fisher*.[90] The Court disagreed. It distinguished *Fisher* from the case against Hubbell, noting that in the former, the government already knew that the subpoenaed records were in the possession of the defendant's attorneys and could independently verify their existence and authenticity through the accountant, whereas in the latter, the prosecution had no prior knowledge of the existence or location of the materials that Hubbell produced.[91] The Court concluded that, "[w]hatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside it."[92] Having determined that the act of production was testimonial in nature (at least to the existence and location of the subpoenaed materials) and that the foregone conclusion doctrine did not apply, the Court noted that Hubbell could not be compelled to produce the documents demanded in the subpoena absent a grant of immunity.[93] Ultimately, the Court dismissed the charges because the prosecution, having received the subpoenaed materials from Hubbell under a grant of immunity, was unable to show that the evidence used to secure the indictment and proposed for use at trial came from legitimate sources "wholly independent" of Hubbell's testimonial act of production.[94]

Turning to the law in Massachusetts, it is axiomatic that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[95] The language of the state constitution addressing the privilege against self-incrimination differs from that of the Fifth Amendment, and consequently the SJC has interpreted this constitutional provision in a more fulsome manner.[96] Article 12 of the Massachusetts Declaration of Rights specifically provides that no person shall be compelled to "furnish evidence against himself."[97] Addressing this provision nearly 150 years ago, the SJC stated:

> [U]pon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself.[98]

Although the breadth of the privilege against self-incrimination is expansive under the Massachusetts Constitution, art. 12, like its federal counterpart, nevertheless protects "only against the compulsion of communications or testimony and not against the production of real or physical evidence, such as fingerprints, photographs, lineups, blood samples, handwriting and voice exemplars."[99] In *Commonwealth v. Brennan*,[100] Chief Justice Edward Hennessey explained that the privilege historically protected against the compelled extraction of confessions and admissions from the accused's lips.[101] The chief justice further elaborated, "[t]his suggests that the framers of our Declaration of Rights did not contemplate that art. 12 apply to real or physical evidence, the production of which would have no inherent communicative value."[102] The court in *Brennan* then went on to hold that neither the federal nor the state constitutional protection against self-incrimination was implicated by compelling an individual to take a breathalyzer or field sobriety test

90. *Id*. at 44.

91. *Id*. at 44-45.

92. United States v. Hubbell, 530 U.S. 27, 44 (2000).

93. *Id*. at 45.

94. *See id*. at 45-46 (setting forth conclusion based upon application of principles set forth in Kastigar v. United States, 406 U.S. 441 (1972)).

95. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original).

96. *See* Commonwealth v. Burgess, 426 Mass. 206, 218 (1997) (greater protection against self-incrimination based on different text and doctrinal structure of art. 12); Opinion of the Justices to the Senate, 412 Mass. 1201, 1210 (1992) (difference in phraseology between art. 12 and Fifth Amendment construed to provide broader protection under state constitution); Attorney General v. Colleton, 387 Mass. 790, 795-96 (1982) (recognizing protections of art. 12 extend beyond the safeguards afforded by federal constitution). For example, art. 12 requires broader protection than the Fifth Amendment for a witness testifying under a grant of immunity. *Compare Attorney General,* 387 Mass. at 795-96 (finding absolute immunity from subsequent prosecution based upon any transaction, matter or occurrence about which immunized witness testified or produced evidence ("transactional immunity")) with *Kastigar*, 406 U.S. at 453 (upholding statute proscribing only use, in criminal case, of compelled testimony and use of any evidence directly or indirectly derived from that compelled testimony ("use and derivative use immunity")). As far back as 1871, the SJC concluded that immunity for a witness could not stand "so long as [the witness] remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." Emery's Case, 107 Mass. 172, 185 (1871).

97. New Hampshire adopted identical language in its constitution, N.H. Const. Part I, art. XVI, and Maine has language similar to art. 12. *See* ME Const. art. I, § 6 ("The accused shall not be compelled to furnish or give evidence against himself.…").

98. Emery's Case, 107 Mass. 172, 182 (1871). The SJC has noted that art. 12 simply restated the common law edict against self-incrimination. Commonwealth v. Joyce, 326 Mass. 751, 756-57 (1951).

99. Opinion of the Justices to the Senate, 412 Mass. at 1208.

100. 386 Mass. 772 (1982).

101. *Id*. at 780.

102. *Id*.

because these tests lacked the communicative weight needed for the accused to invoke the privilege.[103]

An act of production, however, may have sufficiently communicative aspects to justify an invocation of the privilege. The SJC has held that, "the act of production, quite apart from the content of that which is being produced, may itself be communicative."[104] In *Commonwealth v. Doe*,[105] for example, the court held that the keeper of records for a corporation may invoke his right against self-incrimination under art. 12 in response to a grand jury subpoena for corporate records when the act of producing the materials demanded would incriminate the records custodian personally.[106] If the witness produced the records, the court in *Doe* stated, he would essentially be testifying to the existence and location of the documents as well as the authentication of those items.[107] "All this information is reflective of the knowledge, understanding, and thoughts of the witness. To that degree, it is testimonial and, therefore, within the ambit of art. 12."[108]

The SJC has addressed the foregone conclusion exception to the privilege against self-incrimination only a handful of times, including occasionally in a fleeting manner. In *Doe*, for example, the court suggested in passing that the foregone conclusion exception might play some role in the production of corporate records in response to a subpoena *duces tecum*.[109] In *In re a Grand Jury Investigation*,[110] without specifically addressing the exception itself, the SJC rejected the government's proposed application of *Fisher* to conclude that a law firm could not be compelled to produce its client's telephone pursuant to a subpoena.[111]

A more direct example is *Commonwealth v. Hughes*,[112] in which the SJC held that the Fifth Amendment protected a defendant from the compelled production of a gun because its production would have revealed the defendant's knowledge of the existence and location of the firearm as well as the defendant's control over it.[113] In *Hughes*, the defendant allegedly assaulted two males by discharging two rounds from a .38 caliber or .357 magnum handgun through the windshield of a vehicle occupied by the men.[114] In the course of his interactions with local police, Hughes voluntarily surrendered to them a .357 magnum pistol, which subsequent testing revealed had not recently been fired.[115] A search warrant executed on the defendant's vehicle failed to uncover any other firearm.[116] Following indictment of the defendant, the commonwealth filed a motion seeking to compel Hughes to produce a .38 caliber revolver, which Hughes had registered to himself with the appropriate state authorities.[117] The trial court allowed the motion, but the defendant refused to comply and was found in contempt.[118] On direct appellate review, the SJC reversed the orders of production and contempt.[119] Because the commonwealth had no knowledge of the location of the gun or even its existence, the defendant's compelled production of the revolver would not convey mere trivial new knowledge to the government.[120] If produced, Hughes would implicitly make a statement about the gun's existence, location, authenticity, and his control over it.[121] The court flatly rejected any suggestion that the foregone conclusion doctrine operated in these circumstances.[122] The SJC stated that the government was "seeking to be relieved of its ignorance or uncertainty by trying to get itself 'informed of knowledge the defendant possesses[,]'" noting that the gun itself was the instrumentality of the crime and Hughes' possession of it after the assault would tend to incriminate him.[123] The court expressed its belief that its decision in *Hughes* was dictated by the Fifth Amendment, but also concluded that the result "would in our view be required by the rather clearer terms of the Constitution of the Commonwealth …."[124]

With the exception of *In re a Grand Jury Investigation*, the above-cited cases discussing the privilege against self-incrimination under art. 12 predate *Gelfgatt* and *Jones*. Neither the United States

103. *Id*. at 779, 782. With respect to the breathalyzer test, the court in *Brennan* assumed that the "choice" presented to the defendant, that is, either take the breathalyzer test or face suspension of his driver's license for 90 days, was sufficient compulsion to invoke the privilege. *Id*.

104. Commonwealth v. Doe, 405 Mass. 676, 679 (1989).

105. *Id*. at 678.

106. *Id*. at 679.

107. *Id*.

108. *Id.; see also* Commonwealth v. Brennan, 386 Mass. 772, 777 (1982) (noting evidence is testimonial or communicative when it reveals subjective knowledge of thought process of subject).

109. *Doe*, 405 Mass. at 680.

110. 470 Mass. 399 (2015).

111. *Id*. at 407. The precise holding of the case deserves recitation:

> [b]ecause the Commonwealth does not contest that Doe's privilege against self-incrimination would prohibit the Commonwealth from compelling Doe to produce the telephone had he retained it, and because under *Fisher* the law firm cannot be compelled to produce materials transferred to the law firm by a client for the provision of legal advice if the client could not have been compelled to produce them, we conclude on the record before us that the attorney-client privilege protects against compelled production of the telephone.

Id.

112. 380 Mass. 583 (1980).

113. *Id*. at 592.

114. *Id*. at 583-84.

115. *Id*. at 584.

116. *Id*. at 584.

117. *Id*.

118. Commonwealth v. Hughes, 380 Mass. 583, 584-85 (1980).

119. *Id*. at 585.

120. *Id*. at 592-93.

121. *Id*. at 592.

122. *Id*.

123. *Id*. (quoting People ex rel. Bowman v. Woodward, 63 Ill.2d 382, 387 (1976)).

124. Commonwealth v. Hughes, 380 Mass. 583, 595 (1980).

Supreme Court nor the SJC nor the Massachusetts Appeals Court had addressed the application of the foregone conclusion exception in the context of the government seeking to compel a subject to enter his or her password into an electronic device and thus decrypt data stored within that device.[125] It is against this backdrop that the SJC issued its decisions in *Gelfgatt* and *Jones*.

Gelfgatt and *Jones*

The seminal decision in Massachusetts is *Commonwealth v. Gelfgatt*.[126] The gist of *Gelfgatt* is that a defendant's act of entering a password to unlock an electronic device, such as a computer, does not amount to self-incrimination if the government demonstrates that the defendant's knowledge of the password is a "foregone conclusion."

A. The *Gelfgatt* Decision

1. Factual and Procedural Background[127]

Gelfgatt, an attorney, allegedly used his personal computers to orchestrate a sophisticated scheme enabling him to redirect mortgage loan payoffs for residential properties to two sham companies, one of which was Baylor Holdings, Ltd. (Baylor Holdings).[128] The commonwealth alleged Gelfgatt gave these fictitious companies an air of legitimacy by providing them internet-based telephones and facsimile machines.[129] He purportedly hatched the plot in 2009, identifying upscale properties with mortgages listed in an online database as "under agreement."[130] After confirming the existence of a mortgage on a property, the defendant allegedly used a computer to forge an assignment of the mortgage to one of the two sham companies that he had created.[131] He then recorded the fraudulent mortgage assignment at the appropriate registry of deeds, and notified the seller of the mortgage reassignment.[132] A closing attorney requesting a statement documenting the payoff amount would contact one of the sham companies and receive instructions to fax the request to the applicable company.[133] The commonwealth claimed Gelfgatt then obtained the actual payoff amount from the true mortgagee and, concealing his identity through the use of his businesses, transmitted this information to the closing attorney using an internet facsimile number.[134] He then instructed the closing attorney to send payment of the outstanding mortgage to a location in Boston where he had previously practiced law.[135] Gelfgatt, though ultimately unsuccessful, allegedly created 17 fraudulent mortgage reassignments, relying heavily on the use of computers in an effort to effectuate the scheme and mask his identity.[136]

The scheme came to an abrupt end, however, before Gelfgatt allegedly could pocket more than $13 million in mortgage termination payments. In December 2009, state troopers arrested Gelfgatt after he took possession of what Gelfgatt purportedly believed was more than $1.3 million in mortgage loan payoffs associated with the sale of two residential properties.[137] Search warrants were executed on the defendant's automobile and at his residence, resulting in the seizure of, among other things, two desktop computers, one laptop computer, and a "netbook" computer.[138] The data on these electronic devices, however, was encrypted with software that the commonwealth maintained was impenetrable.[139]

Investigators interviewed Gelfgatt following his arrest.[140] After receiving his *Miranda*[141] rights, Gelfgatt acknowledged having more than one computer in his residence.[142] He told a state trooper that he performed real estate work for Baylor Holdings, purportedly a financial services company owned by Russians, and that his communications with that company were highly encrypted because "[that] is how Russians do business."[143] Because of the encryption, Gelfgatt said, the police were "not going to get any of [his] computers."[144] He acknowledged his ability to decrypt the devices, but steadfastly

125. *In re* a Grand Jury Investigation, 92 Mass. App. Ct. 531, 534-35 (2017), decided after *Gelfgatt* but before *Jones*, the Massachusetts Appeals Court upheld an order compelling the defendant to enter the personal identification number (PIN) into his Apple iPhone under the foregone conclusion exception. In that case, the Appeals Court concluded that the commonwealth had met its burden under *Gelfgatt*, and that "[t]he order simply allows execution of" the search warrant that the police had obtained for the phone. *Id*. at 535.

126. 468 Mass. 512 (2014).

127. The SJC's recitation of the factual allegations derived from the uncontested facts set forth in the pleadings filed with the motion judge. *Id*. at 514.

128. *Id*. at 514-15.

129. *Id*. at 515.

130. *Id*. at 514-15.

131. *Id*. at 515.

132. Commonwealth v. Gelfgatt, 468 Mass. 512, 515 (2014).

133. *Id*.

134. *Id*.

135. *Id.*

136. *Id.*

137. *Id*. at 515-16.

138. Commonwealth v. Gelfgatt, 468 Mass. 512, 516 (2014). Visible on some of the computer screens at the time of the execution of the warrant were headers or icons reading, among other things, "Erasing Report," "Erased area," "True Crypt" and "DriveCrypt Plus Pack." *Id*. at 516 n.6.

139. *Id*. at 516-17.

140. *Id*. at 517.

141. Miranda v. Arizona, 384 U.S. 436 (1966).

142. *Gelfgatt*, 468 Mass. at 517, 524.

143. *Id*. at 523-24.

144. Commonwealth v. Gelfgatt, 468 Mass. 512, 524 (2014).

refused to perform the necessary steps to start the decryption program, stating, "[e]verything is encrypted and no one is going to get it."[145] When troopers asked the defendant what type of encryption program he used, Gelfgatt responded that investigators were, in essence, seeking his assistance to put him in jail.[146]

In November 2011, after a state grand jury had returned multiple indictments charging Gelfgatt with various forgery and larceny crimes, the commonwealth filed a motion pursuant to Mass. R. Crim. P. 14(a)(2) seeking to compel the defendant to unlock the encrypted data contained in his various electronic storage devices under a specified protocol.[147] The government maintained that requiring Gelfgatt to enter the key to decrypt the data stored in his computers was essential to uncovering material or significant evidence related to the alleged fraudulent mortgage-assignment shell game.[148] The commonwealth further argued that the proposed protocol accompanying the motion offended neither federal nor state constitutional guarantees against self-incrimination because the defendant's knowledge of the password to the computers was a "foregone conclusion."[149]

The motion judge denied the government's motion, but reported the following question pursuant to Mass. R. Crim. P. 34 to the Appeals Court: "Can the defendant be compelled pursuant to the Commonwealth's proposed protocol to provide his key to seized encrypted digital evidence despite the rights and protections provided by the Fifth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights?"[150] The SJC transferred the matter on its own initiative.

2. The Majority Decision

In a five-to-two decision, a majority of justices answered the question reported by the motion judge as follows: "Yes, where the defendant's compelled decryption would not communicate facts of a testimonial nature to the commonwealth beyond what the defendant already had admitted to investigators."[151]

Writing for the majority, Justice Francis Spina first addressed the defendant's challenge under the Fifth Amendment. Gelfgatt argued that compelling him to enter his encryption key into his electronic storage devices pursuant to the government's proposed protocol violated his Fifth Amendment right against self-incrimination.[152] The court disagreed. Although the entry of the password or encryption key could be incriminating because it may lead to the discovery of incriminating evidence relevant to the alleged mortgage payoff scheme, the issue, the SJC observed, was "whether the act of decrypting the computers is a testimonial communication that triggers Fifth Amendment protection."[153] The court acknowledged that the federal constitutional safeguard against self-incrimination applies not only to oral or written statements that are testimonial in nature, but also to governmentally compelled acts of production that have a "communicative aspect" to them.[154] Whether an act of producing evidence is "testimonial," the court noted, turns on whether the government "compels the individual to disclose 'the contents of his own mind' to explicitly or implicitly communicate some statement of fact."[155] The court stated that the act of production itself is deemed testimonial in nature when, in response to a government demand, it is a tacit admission to the existence and authenticity of the evidence demanded and the defendant's possession or control of such evidence.[156]

The court observed that, "at first blush," Gelfgatt's act of producing the key to decrypt the information stored in his computers appeared to be testimonial in nature.[157] The SJC stated that the defendant's act of entering the encryption key into his desktop and portable computers did not equate to the simple production of real or physical evidence that was exempt from Fifth Amendment protection; rather, it constituted "a communication of his knowledge about particular facts that would be relevant to the Commonwealth's case" for Fifth Amendment purposes.[158] Nevertheless, the court noted that it still had to determine whether compelling Gelfgatt to produce the encryption key lost its testimonial character under the foregone conclusion exception to the Fifth Amendment privilege against self-incrimination. That exception, the SJC noted, "provides that an act of production does not involve testimonial communication where the facts conveyed already are known to the government, such that the individual 'adds little or nothing to the sum total of the Government's information.'"[159] For the exception

145. *Id*. at 517.
146. *Id*.
147. *Id*. at 513, 517.
148. *Id*. at 517-18.
149. *Id*. at 518.
150. Commonwealth v. Gelfgatt, 468 Mass. 512, 514, 518 (2014).
151. *Id*. at 514, 526 (2014).
152. *Id*. at 519.
153. *Id*. at 520.
154. *Id*.
155. *Id*. (citing United States v. Hubbell, 530 U.S. 27, 43 (2000) (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)).
156. Commonwealth v. Gelfgatt, 468 Mass. 512, 521 (2014) (citations omitted).
157. *Id*. at 516.
158. *Id*. at 522.
159. *Id*. at 522 (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)).

to apply, the court stated, the commonwealth must demonstrate the existence and authenticity of, as well as the defendant's possession or control over, the evidence demanded.[160] In cases in which the foregone conclusion exception applies, the SJC repeated the Supreme Court's rationale, "'no constitutional rights are touched. The question is not of testimony but of surrender.'"[161]

Based on the evidence of record in *Gelfgatt*, the SJC concluded that, "the factual statements that would be conveyed by the defendant's act of entering an encryption key in the computers are 'foregone conclusions' and, therefore, the act of decryption is not a testimonial communication that is protected by the Fifth Amendment."[162] Citing Supreme Court precedent, the court stated that the commonwealth had met its burden by establishing through credible evidence that the defendant engaged in real estate transactions involving Baylor Holdings, that his communications with the alleged Russian owners of Baylor Holdings were highly encrypted, that the data pertaining to these real estate conveyances were contained and encrypted on *all* of his computers, and that he could decrypt this information.[163] Consequently, the SJC concluded, "[t]he facts that would be conveyed by the defendant through his act of decryption — his ownership and control of the computers and their contents, knowledge of the fact of encryption, and knowledge of the encryption key — already are known to the government and, thus, are a 'foregone conclusion.'"[164] The court therefore found no Fifth Amendment violation because Gelfgatt was "only telling the government what it already knows."[165]

The SJC next turned to the Massachusetts Declaration of Rights. The court recognized its prior decisions holding that, in carefully circumscribed situations, art. 12 affords individuals greater protection against self-incrimination than its federal counterpart does.[166] Like the Fifth Amendment, the SJC noted, the state constitution only guards against compelled testimonial communications, not the production of real or physical evidence, and that protection extends to information conveyed by acts of production that are "reflective of the knowledge, understanding, and thoughts of the witness."[167] Article 12 protection, however, is also subject to the limitation of the foregone conclusion doctrine.[168] In those instances where the exception applies, the SJC reiterated that, "the witness has no privilege" under art. 12.[169]

Bearing in mind both the greater protection against self-incrimination provided by art. 12 and the concomitant foregone conclusion exception developed under Massachusetts common law, the SJC adopted the analytical framework used by federal courts to assess the application of the foregone conclusion exception in *Gelfgatt*.[170] The court ultimately held that commonwealth's motion seeking to compel the defendant to enter his password into the electronic devices did not violate his privilege against self-incrimination under the state constitution.[171] The SJC, however, did not articulate the standard of proof that the government must meet in order to establish that the foregone conclusion exception applies under the state or federal constitutions.

3. The Dissent

Justice Barbara Lenk, with whom Justice Fernande Duffly joined, dissented.[172] In Justice Lenk's view, ordering Gelfgatt to enter decryption keys into his electronic devices "is the functional equivalent of requiring him to produce the unencrypted contents of the devices seized."[173] The compelled act of entering these decryption codes, resulting in the production of unencrypted data to law enforcement, is protected by both the Fifth Amendment and art. 12. Justice Lenk submitted that the government in *Gelfgatt* failed to show "sufficient knowledge of the existence, location, and authenticity of the documents it seeks such that the information that would be revealed by decryption and production is a 'foregone conclusion' …."[174] Consequently, Justice Lenk believed that compelling Gelfgatt to decrypt his electronic devices in these circumstances would violate the defendant's privilege against self-incrimination.[175]

The dissent first addressed the act of production and authentication associated with compelling Gelfgatt to enter his decryption key into his devices. Justice Lenk initially took issue with the majority's view that compelling Gelfgatt to enter his decryption key into his devices is not analogous to the act of responding to a subpoena *duces tecum*, where the act of production is considered testimonial because it asserts, *inter alia*, that the document produced in response

160. *Gelfgatt*, 468 Mass. at 522.

161. *Id*. at 522 (quoting *Fisher*, 425 U.S. at 411).

162. Commonwealth v. Gelfgatt, 468 Mass. 512, 523 (2014).

163. *Id*. at 524. The court stated, "most significantly, the defendant said that because of encryption, the police were 'not going to get any of [his] computers,' thereby implying that all of them were encrypted." *Id*. (emphasis in original).

164. *Id*.

165. *Id*.

166. *Id*.

167. *Id*. at 525-26 (quoting Commonwealth v. Doe, 405 Mass. 676, 679 (1989)).

168. Commonwealth v. Gelfgatt, 468 Mass. 512, 526 (2014).

169 *Id*.

170. *Id*.

171. *Id*.

172. Justice Lenk identified a significant issue that went unaddressed on appeal. Because the defendant was an attorney who practiced law from home, and told police he maintained an active client base, the dissent observed that the commonwealth's proposed protocol made no accommodation to avoid potentially violating the attorney-client privilege with respect to Gelfgatt's legal clients. *Gelfgatt*, 468 Mass. at 541-42 & n.21 (Lenk, J., dissenting). Except in exceedingly rare situations, the attorney-client privilege and work product doctrine protect discovery of legal advice and related communications between an attorney and client. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Only a client can waive the privilege. Hunt v. Blackburn, 128 U.S. 464, 469 (1888); *see* In re John Doe Grand Jury Investigation, 408 Mass. 480, 483 (1990) (privilege to disclose client's attorney-client communications belongs only to the client). The protocol proposed by the government in Gelfgatt apparently offered no steps, such as the use of a "taint team," to safeguard against inadvertent disclosure of information potentially protected by the attorney-client privilege. *Gelfgatt*, 468 Mass. at 541 (Lenk, J., dissenting).

173. Commonwealth v. Gelfgatt, 468 Mass. 512, 527 (2014) (Lenk, J., dissenting).

174. *Id*. at 527-28.

175. *Id*. at 516 (majority opinion).

to the subpoena is authentic.[176] Justice Lenk criticized the majority for maintaining that, "the defendant merely would be entering a password … and would not thereby be selecting and producing any documents."[177] She characterized this approach as adopting "an artificial distinction between the act of entering the decryption key and the inevitable result of decrypting the devices, and thereby producing the files for inspection …"[178] Such a distinction "obfuscates the reality of what the defendant is being compelled to disclose."[179] Justice Lenk agreed with the Eleventh Circuit Court of Appeals that decryption and production were the functional equivalent of the defendant testifying not only to his ability to decrypt files, but also of his knowledge of the existence and location of potentially incriminating files as well as the defendant's access to, possession of, and control over encrypted data in the electronic devices.[180] She concluded that, "both the acts of decrypting the devices and inexorably producing thereby the unencrypted contents of the devices that the Commonwealth otherwise cannot now access are testimonial."[181]

Justice Lenk next addressed the foregone conclusion doctrine. Citing several federal circuit court decisions for support, the dissent proposed, at a minimum under art. 12, that in order for the foregone conclusion exception to apply, the government must show that it already knows "'with some reasonable particularity that it seeks a certain file and is aware, based on other information, that: (1) the file exists in some specified location, (2) the file is possessed by the target of the subpoena, and (3) the file is authentic.'"[182] Here, Justice Lenk stated, the commonwealth had failed to establish its prior knowledge of the existence, possession and authenticity of the materials sought in the devices to justify application of the foregone conclusion exception.[183]

The dissent also criticized the majority for conflating the probable cause showing needed to seize the devices under the Fourth Amendment and art. 14 with the showing the commonwealth must make under the Fifth Amendment and art. 12 to compel an otherwise testimonial act of production, noting that the latter requires a significantly greater showing.[184] Justice Lenk stated that the commonwealth in *Gelfgatt* made no showing that it had "any knowledge as to the existence or content of any particular files or documents on any particular computer."[185] She identified a number of representations in the search warrant affidavit describing Gelfgatt's efforts to avoid downloading materials to his computers and further noted that the defendant used third-party service providers that advertised storage of documents on the providers', not the defendant's, computers.[186] Gelfgatt's admissions to engaging in real estate transactions for a holding company and using his devices to communicate with that company, as well as admitting that everything on his computer was encrypted and he could decrypt it, added nothing in the dissent's view to the government's knowledge of what documents may be contained in the devices.[187]

The dissent also voiced its belief that the majority had conflated "access to a particular computer with access to, and knowledge and control of, each of the files on that computer."[188] In a footnote, Justice Lenk noted that the encryption program at issue allowed for multiple users with their own passwords, and that the government neither knew how many user accounts existed, nor did it know whether Gelfgatt had access to any portions of any particular computer.[189] The dissent cited past precedent holding that searches of computers must be limited and particular to specific files because each computer file is considered a separate document in a closed container.[190] "Therefore, the government must establish knowledge of the existence of the particular file, either by the name of the file or by knowledge of its contents, as well as the defendant's access to that portion of the encrypted drive on which the file exists."[191] Justice Lenk concluded that the government had failed to carry the day in *Gelfgatt*.[192]

176. *Id*.

177. *Id*. at 528 (Lenk, J., dissenting). In particular, Justice Lenk noted that, under the majority's view that the defendant would be asserting only his ability to decrypt the devices, Gelfgatt "would not be asserting that he owned them, had exclusive use and control of them, or was familiar with any of the files on them; that certain files contained the incriminating evidence sought; or that the documents were authentic. Such is far from the case." *Id*.

178. *Id*. at 528-29.

179. Commonwealth v. Gelfgatt, 468 Mass. 512, 528-29 (2014) (Lenk, J., dissenting).

180. *Id*. at 529; see United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1346 (11th Cir. 2012). The dissent also cited several examples of denials by Gelfgatt about his use of the encrypted devices to perform work for or communicate with one of the holding companies. *Gelfgatt*, 468 Mass. at 529 (Lenk, J., dissenting). Should documents be produced that contradict these denials, the defendant's act of decryption would result in the disclosure of prior inconsistent statements that the commonwealth may seek to admit in evidence at trial. *Id*.

181. *Gelfgatt*, 468 Mass. at 529-30 (Lenk, J., dissenting) (citing United States v. Hubbell, 530 U.S. 27, 43 (2000); Doe v. United States, 487 U.S. 201, 212 (1988)).

182. *Id*. at 532 (quoting United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1349 n.28 (11th Cir. 2012).

183. *Id*. at 532.

184. *Id*. at 533.

185. Commonwealth v. Gelfgatt, 468 Mass. 512, 534 (2014) (Lenk, J., dissenting).

186. *Id*. at 535-36.

187. *Id*. at 537.

188. *Id*. at 539-40.

189. *Id*. at 540 n.20.

190. *Id*. at 540 (citations omitted).

191. Commonwealth v. Gelfgatt, 468 Mass. 512, 541 (2014) (Lenk, J., dissenting).

192. *Id.*

B. The *Jones* Decision

Five years after the *Gelfgatt* decision, the SJC squarely addressed the burden of proof that the government must satisfy for the foregone conclusion exception to apply under art. 12. The court in *Jones* held that in order to compel an individual under *Gelfgatt* to enter his or her password into a cellphone to unlock the phone and decrypt its contents, art. 12 requires the government to prove beyond a reasonable doubt that the defendant's knowledge of the device's password is a foregone conclusion.[193]

1. Factual and Procedural Background[194]

The investigation of *Jones* began in December 2016, after the Woburn police received information from a female who claimed that the defendant had stolen her purse at a hotel.[195] The victim, identified in the decision by the pseudonym "Sara," later informed investigators that she had met Jones through an online dating service weeks earlier, but their initial relationship, which she believed was a dating one, devolved into Sara prostituting herself in exchange for housing.[196] Further investigation revealed a link between the defendant and an LG brand cellphone (LG phone), which Sara stated Jones used to communicate with her orally and through text messaging.[197] Investigators observed several text messages between Sara's phone and the LG phone related to prostitution, including, among other texts, graphic instructions on how to perform sex acts on customers.[198] The LG phone number appeared in the contacts section of Sara's phone under the defendant's first name.[199] Sara also told police that the defendant and a female associate regularly used the LG phone to conduct the prostitution business and communicate with customers.[200] On Sara's phone, police observed several postings on a website that listed the LG phone number as the principal point of contact for individuals seeking to have sex-for-a-fee with Sara, as well as screenshots of customer communications responding to online advertisements for Sara's prostitution services sent from the LG phone.[201]

Upon arresting the defendant shortly after commencing the investigation, police found the LG phone in Jones' pants pocket.[202] Investigators applied for and received a warrant to search the LG phone, presumably for evidence related to prostitution and trafficking a person for sexual services.[203] Like the situation in *Gelfgatt*, however, police were unable to execute the search warrant because the LG phone's contents were encrypted and accessible only after the password to the device was entered and the phone was unlocked.[204] Lacking the technology to bypass the lock function without that code, investigators were thwarted from executing the warrant.[205]

Following the indictment of the defendant for prostitution-related charges, the commonwealth filed a "*Gelfgatt* motion" seeking to compel Jones to enter the password into the LG phone, thereby decrypting its contents.[206] A Superior Court judge denied the motion.[207] The judge concluded that the government had failed to demonstrate with "reasonable particularity" that Jones knew the password to the LG phone, and therefore the foregone conclusion exception to the Fifth Amendment did not apply.[208] The commonwealth later renewed the motion, citing additional information, including, but not limited to, Jones' identification of the LG phone number as his telephone number during a prior, unrelated booking.[209] The renewed motion was denied.[210]

The commonwealth filed a petition under General Laws chapter 211, § 3, seeking review of the motion judge's decision.[211] A single justice of the SJC reserved and reported the case to the full bench, identifying three issues to be addressed, two of which are of concern here:[212]

1. What is the burden of proof that the Commonwealth bears on a motion like this in order to establish a 'foregone conclusion' as that term is used in *Commonwealth v. Gelfgatt*, 468 Mass. 512, 520-526, 11 N.E.3d 605 (2014)?

2. Did the Commonwealth meet its burden of proof in this case?

193. Commonwealth v. Jones, 481 Mass. 540, 542-43 (2019). The *Jones* court noted that technically there is a two-step process to decrypting a cellphone's contents not visible to the casual user, but treated the entry of the passcode as the equivalent of decryption. *Id*. at 544 n.5.

194. The SJC based its decision in *Jones* on the uncontested facts contained in the pleadings filed with the motion judge. *Id*. at 543.

195. *Id*.

196. *Id*.

197. *Id*. at 543.

198. *Id*. at 543-44.

199. Commonwealth v. Jones, 481 Mass. 540, 543 (2019).

200. *Id*. at 543-44.

201. *Id*. at 544.

202. *Id*.

203. *Id*.

204. *Id*.

205. Commonwealth v. Jones, 481 Mass. 540, 544 (2019).

206. *Id*. at 541, 545.

207. *Id*. at 545.

208. *Id*.

209. *Id*.

210. *Id*. at 542, 545.

211. Commonwealth v. Jones, 481 Mass. 540, 542 (2019).

212. *Id*. The third issue related to a procedural concern. The motion judge indicated that he was disinclined to consider the government's renewed motion because the additional information "was known or reasonably available to the Commonwealth when the initial motion was filed." *Id*. Even considering the additional information, the judge opined that the government had fallen short of proving that Jones' knowledge of the password to the LG phone was a "foregone conclusion." *Id*. On appeal, the SJC stated that a motion judge has the discretion to consider a renewed *Gelfgatt* motion without first finding that the additional information was known or reasonably available to the government at the time of the first filing. *Id*. at 558. The court compared *Gelfgatt* motions to applications for search warrants, noting that both instruments are investigatory tools filed early on during an investigation that can be renewed without the court having to find that the additional information was known or reasonably available to the government at the time of the initial filing. *Id*. at 558-59. The SJC noted that the motion judge based his decision upon a mistaken analogy to motions to suppress, where the court has imposed tighter constraints upon the filing of renewed motions, emphasizing the different nature and purpose of *Gelfgatt* motions. Id. at 558-60. Ultimately, the court reversed and ruled that "[t]he motion judge therefore abused his discretion in denying the Commonwealth's renewed *Gelfgatt* motion." *Id*. at 561.

2. The Opinion of the Court

The SJC answered the first and second questions respectively as follows:

> We conclude that when the Commonwealth seeks an order pursuant to our decision in *Gelfgatt* (*Gelfgatt* order or motion) compelling a defendant to decrypt an electronic device by entering a password, art. 12 requires the Commonwealth to prove that the defendant knows the password beyond a reasonable doubt for the foregone conclusion exception to apply.
>
> We also conclude that the Commonwealth has met its burden in this case.[213]

The court in *Jones* revisited at length its prior decision in *Gelfgatt*. It reiterated that a "testimonial communication" encompasses not only written and oral statements, but also compelled acts of production that have a communicative aspect, i.e., that disclose the contents of the defendant's mind to communicate some statement of fact, implicitly or explicitly, such that the act of producing this information triggers Fifth Amendment and art. 12 protection.[214] That guardianship, however, yields to the foregone conclusion exception.[215] Although the foregone conclusion exception originally traced its roots to *Fisher* and the compelled production of documents pursuant to a government-issued subpoena, the SJC noted that it extended the exception in *Gelfgatt* to apply to encrypted electronic devices.[216] The court stated,

> [i]n the context of compelled decryption, the only fact conveyed by compelling a defendant to enter the password to an encrypted electronic device is that the defendant knows the password, and can therefore access the device. The Commonwealth must therefore establish that a defendant knows the password to decrypt an electronic device before his or her knowledge of the password can be deemed a foregone conclusion under the Fifth Amendment or art. 12.[217]

Addressing the Fifth Amendment, the SJC declined to predict the appropriate standard of proof that the Supreme Court would set in order to establish that a defendant's knowledge of a password to an electronic device is a foregone conclusion — highlighting the relative lack of federal precedent in this area.[218] Instead, the court based its decision on the state constitution, concluding that "art. 12 requires the commonwealth to prove that a defendant knows the password to decrypt an electronic device beyond a reasonable doubt for the foregone conclusion exception to apply."[219]

The court noted that it has consistently interpreted art. 12 to bestow greater prophylactic protections against potential infringements of the right against self-incrimination than the Fifth Amendment, citing as examples the voluntariness of a confession and the waiver of *Miranda* rights, which must be established beyond a reasonable doubt under art. 12, but only by a preponderance of evidence under the Fifth Amendment.[220] The more expansive protection against self-incrimination afforded by the state constitution is based, at least in part, on the textual differences between art. 12 and the Fifth Amendment.[221] Citing those differences, the SJC determined that imposing the standard of proof beyond a reasonable doubt was necessary to protect a defendant's right against self-incrimination under art. 12 and to recognize the privilege as a bedrock principle to our system of justice.[222]

The court further observed,

> [m]ost critically, the imposition of this burden is also necessary to respect the meaning and purpose of the foregone conclusion exception. Indeed, as its very name suggests, the government must be certain that the facts conveyed by a compelled act of production are already known before it can properly be considered a *foregone conclusion*.[223]

The SJC rejected the commonwealth's argument, adopted by at least one federal district court, that the clear and convincing standard was sufficient to protect a defendant's right against self-incrimination.[224] It noted that in *Fisher*, the case that gave rise to the term "foregone conclusion" in the Fifth Amendment context, the Supreme Court neither defined foregone conclusion nor articulated its standard of proof; however, the SJC observed, the Supreme Court's opinion in *Fisher* "suggest[ed] that the government must have a high level of certainty that the defendant's act of production will not reveal any factual information beyond what it already knows for the exception to apply."[225] The SJC then discussed its past decisions addressing the application of the foregone conclusion exception, noting that "[t]hese decisions make clear that the Commonwealth must be certain that the compelled act of production will not implicitly

213. *Id*. at 542-43.

214. *Id*. at 545-46.

215. *Id*. at 546.

216. *Id*.

217. Commonwealth v. Jones, 481 Mass. 540, 547-48 (2019) (citations omitted).

218. *Id*. at 550-51. The court cited one federal district court decision that adopted the "clear and convincing" standard of proof under the Fifth Amendment. *Id*. at 550 (citing United States v. Spencer, 2018 WL 1964588 (N.D. Cal. Apr. 26, 2018)). The Commonwealth in *Jones* advocated for the adoption of the clear and convincing benchmark. *Id*. at 550-51.

219. *Id*. at 551.

220. *Id*. at 551-52 & n.13.

221. *Id* at 552. The SJC noted that the Fifth Amendment protects an individual in a criminal case from being "a witness against himself," whereas art. 12 guarantees that no person shall "furnish evidence against himself." *Id*.

222. *Id*. at 552-53.

223. Commonwealth v. Jones, 481 Mass. 540, 553 (2019) (emphasis in original).

224. *Id*. at 555; *see* United States v. Spencer, 2018 WL 1964588 (N.D. Ca. Apr. 26, 2018) (adopting clear and convincing standard to establish application of foregone conclusion to Fifth Amendment right against self-incrimination).

225. *Jones*, 481 Mass. at 554.

convey facts not otherwise known to the Commonwealth."[226] Requiring anything less than proof beyond a reasonable doubt — even the clear and convincing evidence standard — might result in a civil or criminal contempt finding against a defendant who honestly does not know the password to an electronic device and is unable to comply with a *Gelfgatt* order.[227] The SJC in *Jones* stated that it was unwilling to endorse the risk of incarcerating such a defendant based on anything less than proof beyond a reasonable doubt.[228]

In requiring the application of the reasonable doubt standard to the foregone conclusion exception, the *Jones* court also clarified one important aspect of the *Gelfgatt* decision. The SJC noted that the commonwealth must prove that the defendant knows the password to the device, not that the government knows with particularity what the device contains, to compel production of the password under the foregone conclusion exception to the federal and state constitutional guarantees against self-incrimination.[229] The court stressed that the compelled testimonial evidence in *Jones* related strictly to the defendant's knowledge of the password itself and nothing more.[230] Had the government additionally demanded the defendant to produce specific files stored in the LG phone, the court expressly stated that the analysis would be different.[231] Citing *United States v. Doe* (*In re Grand Jury Subpoena Duces Tecum*), the SJC stated that such an act of production would "convey far more information than just the fact that the defendant knows the password."[232] The court stated that the defendant's act of production in those circumstances would equate to implicit testimony triggering the need for the government to further show under the foregone conclusion exception its knowledge of the existence of the files, the defendant's control over them, and their authenticity.[233]

Consistent with its position, the court also rejected the concurring justice's position that the government should be required to demonstrate under the foregone conclusion exception that it knows, with reasonable particularity, the existence and location of evidence relevant to the crimes under investigation in an electronic device such as a cellphone.[234] The SJC pointed out that in addition to the constitutional guarantee against self-incrimination afforded by art. 12, the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights required the police in *Jones* to secure a warrant based upon probable cause from an independent magistrate before searching the device for evidence of the alleged crime. Thus, the court noted,

> [U]nder these circumstances, the Commonwealth was required to abide by two sets of constitutional protections. Requiring this dual protection does not, as the concurrence suggests, sound a 'death knell' for constitutional protection in the digital age … Nor do we read the two constitutional protections in 'splendid isolation' … Each has its own purpose, function, and requirements, and they work together to form a double protection of digital privacy before particular files on the LG phone can be accessed.[235]

In light of these "two sets of constitutional protections," and because the government sought only to compel the defendant to enter his password into the cellphone under the "forgone conclusion" exception, the court declined to impose upon the government the additional burden of having to establish with reasonable particularity the existence and location of relevant, incriminating evidence in the LG phone.[236]

Turning to the lower court's decision, the SJC similarly rejected the motion judge's approach to requiring the government to prove with "reasonable particularity" both the defendant's knowledge of the password to the LG phone and the existence of evidence relevant to the charges within the device.[237] The court noted that the "reasonable particularity" standard applied in circumstances in which the government sought to compel a defendant to produce documents or electronic files pursuant to a subpoena.[238] The SJC again emphasized that the commonwealth in *Jones* sought only to

226. *Id*. at 555.

227. *Id.; see* Mass. R. Crim. P. 43 & 44 (state procedural rules addressing criminal contempt); Mass R. Civ. P. 65.3 (state proceedings for civil contempt).

228. *Jones*, 481 Mass. at 555.

229. Commonwealth v. Jones, 481 Mass. 540, 548 n.10 (2019). The SJC succinctly stated, "[w]e clarify that the evidence at issue in the compelled decryption here is the password itself, not the contents of the LG phone." *Id*.

230. *Id*.

231. *Id*.

232. *Id*. (citing United States v. Doe (In re Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1349 (11th Cir. 2012).

233. *Jones*, 481 Mass. at 548 n.10 (citing United States v. Hubbell, 530 U.S. 27, 36 n.19 (2000).

234. *Jones*, 481 Mass. at 548 n.11.

235. Commonwealth v. Jones, 481 Mass. 540, 54 n.11 (2019) (citations omitted).

236. *Id*. at 548-49 & n.11.

237. *Id*. at 552 n.14.

238. *Id*. at 552 n.14 (citing United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1349 (11th Cir. 2012)).

compel the defendant to disclose the password to the LG phone, not documents or contents contained within the device, and therefore the "reasonable particularity" standard, which defines the degree of particularity with which the government must identify subpoenaed documents, was "inapt in the context of compelled decryption."[239] The court succinctly noted, "the defendant either knows the password or does not."[240] This involves analysis of a level of certainty, the court opined, not a level of specificity.[241]

Having articulated the applicable standard for establishing the foregone conclusion, the SJC turned to the facts in *Jones*. The court noted that the defendant possessed the LG phone at the time of his arrest and further supplied the number to that cellphone during booking on an unrelated arrest one month earlier.[242] The victim also informed investigators that she communicated with Jones directly over the LG phone and via text messages, and the LG phone number was listed in the contacts section of the victim's cellphone under the defendant's first name.[243] She explained to police that Jones would use the LG phone to communicate with customers.[244] The court also observed that the subscriber information for the cellphone listed a "backup" number corresponding with the defendant's name, birth date and social security number.[245] Finally, the court noted, CSLI (information collected to identify the location of a cellphone) records revealed that another phone belonging to Jones and the LG phone were in the same location at the same time on various occasions.[246]

Although evidence that Jones owned or exclusively controlled the LG phone would have further supported the government's position, the SJC concluded that the commonwealth was not required to prove ownership or exclusive control to meet its burden.[247] That others may have used the cellphone, and therefore may know its password, does not disprove the defendant's knowledge of the password.[248] Indeed, the court opined that, "short of a direct admission, or an observation of the defendant entering the password himself and seeing the phone unlock, it is hard to imagine more conclusive evidence of the defendant's knowledge of the LG phone's password."[249] Jones' knowledge of the password to the phone in these circumstances, the majority concluded, was a foregone conclusion under the reasonable doubt standard and consequently exempted from the protections of the Fifth Amendment and art. 12.[250] Thus, the court reversed the motion judge's denial of the *Gelfgatt* motion and remanded the matter to the Superior Court for entry of an order compelling the defendant to enter the password into the LG phone.[251]

3. The Concurrence

Justice Lenk filed a concurring opinion. In her view, the appropriate standard for applying the foregone conclusion doctrine in cases such as *Jones* is twofold: (1) the government must establish, beyond a reasonable doubt, that the accused knows the password to the device, and (2) the government must demonstrate that it already knows, with reasonable particularity, the existence and location of relevant, incriminating evidence it expects to find on that device.[252] Justice Lenk, however, ultimately concurred in the result because, in her view, the government satisfied both prongs of this inquiry in *Jones*.[253]

The concurring justice noted that historically the foregone conclusion doctrine applied to a narrow set of circumstances in which "any testimonial aspects inherent in the act of producing evidence are a 'foregone conclusion' to the government."[254] In other words, where the government establishes its prior knowledge of the existence and location of compelled documents, any concession by the accused of his or her possession of those papers adds little to nothing to the government's prior information, and therefore the privilege against self-incrimination is not implicated.[255] Justice Lenk repeated her view, first expressed in *Gelfgatt*, that a defendant allows the government access to unencrypted information in an electronic device

239. *Id*. at 552 n.14.

240. *Id*.

241. Commonwealth v. Jones, 481 Mass. 540, 552 n.14 (2019).

242. *Id*. at 556.

243. *Id*.

244. *Id*.

245. *Id*.

246. *Id*.

247. Commonwealth v. Jones, 481 Mass. 540, 557 (2019).

248. *Id*.

249. *Id*. at 557-58.

250. *Id*. at 558.

251. *Id*. at 558, 561.

252. *Id*. at 562 (Lenk, J., concurring). In a footnote, the majority disagreed with this proposition, noting that in order to search an electronic device, the government must obtain a warrant that sets forth probable cause to believe that a crime was committed and that evidence of the crime would be found in the device. *Id*. at 549 n.11 (majority opinion). The majority stated that the standard proposed by Justice Lenk "conflates" Fourth Amendment and art. 14 protections with the protections guaranteed by art. 12. *Id*.

253. Commonwealth v. Jones, 481 Mass. 540, 562 (2019) (Lenk, J., concurring).

254. *Id*. (citations omitted).

255. *Id*.

when he or she enters the password to that device.[256] Invoking language from the *Gelfgatt* decision itself, Justice Lenk observed that in such situations, "the defendant implicitly would be acknowledging that he has ownership and control of the [devices] and their contents."[257] Citing several federal decisions addressing the foregone conclusion exception,[258] Justice Lenk stated that the Fifth Amendment and art. 12 demand that,

> before the government may compel an accused's assistance in building a case against that accused, the government must demonstrate that it already knows, with reasonable particularity, of files on the device relevant to the offenses charged, and the defendant knows the passcode to unlock them.[259]

The concurring opinion cited several examples in *Jones* of the government's prior knowledge of the existence and location of relevant and incriminating files on the LG phone, including specific text messages from the LG phone related to prostitution, several dated online advertisements for commercial sex acts, CSLI location information corresponding with the location of Jones and the locations where commercial sex acts occurred, text messages to the victim, screenshots of conversations with clients, and hotel reservation records containing the defendant's email address and the LG phone number.[260] The concurrence characterized this as "a comprehensive showing of the government's prior knowledge of these particularized files on the LG telephone[,]" thus justifying an order compelling the defendant to enter his password into the LG phone.[261]

In a footnote, Justice Lenk expressed her view that the Fourth and Fifth Amendments are "coequal amendments [that] do not dwell in splendid isolation … the Fourth Amendment does not somehow limit or trump the Fifth Amendment whenever there may be a valid search warrant."[262] The concurrence emphasized the need "to reconcile the Fourth Amendment's authorization of the government's taking of evidence with the Fifth Amendment's limitations on its requiring an individual to produce it."[263] Justice Lenk posited that her reading of the case law gives the constraints imposed by the Fifth Amendment "meaningful teeth."[264]

Justice Lenk concluded her concurring opinion on an ominous note,

> [t]he court's decision today sounds the death knell for a constitutional protection against compelled self-incrimination in the digital age. After today's decision, before the government may order an individual to provide it with unencrypted access to a trove of potential incriminating and highly personal data on an electronic device, all that the government must demonstrate is that the accused knows the device's passcode. This is not a difficult endeavor ….[265]

Looking Ahead

There are several takeaways from the SJC's decisions in *Gelfgatt* and *Jones*, as well as the federal and state court decisions preceding those opinions. Two are perhaps blatantly obvious. First, in both *Gelfgatt* and *Jones*, police obtained valid warrants authorizing the seizure of electronic devices and the search of their contents, but encountered impenetrable encryption software in attempting to execute those warrants. Thus, Fourth Amendment and art. 14 protective concerns were not at issue in those cases. Second, courts continue to distinguish between non-testimonial and testimonial communications for Fifth Amendment and art. 12 purposes. The distinction between protected and unprotected acts of production, however, is not always easy to discern.[266] In producing a handwriting exemplar, for example, the defendant admits both the ability to write and authentication of the exemplar itself, but the physical properties of the writing, not its contents, are the identifying

256. *Id*.

257. *Id*. at 563 (quoting Commonwealth v. Gelfgatt, 468 Mass. 512, 522 (2014)). In apparent response to this observation, the court in *Jones* clarified its decision in *Gelfgatt*, stating, "the entry of a password alone does not convey the fact of 'ownership' of the device or its contents." *Id*. at 547 n.8. The court distinguished between knowledge of a password and ownership or control of an electronic device, noting that individuals, such as family members, may know the password to a device belonging to another family member, and students may receive passwords to computers owned by their schools. *Id*.

258. *Id*. at 563-64; *see* United States v. Apple MacPro Computer, 851 F.3d 238, 247 (3d Cir. 2017), cert. denied sub nom. Doe v. United States, 138 S. Ct. 1988 (2018); United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1349 (11th Cir. 2012); Matter of the Decryption of a Seized Data Storage Sys., U.S. Dist. Ct., No. 13-M-449, 2103 WL 12327372 (E.D. Wis. Apr. 19, 2013).

259. Commonwealth v. Jones, 481 Mass. 540, 566 (2019) (Lenk, J., concurring).

260. *Id*.

261. *Id*.

262. *Id*. at 564 n.1.

263. *Id*.

264. *Id*. In a footnote, the majority disagreed with the analysis of federal appellate court decisions cited in support of the concurring opinion's proposed standard. *Id*. at 549 n.11 (majority opinion). In one opinion, United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum), 670 F.3d 1335, 1337 (11th Cir. 2012), the majority noted that the government had issued a subpoena requiring the defendant not only to enter his password into devices, but also to identify and produce unencrypted files stored in the hard drives of electronic devices. Jones, 481 Mass. at 549 n.11. In another case, the majority noted that under a plain error analysis, the Third Circuit Court of Appeals specifically stated, "it is important to note that we are not concluding that the Government's knowledge of the contents of the devices is necessarily the correct focus of the 'foregone exclusion' inquiry in the context of a compelled decryption order …" *Id*. (quoting United States v. Apple MacPro Computer, 851 F.3d 238, 247 (3d Cir. 2017), cert. denied sub nom. Doe v. United States, 138 S. Ct. 1988 (2018)) (emphasis added). The majority further observed that the Third Circuit suggested that a "very strong argument" can be advanced that the proper focus of the foregone conclusion exception is whether the government already knows the testimony implicit in the act of production, that is, the defendant has knowledge of the password to the electronic devices. Jones, 481 Mass. at 549 n.11.

265. Commonwealth v. Jones, 481 Mass. 540, 566 (2019) (Lenk, J., concurring).

266. Opinion of the Justices to the Senate, 412 Mass. 1201, 1208 (1992) (distinction between real and communicative evidence not always easy to make in every case).

characteristics that take the act of writing outside the privilege's protection.[267] Similarly, compelling an individual to speak or participate in field sobriety tests requires an oral or volitional act on the part of subject, but it is not the content of the speech or the thoughts or knowledge of the subject submitting to a sobriety test; rather, it is the physical characteristic of the voice and the lack of physical coordination of the test-taker that make this evidence non-testimonial.

Even if a compelled act appears testimonial "at first blush," judges and litigants likely will find themselves addressing the foregone conclusion exception in this digital age with increased frequency. In *Gelfgatt* and *Jones*, majorities of the court believed that compelling a defendant to enter a password into an electronic device under the foregone conclusion doctrine was non-testimonial, focusing on the physical act of entering the password into the device as opposed to its natural and inevitable effect, i.e., revealing its decrypted contents to investigators. *Doe II* seems to support this approach. There, the Supreme Court stated, "in order to be testimonial, an accused's communication must *itself*, explicitly or implicitly, relate a factual assertion or disclose information."[268] If a statement is non-testimonial, it falls outside the protection of the Fifth Amendment whether or not it may lead to incriminating evidence.[269] Thus, at least for purposes of compelling a subject to enter his or her password into a device under the foregone conclusion exception, *Doe II* suggests that the proper focus of the inquiry is whether entering the password itself will relate a factual assertion or disclose information, not whether the physical act of unlocking the device might lead to the discovery of incriminating evidence. Other courts have agreed with this approach.[270] Not surprisingly, there are courts that disagree,[271] others that are less than clear in their analysis,[272] and a majority of jurisdictions that have not addressed the matter. A fixed Procrustean rule there is not.

The court in *Jones* stressed that its decision only addressed those instances in which the government sought to compel the defendant to physically enter his password into a cellphone, not reveal it to police. This distinction likely will become critical in future cases for art. 12 purposes. The SJC observed in a footnote in *Jones* that, "[t]here is some support for the idea that the written disclosure of the password would amount to direct testimony, not an act of production, and that the foregone conclusion exception is limited only to acts of production."[273] Because its decision was limited to requiring Jones to enter his password into the LG phone, the SJC declined to resolve the distinction.[274] Given the SJC's cautionary asterisk in *Jones*, an argument exists under art. 12 that compelling a subject to make an oral or written disclosure to police of his or her password to an electronic device is more akin to "be[ing] compelled to reveal the combination to [a] wall safe," whereas the compelled entry of the password into such a device is more like "be[ing] forced to surrender a key to a strongbox containing incriminating documents."[275]

267. Fisher v. United States, 425 U.S. 391, 411 (1976); Gilbert v. California, 388 U.S. 263, 266-67 (1967); Commonwealth v. Gelfgatt, 468 Mass. 512, 521 (2014).

268. Doe v. United States, 487 U.S. 201, 210 (1988) (emphasis added).

269. *Id*. at 209.

270. United States v. Apple MacPro Computer, 851 F.3d 238, 248 n.7 (3d Cir. 2017), cert. denied sub nom. Doe v. United States, 138 S. Ct. 1988 (2018) (sound argument can be made that foregone conclusion doctrine properly focuses on whether government already knows testimony implicit in act of production, that is, "I, John Doe, know the password for these devices."); United States v. Spencer, 2018 WL 1964588 at *3 (N.D. Cal. Apr. 26, 2018) (to invoke foregone conclusion doctrine in context of compelled decryption, "the government need only show it is a foregone conclusion that [the subject] has the ability to decrypt the devices"); State v. Johnson, 576 S.W.3d 205, 277 (Mo. Ct. App. 2019) (proper focus of foregone conclusion exception is extent of government's knowledge of existence, possession or control, and authenticity of passcode to cellphone); State v. Andrews, 197 A.3d 200, 205 (N.J. Super. Ct. App. Div. 2018) (government's awareness of possible contents of defendant's cellphones was immaterial "because the order requires defendant to disclose passcodes, not the contents of the phones unlocked by those passcodes."); State v. Stahl, 206 So.3d 124, 137 (Fla. Dist. Ct. App. 2016) (finding state had shown with reasonable particularity that passcode exists, is in defendant's possession or control, and is authentic, and because state already possessed search warrant for device's contents, no new "source of evidence" uncovered).

271. *In re* Boucher, No. 2:06-mj-91, 2009 WL 424718 at *3 (D. Vt. 2009) (government must prove it knows with reasonable particularity the existence and location of files on defendant's hard drive, but it need not know specific content of specific files); United States v. Fricosu, 841 F. Supp. 2d 1232 (D. Colo. 2012) (defendant's Fifth Amendment privilege not violated by requiring her to produce unencrypted contents of computer where government knew existence and location of computer files, a preponderance of the evidence established defendant owned or was primary user of computer such that she had ability to access encrypted contents, and government offered immunity precluding it from using act of production against her); Commonwealth v. Davis, 220 A.3d 534 (Pa. 2019) (compelling a defendant to disclose his password to allow government access to his encrypted, but lawfully seized, computer violated the defendant's Fifth Amendment right against self-incrimination); G.A.Q.L. v. State, 257 So.3d 1058, 1062-63 (Fla. Dist. Ct. App. 2018) (disagreeing with Second District's Stahl opinion and concluding that compelled production of phone and iTunes passwords is testimonial and covered by the Fifth Amendment); Seo v. State, 109 N.E.3d 418, 431 (Ind. Ct. App. 2018) (compelling defendant to enter password into phone is testimonial and violates Fifth Amendment).

272. *See* United States v. Gavegnano, 305 F. App'x. 954, 956 (4th Cir. 2009) (per curiam) (defendant's disclosure of password to government-issued computer after invoking his right to counsel was already a foregone conclusion because government independently proved defendant was sole user and possessor of computer); United States v. Mitchell, 76 M.J. 413, 419 (C.A.A.F. 2017) (after finding *Miranda* and *Edwards* violation, military court declined to address whether appellee's delivery of his passcode to military police was "testimonial" or "compelled").

273. Commonwealth v. Jones, 481 Mass. 540, 547 n.9 (2019). (citations omitted). It is quite common, for example, for an individual to choose a password that is uniquely memorable to him or her, such as a birthdate or some phrase that has significant meaning in his or her life.

274. *Id*.

275. Doe v. United States, 487 U.S. 201, 210 n. 9 (1988).

In accord with this view, other courts have expressly concluded that compelling a defendant to reveal to police the password to an electronic device violates the Fifth Amendment.[276] For example, in a sharply divided four-to-three decision, the Pennsylvania Supreme Court in C*ommonwealth v. Davis*[277] held that compelling a defendant to disclose his 64-character password to allow the government access to his lawfully seized, but encrypted, computer violated the defendant's Fifth Amendment right against self-incrimination.[278] The court in *Davis* articulated,

> [d]istilled to its essence, the revealing of a computer password is a verbal communication … As a passcode is necessarily memorized, one cannot reveal a passcode without revealing the contents of one's mind. Indeed, a password to a computer is, by its nature, intentionally personalized and so unique as to accomplish its intended purpose — keeping information contained therein confidential and insulated from discovery.[279]

The *Davis* court went even further to reject an extension of the foregone conclusion doctrine to compelled oral or written disclosures of passwords to police.[280] After characterizing the exception as "extremely limited," pointing to the fact that its application has been constrained in Supreme Court cases to existing business or financial records, the court stated that it would be a significant and unwarranted expansion of the exception's rationale to compel an accused to disclose his password, which involves written or oral testimony, to investigators.[281] Even if the foregone conclusion exception applied, the majority stated, the court would require the government to prove its knowledge of the existence and authenticity of the files stored in the computer as well as the defendant's possession or control over them.[282]

Looking ahead, Massachusetts courts inevitably will need to resolve with increased frequency not only motions to compel the entry of alphanumeric and special character passwords into electronic devices under the foregone conclusion doctrine, but also challenges under art. 12 and the Fifth Amendment to the compelled unlocking of cellphones and other devices through the use of biometric features, such as the placement of a finger on a "Touch ID" or other fingerprint sensor, or through a facial or retinal recognition feature on a mobile phone. Generally stated, the issue in these instances is whether the act of applying a fingerprint to a phone's electronic sensor or having an individual display his or her facial features or other physical characteristic to a phone, without more, is testimonial in nature. On the one hand, "the compelled display of identifiable physical characteristics [including fingerprints] infringes no interest protected by the privilege against compulsory self-incrimination."[283] In instances involving the compelled production of real or physical evidence, the Supreme Court has noted, the subject is "not required to disclose any knowledge he might have," "to speak to his guilt," or "to disclose the contents of his own mind."[284] On the other hand, providing police a fingerprint to unlock a cellphone differs from a mere display of a physical characteristic because it both exhibits the physical characteristic of a fingerprint, and results in the production of potentially vast amounts of highly personal information contained within the electronic device.[285] As one court noted, "when it comes to data locked behind a passcode wall, the object of the foregone conclusion exception is not the password itself, but the data the state seeks behind the passcode wall."[286] If the privilege applies, it is important to bear in mind that, "'the constitutionally required result is that no balancing of State-defendant interests is permissible to facilitate the admittedly difficult burdens of the prosecution.'"[287]

276. *See, e.g.,* Securities and Exchange Commission v. Huang, No. 15-269, 2015 WL 5611644 at *1-2 (E.D. Pa. 2015) (denying motion to compel defendants to supply passwords to smartphones because it would "require intrusion into the knowledge of the Defendants"); United States v. Kirschner, 823 F. Supp. 2d 665, 669-70 (E.D. Mich. 2010) (subpoena compelling defendant to reveal password amounted to testimony that would require him to divulge mental processes); Commonwealth v. Baust, 89 Va. Cir. 267, 267 (Cir. Ct. 2014) (upholding order compelling defendant to use his fingerprint to unlock phone, but finding disclosure of passcode would violate Fifth Amendment).

277. 220 A.3d 534 (Pa. 2019).

278. *Id*. at 548. *See id*. at 555. (Baer, J., dissenting) (noting Davis' password had 64 characters).

279. *Id*. at 548 (majority opinion). The dissent acknowledged the facial appeal of this position, but noted that virtually every act of production involves mental effort and recall. "The mere fact that Appellant is required to think in order to complete the act of production, in my view, does not immunize that act of production from the foregone conclusion rationale." *Id*. at 555 (Baer, J., dissenting).

280. *Id*. at 549 (majority opinion). The three dissenting judges believed that the foregone conclusion analysis applied to the compelled disclosure of a password to an electronic device, noting that the government in that case had seized the device pursuant to a warrant. *Id*. at 553 (Baer, J., dissenting). "To hold to the contrary would create an entire class of evidence, encrypted computer files, that is impervious to governmental search." *Id*. at 557.

281. *Id*. at 549 (majority opinion). The dissent viewed the compelled production of the password similar to the production of a business or financial document, as articulated in *Fisher*. *Id*. at 554 (Baer, J., dissenting). It stated, "the Commonwealth is not asking the Appellant to 'speak his guilt,' but merely to allow the government to execute a warrant that it lawfully obtained." *Id*. at 555.

282. *Id.* at 551 n.9 (majority opinion). The dissent, like the majority in *Jones*, stated, "it is my position that the foregone conclusion exception as applied to the facts presented relates not to the computer files, but to the password itself." *Id*. at 556 (Baer, J., dissenting).

283. United States v. Dionisio, 410 U.S. 1, 5-6 (1973); *see* United States v. Wade, 388 U.S. 218, 223 (1967) (privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting and other physical characteristics).

284. Doe v. United States, 487 U.S. 201, 211 (1988) (citations omitted).

285. State v. Diamond, 905 N.W.2d 870, 875 (Minn., 2018), cert. denied, 138 S. Ct. 2003 (2018); *see* Matter of Residence in Oakland, Cal., 354 F. Supp. 3d 1010, 1015-16 (N.D. Cal., 2019) (discussing biometric features used to potentially unlock electronic device that contains vast amounts of highly personal information).

286. G.A.Q.L. v. State, 257 So.3d 1058, 1063 (Fla. Dist. Ct. App. 2018). The court also stated that because the government had failed to show reasonable particularity as to the documents sought behind the passcode wall, the case fell outside the foregone conclusion exception and amounted to a fishing expedition. *Id*. at 1064.

287. Commonwealth v. Doe, 405 Mass. 676, 680 (1989) (quoting Blaisdell v. Commonwealth, 372 Mass. 753, 761 (1977)).

To date, neither the Supreme Court nor any federal circuit court of appeals has addressed the issue of whether the compelled use of biometric features to unlock a mobile phone is constitutional. However, two federal district courts and the Minnesota Supreme Court have published opinions explicitly holding that unlocking a cellphone through the use of biometric features is non-testimonial and therefore not a violation of the Fifth Amendment.[288] In *State v. Diamond*,[289] the court acknowledged the distinction under the Fifth Amendment between protected testimonial communications and unprotected real or physical evidence.[290] Noting that the production of a fingerprint to unlock an electronic device failed to fit neatly into either category, the Minnesota Supreme Court nonetheless concluded that, "producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the body, not of the mind, to the police," and therefore was not a testimonial communication under the Fifth Amendment.[291]

Both federal district courts addressing the matter employed similar reasoning, but strongly implied that the police, not the subject, must select which finger to apply to the phone's sensor, so that there is "no need to engage the thought process of any [subject] at all in effectuating the seizure."[292] The District Court for the Northern District of Illinois explained,

> The government chooses the finger to apply to the sensor, and thus obtains the physical characteristic — all without need for the person to put any thought at all into the seizure … [T]he person's performance of the compelled act is not an act of communication by that person. Indeed, the person can be asleep — and thus by definition not communicating anything — when a seizure of this sort is effectuated … [I]f anything, handwriting and voice exemplars contain more implicit admissions than a fingerprint, namely, that "I can write and this is my handwriting," or "this is my voice and this is how I pronounce this word."[293]

The District Court for the District of Columbia likewise concluded, "the use of the fingerprint is much more like the government's compelled use of other 'physical characteristics' of criminal suspects that courts have found non-testimonial even when they are used for investigatory purposes rather than solely for identification."[294] These courts, it appears, believe the compelled application of a fingerprint or the display of other biometric features to unlock a phone is analogous to surrendering a key to a lockbox.[295]

There are courts, however, that disagree with this analysis. In *Seo v. State*,[296] for example, the Indiana Court of Appeals, after concluding that the compelled entry of a password into a phone is testimonial and violates the Fifth Amendment, went on to criticize the dichotomous analysis employed by some courts in determining whether the unlocking of a phone through the use of a fingerprint, as opposed to an alphanumeric and special character password, violates an individual's right against self-incrimination. The court stated,

> [I]t is the height of irony that the most secure current forms of electronic identification, the fingerprint, and more recently facial or retinal scans, currently have no protection against compulsory use by law enforcement authorities under *Schmerber*, et. al. This difference is reflective of legal thinking from a paper-based world that courts currently are called upon to stretch to fit a world of electronic data about everything and everyone. Our courts need a new paradigm that reflects our modern world.[297]

288. *See In re* Search of [Redacted] Washington, D.C., 317 F. Supp. 3d 523, 540 (D.D.C. 2018) (concluding that use of subject's biometric features such as fingerprints, face or irises to unlock subject's device found at premises did not violate Fifth Amendment); *In re* Search Warrant Application for [redacted text], 279 F. Supp. 3d 800, 807 (N.D. Ill. 2017) (reversing magistrate judge's denial of government's search warrant application seeking seizure of four individuals' fingerprints to unlock electronic devices); Diamond, 905 N.W.2d at 876 (in a matter of first impression, court determined that ordering defendant to provide his fingerprint to unlock device did not violate privilege against self-incrimination); *see also* State v. Trant, No. CUMCDCR201502389, 2015 WL 7575496 (Me. Dist. Oct. 27, 2015) (concluding that compelling defendant to surrender passcodes to phones violated federal and Maine constitutions, but suggesting that outcome would be different if phones were protected by fingerprint password).

289. 905 N.W.2d 870 (Minn. 2018), cert. denied, 138 S. Ct. 2003 (2018).

290. *Id.* at 874-75.

291. *Id*. at 875 (emphasis original) (citations omitted).

292. *In re* Search Warrant Application for [redacted text], 279 F. Supp. 3d 800, 804 (N.D. Ill. 2017); *see In re* Search of [Redacted] Washington, D.C., 317 F. Supp. 3d 523, 536 (D.D.C. 2018). It may be improper, for example, for police to instruct a person to place the specific finger that the subject knows will unlock the phone on the touch sensor instead of physically applying each of the subject's fingers to the device itself until it unlocks.

293. *In re* Search Warrant Application for [redacted text], 279 F. Supp. 3d at 804.

294. *In re* Search of [Redacted] Washington, D.C., 317 F. Supp. 3d at 536.

295. *But see Matter of Residence in Oakland, Cal.*, 354 F. Supp. at 1015-16 (biometric features used to potentially unlock electronic device are testimonial and protected under the Fifth Amendment privilege against self-incrimination). In *Matter of Residence in Oakland, Cal.*, a federal magistrate judge denied a search warrant application in which the government sought authorization to compel any individual at the premises at the time of the search to provide fingerprints or other biometric features to unlock any phone found inside the residence during execution of the warrant. *Id*. at 1013. The magistrate judge found that utilizing a biometric feature to unlock a phone is not akin to producing physical evidence such as a fingerprint because the biometric features are the functional equivalent of a passcode, which, in the court's view, was protected under the Fifth Amendment, and because, if successfully opened, it concedes the subject's possession and control over the device as well as authentication of that person's ownership or access to the phone and its contents. *Id*. The magistrate judge further rejected application of the foregone conclusion exception in these circumstances because, inter alia, "the Government inherently lacks the prerequisite knowledge of the information and documents that could be obtained via a search of these unknown devices, such that it would not be a question of mere surrender." *Id*. at 1017-18.

296. 109 N.E.3d 418 (Ind. Ct. App. 2018).

297. *Id*. at 430 n.17.

A question that could arise in the future is whether, and in what circumstances, might the foregone conclusion doctrine arise in connection with the compelled biometric unlocking of electronic devices. On a practical level, fingerprint identification on cellphones is very time-sensitive. For example, the fingerprint sensor on certain Apple iPhones will not function and the password for the device must be re-entered if, among other things, the phone has been restarted, the device has been locked for more than 48 hours, or more than five attempts at the Touch ID have been made.[298] Thus, if for one of these reasons or some other reason a phone is not capable of being unlocked with a biometric feature (and investigators otherwise are unable to unlock the device), compelling the subject to enter its password is the next logical option. Coming full circle to *Gelfgatt* and *Jones*, art. 12 would require the commonwealth to demonstrate beyond a reasonable doubt that the defendant's knowledge of the password to the device is a foregone conclusion.

Although the privilege against self-incrimination is sacrosanct, like other constitutional rights it is not without limitation.[299] If nothing else, what becomes self-evident from an examination of both federal and state decisions is that reasonable and learned jurists differ on the scope of the foregone conclusion exception and the showing required to evict a defendant from the protective shelter of the privilege against self-incrimination under the exception. This is particularly acute in the context of compelling an individual to unlock a device that today has become a near physical appendage to the human body in this country. Resolving alleged violations of centuries-old constitutional guarantees in connection with searches of cellphones and computers by law enforcement no doubt pose complex analytical challenges to courts. The law, or at least its application, is striving to keep pace with rapid advancements in technology.

Before *Gelfgatt* and *Jones*, the foregone conclusion exception in Massachusetts was an abstruse concept, particularly in connection with compelled decryption of electronic devices. By requiring the commonwealth to establish beyond a reasonable doubt that the defendant's knowledge of the password to a device is a foregone conclusion, judges can have a high degree of confidence in issuing compulsion orders in appropriate cases and dealing with recalcitrant defendants. Whether the reader agrees or disagrees with the outcome of these cases, the SJC certainly deserves credit for clarifying the otherwise oblique concept known as the foregone conclusion exception, and providing clear-cut guidance to courts and parties moving forward. Only time will tell whether the *Gelfgatt* and *Jones* decisions will become the "death knell for a constitutional protection" against self-incrimination in the digital age.[300]

298. *See* Apple, About Touch ID advanced security technology, https://support.apple.com/en-us/HT204587 (discussing security features of iPhones). Similarly, Google Pixel 3XL requires use of a backup PIN, pattern or password if more than 48 hours have elapsed since the user last unlocked the phone using the backup login method. *See* Google, Pixel Phone Help, https://support.google.com/pixelphone/answer/6285273?hl=en. Time is of the essence, therefore, in compelling an individual to place his or her fingertip on the phone's sensor. There are, of course, significant art. 14 and Fourth Amendment issues associated with the seizure of an individual's physical characteristic that lay beyond the scope of this publication. *See, e.g.,* United States v. Dionisio, 410 U.S. 1, 8 (1973) ("The obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels — the 'seizure' of the 'person' necessary to bring him into contact with government agents, and the subsequent search for and seizure of the evidence."); Hayes v. Florida, 470 U.S. 811, 816-18 (1985) (where no probable cause to arrest petitioner, no consent to journey to police station, and no prior judicial authorization for detaining him, investigative detention of petitioner violated Fourth Amendment; however, "Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."); *In re* Search of [Redacted] Washington, D.C., 317 F. Supp. 3d 523, 535 (D.D.C. 2018) (government may use fingerprints of suspected user of Apple product only if "(1) the procedure is carried out with dispatch and in the immediate vicinity of the premises to be searched, and if, at time of the compulsion, the government has (2) reasonable suspicion that the suspect has committed a criminal act that is the subject matter of the warrant, and (3) reasonable suspicion that the individual's biometric features will unlock the device, that is, for example, because there is a reasonable suspicion to believe that the individual is a user of the device").

299. *See, e.g.,* Miller v. California, 413 U.S. 15, 42 n.6 (1973) (Douglas, J., dissenting) (speech can fall outside protection of First Amendment, such as when someone shouts "'Fire' in a crowded theater" when there is no fire); United States v. Miller, 307 U.S. 174, 178 (1939) (National Firearms Act regulating firearms does not infringe on Second Amendment right of people to keep and bear arms); Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (discussing probable cause and exigent circumstances exception to Fourth Amendment warrant requirement); Wheat v. United States, 486 U.S. 153, 159 (1988) (right to be represented by counsel of choice comprehended by Sixth Amendment, but it is qualified and not absolute).

300. Commonwealth v. Jones, 481 Mass. 540, 566 (2019) (Lenk, J., concurring).

Case Comment

A Wage by Any Other Name

Calixto v. Coughlin, 481 Mass. 157 (2018); *Ferman v. Sturgis Cleaners Inc.*, 481 Mass. 488 (2019); *Lynch v. Crawford,* 483 Mass. 631 (2019); *Parker v. EnerNOC Inc.,* 484 Mass. 128 (2020)

The Massachusetts Wage Act, G.L. 149, §§ 148, 150 (Wage Act or the Act) is a strict liability statute — one that imposes harsh consequences on companies and certain corporate officers who fail to pay employees on time (or at all). As a result of a 2008 amendment to the act, G.L. c. 149, § 150 mandates treble damages and reimbursement of a successful plaintiff's attorneys' fees upon a finding of a Wage Act violation. And under G.L. c. 149, § 148, "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section." The broad definition of employer and the non-discretionary liquidated damages and fee-shifting provisions make Wage Act claims a powerful tool for plaintiffs — within limits.

Almost every year, the Massachusetts Supreme Judicial Court (SJC) is tasked with deciding new cases that test the scope of the Act. In the last year and a half, in four separate decisions, the SJC provided additional guidance on what constitutes a "wage" for the purposes of the Act in *Calixto v. Coughlin*;[1] articulated, for the first time, the standard to govern claims reimbursement of attorneys' fees under the Wage Act in *Ferman v. Sturgis Cleaners, Inc.*;[2] outlined a framework for determining whether a volunteer officer could avail himself of charitable immunity to avoid the imposition of individual Wage Act liability in *Lynch v. Crawford*;[3] and shed light on the circumstances under which a commission, conditioned on continued employment, may be deemed a wage for the purpose of the Act even after employment has been terminated before the scheduled payment date in P*arker v. EnerNOC, Inc.*[4] While these cases are unrelated on the surface, collectively they reflect the complexities of the Act, the need for decisional law to define statutory terms where no definition exists within the confines of the statute, and the court's efforts to construe the statute in accordance with its intended purpose, but not to tread too far beyond the factual scenario before it. Even with this new guidance, there are still issues left undecided.

In *Calixto*, the court was asked to decide whether an employer, found to have violated the federal Worker Adjustment and Retraining Act, 29 U.S.C. §§ 2101-2109 (2018) (WARN Act),[5] also violates the Wage Act.[6] The WARN Act requires an employer with at least 100 employees who work at least 4,000 non-overtime hours a week to provide 60 days' notice of a plant closing or mass layoff.[7] Under that federal statute, failure of the employer to provide such notice renders the employer liable for "back pay" and employee benefits for each day of its violation. The employer in *Calixto* abruptly closed its doors and, without notice, terminated its workforce of more than 200 people without the requisite pay and benefit continuation.[8] Its employees initiated a class action under the WARN Act in the United States District Court and, upon the default of the company, obtained a $2 million default judgment.[9] The judgment was uncollectible, and the employees, seizing upon the remedy of "back pay" they received against the company for WARN Act violations, brought a putative class action in the Superior Court against the officers individually under the Wage Act.[10] The Superior Court granted the former officers' motion to dismiss, finding that "the Federal District Court's WARN Act award 'does not qualify as "earned wages" giving rise to a claim under the Wage Act.'"[11] The SJC affirmed.[12]

The Wage Act requires that "[e]very person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned . . . ."[13] To arrive at its conclusion that "earned wages" recoverable under the Wage Act were not synonymous with "back pay" under the WARN Act, the SJC acknowledged that the Wage Act does not define "wages earned," but relied, as it did in previous decisions, on the "plain and ordinary meaning" of that term.[14] Citing its decision in *Awuah v. Coverall N. Am. Inc.,*[15] the court confirmed that it would continue to impose Wage Act liability only on defendants who fail to pay employees for hours the employees actually worked: "Where an employee has completed the labor, service, or performance required of him, . . . according to common parlance and understanding he has 'earned' his wage."[16] The court noted that the purpose of the Act was

1. Calixto v. Coughlin, 481 Mass. 157 (2018).
2. Ferman v. Sturgis Cleaners Inc., 481 Mass. 488 (2019).
3. Lynch v. Crawford, 483 Mass. 631 (2019).
4. Parker v. EnerNOC Inc., 484 Mass. 128 (2020).
5. *Calixto*, 481 Mass at 158.
6. *Id*.
7. *Id*. at 159; 29 U.S.C. §§ 2101(a)(1), 2102(a).
8. *Id*. at 158.
9. *Id*. at 159-60.
10. *Id*. at 160.
11. Calixto v. Coughlin, 481 Mass. 157, 160 (2018).
12. *Id*.
13. Mass. Gen. Laws c. 149, § 148.
14. *Calixto*, 481 Mass. at 160.
15. Awuah v. Coverall N. Am. Inc, 460 Mass. 484 (2011).
16. *Id*. at 492.

to prevent "unscrupulous employers" from withholding wages,[17] but it further clarified that for liability to be imposed, the "wages . . . must be presently — not just prospectively or potentially — due to be paid by the employer."[18] The court cited its previous rejections of Wage Act claims brought by employees subject to a mandatory furlough program and thus deprived of earnings they *would* have been paid,[19] employees who were not paid accrued sick time to which they only were entitled under certain circumstances,[20] and employees who were not paid tax deferred compensation within seven days of termination of employment.[21]

The plaintiffs in *Calixto* relied on federal bankruptcy cases, in which the bankruptcy courts have classified WARN Act notice pay as "wages" for the purposes of creditor priority.[22] The SJC, however, noted that the Bankruptcy Code specifically includes severance pay in the definition of "wages" and reasoned that, under the code, WARN Act pay is thereby a form of statutory severance.[23] By contrast, the Wage Act makes no reference to severance as a form of wages.[24] In previous decisions, the SJC and the Appeals Court rejected claims that severance pay is covered by the Wage Act, because severance is a prospective entitlement not tied to services actually rendered.[25] For these reasons, the SJC was not persuaded that the federal courts' definitions of "wage" under federal law for the purpose of interpreting a federal statute required it to find that WARN Act pay was a form of "earned wages" under the state's Wage Act.[26] Overall, *Calixto* makes clear that, even in the face of conflicting definitions of "wage" under federal statutory law, the SJC remains unwilling to expand the definition of "wage" beyond the "plain and ordinary" sense of payment presently due for past services actually performed.[27]

In *Ferman*, in the context of determining, for the first time, the standard to be used in imposing upon an employer the obligation to pay counsel fees, the SJC similarly focused on the Wage Act's intended purpose.[28] As in *Calixto*, the court rejected the use of federal interpretations of federal statutes as a guidepost for interpreting the state statute.[29]

The facts of *Ferman* were not disputed. Plaintiffs, former employees of a cleaning business, filed a complaint alleging that their employer failed to pay them regular and overtime wages as required under the Wage Act (G.L. c. 149, §§ 148, 150) and the overtime statute, G.L. c. 151, §§ 1A, B. The parties litigated the matter for two years.[30] A few weeks before the scheduled trial date, the Superior Court referred the parties to mediation and, thereafter, the matter settled for 70 percent of the single damages award sought by the plaintiffs.[31] In their settlement agreement and stipulation of dismissal filed with the Superior Court, the parties expressly reserved their right to have the court decide whether, under the circumstances, plaintiffs were entitled to an award of attorneys' fees and costs under the Wage Act in connection with the settlement.[32]

Over defendants' objection, the Superior Court found that the plaintiffs were entitled to a fee award because they were the "prevailing party" (although the court reduced the requested fees substantially by deducting fees for pre-complaint work, motions, and claims on which the court found the plaintiffs did not prevail).[33] The SJC accepted the case for direct appellate review and sought amicus briefing "to resolve the important, unresolved issue of the appropriate standard to apply for attorney's fees petitions under the Wage Act."[34] Plaintiffs argued in favor of the "catalyst test" test applied by the trial court.[35] Defendants argued that *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res.*[36] prohibited the trial court from defaulting to the catalyst test and, instead, required the court to consider, under the *Buckhannon* standard enunciated in 2001, whether "there was a material alteration of the legal relationship of the parties" and "a judicial *imprimatur* on the change."[37] The SJC acknowledged that while it must apply *Buckhannon* to fee petitions involving federal statutes, it historically has rejected the *Buckhannon* standard to fee requests arising out of Massachusetts fee-shifting statutes or as applied to cases based upon other Massachusetts authority.[38] It thus interpreted its role as deciding whether the "catalyst test" or some other test should apply to fee petitions under the Wage Act.[39]

In ultimately concluding that the "catalyst" test was the appropriate test, the SJC not only examined the intent of the Wage Act, but also analyzed the purpose of fee-shifting statutes generally.[40] Fee-shifting statutes, it found, generally accomplish two

17. *Calixto*, 481 Mass. at 160.
18. *Id*. at 161.
19. Mass. State Police Commissioned Officers Ass'n v. Commonwealth, 462 Mass. 219 (2012).
20. Mui v. Mass. Port Auth., 478 Mass. 710 (2018).
21. Bos. Police Patrolmen's Ass'n v. City of Boston, 435 Mass. 718 (2002).
22. *Calixto*, 481 Mass. at 162 n.9 (citing 11 U.S.C. § 507(a)(4)(A) (2018)).
23. *Id*.
24. *Id*.
25. Mui, 478 Mass. at 713; Weems v. Citigroup Inc., 453 Mass 147, 151 (2009); Prozinski v. Ne. Real Estate Servs., LLC, 59 Mass. App. Ct. 599, 603-05 (2003).
26. Calixto v. Coughlin, 481 Mass. 157 (2018).
27. *Id*.
28. Ferman v. Sturgis Cleaners Inc., 481 Mass. 488 (2019).
29. *Id*.
30. *Id*. at 490.
31. *Id*.
32. *Id*. at 491 n.7.
33. *Id*. at 491.
34. Ferman v. Sturgis Cleaners Inc., 481 Mass. 488, 491 n.7 (2019).
35. *Id*. at 491.
36. Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001).
37. *Ferman*, 481 Mass. at 491, quoting *Buckhannon*, 532 U.S. at 604-05 (emphasis in original).
38. *Ferman*, 481 Mass. at 491-92.
39. *Id*. at 492.
40. *Id*.

things — they act as disincentives against unlawful conduct and incentivize attorneys to take on cases for claimants that otherwise could not afford counsel, especially where the amount at stake may be too small to justify the time and energy required to litigate.[41] The court determined that these reasons motivated the legislature to include fee-shifting provisions in the Wage Act, as well as the Massachusetts Civil Rights Act[42] and the Massachusetts Consumer Protection statute.[43] The catalyst test, in the court's view, promotes the dual purposes of fee-shifting legislation.[44] The test, in contrast to *Buckhannon*, requires the court to find that a plaintiff's lawsuit was a "'necessary and important factor' in causing the defendant to provide a material portion of the requested relief, but does not require litigation to a final judicial determination or other judicial imprimatur."[45] As the court acknowledged, successful litigation often results in settlements.[46] The catalyst test, in the court's view, not only reflects this reality, but promotes the purpose of fee-shifting statutes generally by rewarding attorneys to take cases that correct unlawful conduct and disincentivizes "strategic capitulation" by defendants to settle at the eleventh hour to avoid imposition of counsel fees.[47]

After discussing these rationales in the context of fee-shifting legislation generally, the court concluded that "[t]he statutory language, structure, purpose, and history all confirm that the catalyst test is the correct standard to apply to the Wage Act."[48] The court focused on the Wage Act's goal of incentivizing private attorneys to take on cases often involving small amounts of money, the desirability of prompt settlement in furtherance of the Act's goal of timely payment of wages, and the Act's oft-quoted objective of providing a powerful disincentive for "unscrupulous employers" to withhold wages in the first place.[49] The court found a further rationale for applying the catalyst test in the fact that the fee provisions in the overtime statute and the Wage Act were enacted in 1962 and 1993, respectively, years before the United States Supreme Court decided *Buckhannon*.[50] Accordingly, the court presumed when the legislature enacted these fee provisions, it acted with knowledge of the current state of the law, which, at the time of passage, was the "catalyst test."[51]

In *Lynch v. Crawford*,[52] the court, on an interlocutory appeal, was asked to reconcile two competing sets of rights — the right of employees to be paid under the Wage Act, and the right of a senior executive of a charitable organization, who serves without compensation, to charitable immunity from individual liability under the federal Volunteer Protection Act (VPA)[53] and the state charitable immunity statute (section 85W).[54] Plaintiffs, former employees of a nonprofit health center, were not paid their wages for the weeks before the organization was dissolved.[55] They sued the individual defendant personally in reliance on the Wage Act's imposition of personal liability upon "employers," which include "the president and treasurer of a corporation and any officers or agents having the management of such corporation."[56] Defendant moved for summary judgment on the grounds that he was not the organization's president, but merely the chairman of the board and, even if he were president, he was protected under federal and state law by the charitable immunity doctrine.[57] The Superior Court denied his motion.[58] After a series of procedural maneuvers, including an interlocutory appeal to the Appeals Court, the defendant succeeded in obtaining further appellate review from the SJC.[59]

The SJC explained that the defendant had a right to direct appellate review because he was claiming not only immunity from liability, but immunity from being sued in the first place: "In civil cases, one of those limited circumstances in which we invoke the doctrine of present execution is 'where protection from the burden of litigation and trial is precisely the right to which [a party] asserts an entitlement.'"[60] The court reasoned that if the order denying summary judgment was erroneous, even if reversed after the lawsuit was over, "the right to immunity from suit would still have been lost forever."[61] The court noted that in previous cases, it interpreted claims of absolute or qualified immunity to mean immunity from suit, not just liability.[62]

41. *Id*. at 492-93. The court cited Commonwealth v. Augustine, 470 Mass. 837, 842 (2015) and Justice Ruth Bader Ginsburg's dissenting opinion in *Buckhannon*, 521 U.S. at 623, in which she expressed her concern that rejection of the catalyst test would shrink the incentives provided by fee-shifting statutes.

42. Mass. Gen. Laws c. 12, §11I.

43. Mass. Gen. Laws c. 93A.

44. Ferman v. Sturgis Cleaners, Inc., 481 Mass. 488, 493 (2019), citing Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Realty of Buckhannon for the Private Attorney General,* 54 U.C.L.A. L. Rev. 1087, 1121, 1130 (2007)).

45. *Id*.

46. *Id*. at 494.

47. *Id*.

48. *Id*. at 494-95.

49. *Id* at 495.

50. Ferman v. Sturgis Cleaners Inc., 481 Mass. 488, 495 (2019).

51. *Id*. at 495-96. In *Ferman*, the court quoted its decision in Commonwealth v. Mogelinski, 466 Mass. 627, 646 (2013): "[w]e presume that the Legislature enacts legislation with an aware[ness] of the prior state of the law as explicated by the decisions of this court" (internal citation omitted). 481 Mass. at 496.

52. Lynch v. Crawford, 483 Mass. 631 (2019).

53. 42 U.S. c. 139 § 14503(a).

54. Mass. Gen. Laws c. 231, § 85W.

55. *Lynch*, 483 Mass. at 633.

56. *Id*. (citing Mass. Gen. Laws c. 149, § 148).

57. *Lynch*, 483 Mass. at 633.

58. *Id*. at 632.

59. *Id*. at 633.

60. *Id*. at 634 (quoting Estate of Moulton v. Puopolo, 467 Mass. 478, 485 (2014)).

61. Lynch v. Crawford, 483 Mass. 631, 638 (2019) (quoting Patel v. Martin, 481 Mass. 29, 33 (2018)).

62. *Id*. at 635.

Focusing on the charitable immunity statutes at issue, the court looked first to the VPA, which pre-empts inconsistent state laws, "except where State law 'provides additional protection from liability relating to volunteers . . . in the performance of services for a nonprofit or governmental entity.'"[63] The VPA, in furtherance of its purpose of promoting social service programs by establishing protections to those who serve nonprofits and government entities, exempts the volunteers from liability, provided "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."[64] Although the language of the VPA focuses on liability, the court determined, given the statute's overarching purpose and congressional findings, that the statute was intended to extend immunity not only from liability, but from being sued in the first place.[65] "A volunteer does not merely want to prevail in such litigation; the volunteer wants to end it."[66] Having concluded that the VPA grants qualified immunity from suit as well as liability, the court also concluded that section 85W provides the same immunity because, under the VPA, state law cannot offer fewer protections.[67]

The court's detailed analysis of the protections accorded by the VPA and section 85W, and its conclusion that both statutes provide qualified immunity from both liability and the need to defend a lawsuit in the first place, ultimately served only to grant the defendant the right to an interlocutory appeal.[68] In turning to the merits of his appeal, the SJC found sufficient evidence to conclude there was a genuine issue of material fact as to whether the defendant did, in fact, serve as president of the organization and thereby was an "employer" within the meaning of the Act.[69] The court then concluded that the VPA would not protect the defendant because a Wage Act violation by an employer constitutes a crime punishable by imprisonment of not more than six months or a $10,000 fine under G.L. c. 149, § 27C (2) regardless of criminal intent.[70] Under the VPA, criminal misconduct causes the volunteer to lose his immunity from suit or liability.[71] The court noted, however, that section 85W does not expressly exclude criminal conduct, only "acts or omissions intentionally designed to harm" or "grossly negligent acts or omissions which result in harm to the person."[72] Thus, the state statute, as permitted under the VPA, accords greater protection to volunteer employers than the federal corollary.[73] However, the court upheld the lower court's denial of summary judgment based on evidence that the defendant was informed that the volunteer organization would not make payroll, he encouraged the employees to continue to work and assured them payment was forthcoming, and wrote in an email message that he wanted to use available funds to pay two vendors.[74] The court found that such evidence, viewed in the light most favorable to the employees, could be construed as creating a genuine issue of material fact that the defendant acted "with an intentional design to harm employees by failing to pay them the wages they were due."[75] The case involved arcane issues to be sure, and revealed the court's arduous grappling with competing federal and state statutes.

In *Parker v. EnerNOC Inc.*, the court answered a question, at least in part, that had plagued employment lawyers for years — whether a commission, which, in the ordinary course, would have been paid after the employee was terminated from employment, constitutes a "lost wage" for the purposes of awarding that employee treble damages and attorneys' fees.[76] The plaintiff in that case negotiated a large deal worth $20 million for her employer, EnerNOC, an energy-related services provider.[77] That contract between EnerNOC and its client contained a "termination for convenience" clause that allowed the parties to terminate the contract within 30 days following the first anniversary of the contract.[78] Under the terms of the company's commission policy, commissions on the contract would be paid first on the guaranteed portion of the contract (the first year), and thereafter under the company's "true-up policy," and an additional commission would be paid on the entire value of the contract once the opt-out period had passed.[79] The policy provided that a salesperson's eligibility for further commissions would cease upon her termination "for any reason."[80] The plaintiff in this case was fired on April 1, 2016, shortly after she complained that she did not get the full amount of the commission owed for the guaranteed portion of

63. *Id*. at 638 (citing 42 U.S.C. § 14502(a)).
64. *Id*. at 638-39 (citing 42 U.S.C. §§ 14501(b), 14503(a)).
65. *Id*. at 640.
66. *Id*.
67. Lynch v. Crawford, 483 Mass. 631, 641 (2019).
68. *Id*. at 640.
69. *Id*. at 642.
70. *Id*. at 643.
71. *Id*.
72. *Id*.
73. Lynch v. Crawford, 483 Mass. 631, 643-44 (2019).
74. *Id*. at 644.
75. *Id*.
76. Parker v. EnerNOC Inc., 484 Mass. 128 (2020).
77. *Id*. at 129.
78. *Id*.
79. *Id*.
80. *Id*.

the contract.[81] The true-up commission would have been due to the plaintiff had she been employed after March 4, 2017, when EnerNOC's client declined to opt out of the contract.

After her termination, plaintiff sued her former employer for gender discrimination, Wage Act violations, retaliation for asserting rights under the Wage Act, breach of contract, and breach of the duty of good faith and fair dealing, later amending her complaint to add a claim of quantum meruit after the opt-out period expired.[82]

After trial, the jury found in favor of the plaintiff on her Wage Act and retaliation claims, among other counts.[83] The judge trebled the damages on the difference between the jury's determination as to what plaintiff should have been paid for the guaranteed portion of the contract, but he declined to treble damages on the true-up commission that would have been due to the plaintiff almost a year after her termination from employment.[84] The trial judge interpreted the Wage Act (which included commissions as wages) to require that the commission be due and payable upon plaintiff's last day of employment.[85] Because of that determination, the judge did not consider the true-up commission, due a year later, to be subject to trebling mandated by the 2008 amendment to the Act "for lost wages and other benefits."[86]

In ultimately ruling that the true-up commission of $349,098.48 must be trebled even though the commission was not required to be paid for almost a year after termination, the SJC focused not only on the language of the Act that requires prompt payment of wages, including commissions, that are "due and payable," but also on the anti-retaliation provisions of the Act.[87] The jury found that the employer violated the Act in both ways — by failing to pay plaintiff the full amount of her commission on the guaranteed portion of the contract (G.L. c. 149, § 148) and then retaliating against the plaintiff by firing her after she complained about the shortfall in her commission (G.L. c. 149, § 148A).[88] The court specifically rejected the employer's defense that its policy required continued employment for the plaintiff to be entitled to the true-up commission:

> Here, the true-up policy, in conjunction with EnerNOC's retaliatory termination of the plaintiff, made it impossible for the plaintiff to fulfill the only unmet contingency required to collect the true-up commission. A policy that conditions payment on continued employment cannot relieve an employer from the obligation of paying a commission where the employer terminates its employees in retaliation for complaining about wage violations in the first place. On these facts, the policy is therefore unenforceable under the Wage Act.[89]

Parker is an important decision, rooted, like the other cases described in this comment, in the strong policies underlying the Wage Act, its anti-retaliation clause and its legislative history. The decision did not, however, answer some important questions: What if the plaintiff had been fired without cause, or for some reason unrelated to her complaint about her pay or for an unlawful reason such as gender discrimination? What if she resigned before the opt-out period expired? The plaintiff, according to the facts described by the court, had done everything she needed to do to earn the true-up commission such that failure to pay it after the lapse of the opt-out period arguably could be construed as loss of a wage "due and payable" even post-termination. The court added a footnote to its decision,

> [i]n so concluding [that the unpaid true-up commission was a wage to be trebled] we do not suggest that a period of continued employment is per se an inappropriate perquisite upon which to condition a commission. However, such a contingency cannot be relied upon by an employer to create circumstances under which the contingency goes unfulfilled in order to deny a commission that otherwise would be due and payable to an employee.[90]

It will be up to the next set of counsel to argue the significance of this footnote in another context. The SJC has shown its willingness to enforce the harsh penalties of the Wage Act, including its anti-retaliation provisions, but as the cases reveal, it does so in the context of focusing narrowly on the set of facts before it.

— Jessica Block

81. *Id*. at 130 and n.3.
82. Parker v. EnerNOC Inc., 484 Mass. 128, 130 (2020).
83. *Id*.
84. *Id*.
85. *Id*. at n.10.
86. *Id*. at 130.
87. *Id*. at 135.
88. Parker v. EnerNOC Inc., 484 Mass. 128, 136 (2020).
89. *Id*.
90. *Id*. at 136 n.13.

Case Comment

Refining Seizures and Park Zones

Commonwealth v. Matta, 483 Mass. 357 (2019)

In *Commonwealth v. Matta*,[1] the Supreme Judicial Court (SJC) held that, in a field stop, a seizure occurs where a reasonable person would believe, in the totality of the circumstances, that a police officer would compel the person to stay. The court also interpreted Massachusetts General Laws (G.L.) c. 94C, § 32J, holding, among other things, that the commonwealth is not required to prove that a defendant knew that he was within 100 feet of a park, and that the finder of fact at trial must determine whether a particular tract of land is a public park within the meaning of the statute.

The Facts

The Holyoke police received two telephone calls from an unknown source reporting that someone had placed a firearm under the front seat of a black motor vehicle.[2] The car was parked in a part of Holyoke known for violent crime, drug offenses and shootings.[3] Police officers were dispatched to the scene and arrived about three to four minutes later where one of them saw two people in a dark green Honda.[4] The officer parked his marked cruiser behind the Honda but did not activate his lights and sirens, and exited his cruiser.[5]

The officer saw the defendant exit the passenger seat of the motor vehicle, and, as he did so, the defendant reached to the right side of his body, adjusted his waistband and walked toward bushes that were away from the sidewalk.[6] The officer called out to the defendant, "Hey, come here for a second"; the defendant made eye contact and then ran, holding his waistband.[7] The officer ordered the defendant to stop and chased him.[8]

The defendant ran behind an apartment building and threw a plastic bag over a fence onto a pedestrian walkway.[9] Police officers stopped the defendant as he attempted to climb the fence, and all fell to the ground.[10] Wax baggies were found at the defendant's feet, and the plastic bag that he had thrown over the fence into a tract of land known as Ely Pedestrian Walkway also contained small bags; the bags contained heroin.[11]

The defendant was indicted for possession of heroin with intent to distribute it, subsequent offense, in violation of G.L. c. 94C, § 32(b), and for committing a drug offense within 100 feet of a public park, in violation of G.L. c. 94C, § 32J.[12] His motion to suppress evidence was denied, and after conviction following a jury trial, he appealed from the denial of his motion for a new trial, and the SJC took up the appeal on its own motion.[13]

The Stop

The SJC rejected the defendant's contention that the seizure occurred when the police officer first addressed the defendant by saying "Hey, come here for a second." The court also took the opportunity to recast the test for determining when a seizure occurs.

Before *Matta*, it was well established under Article 14 (art. 14) of the Massachusetts Declaration of Rights that a person is seized where, viewing all the facts and circumstances, a reasonable person would believe that she was not free to leave.[14] This "free to leave" standard was drawn from Justice Potter Stewart's opinion in *United States v. Mendenhall*,[15] and the SJC applied it as the standard for determining whether a seizure has occurred under art. 14.[16] The United States Supreme Court later moved away from this standard for determining whether a seizure has occurred under the Fourth Amendment to the United States Constitution in *California v. Hodari D.*,[17] and instead held that a seizure occurs when a person submits to a show of police authority. The SJC explicitly rejected this approach and retained the "free to leave" standard under art. 14 in 1996[18] and reaffirmed its view in 2010.[19]

In *Matta*, however, the SJC observed that the "free to leave" standard, literally applied, would transform nearly every encounter with the police into a seizure requiring reasonable suspicion on the part of the officer, because "civilians rarely feel 'free to leave' a police encounter."[20] The *Mendenhall* standard appears to measure when a seizure occurs by the mental state of a reasonable person in the position of the person being seized. In practice, Massachusetts

1. Commonwealth v. Matta, 483 Mass. 357 (2019).
2. *Id*. at 359.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. Commonwealth v. Matta, 483 Mass. 357, 359 (2019).
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*. at 359, 367-68.
12. *Id*. at 358.
13. Commonwealth v. Matta, 483 Mass. 357, 358 (2019).
14. *Id*. at 360
15. United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").
16. Commonwealth v. Borges, 395 Mass. 788, 791 (1985).
17. California v. Hodari D., 499 U.S. 621, 628-29 (1991).
18. Commonwealth v. Stoute, 422 Mass. 782, 786-87 (1996); *Matta*, 483 Mass. at 360 n.2.
19. Commonwealth v. Franklin, 456 Mass. 818, 821-22 (2010).
20. *Matta*, 483 Mass. at 360-61.

courts had not applied the test literally, and instead had looked to whether police conduct was meant to force compliance with police commands.[21] The test seems to conflict with empirical reality (because people do not subjectively feel free to leave when a police officer speaks to them) and is inconsistent with the principle that a seizure is a discrete event effectuated by law enforcement.[22] The SJC also noted that the test "does not produce the information necessary to determine whether a seizure has occurred."[23] In determining whether a person has been seized, "the more pertinent question," the SJC concluded, "is whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay."[24]

The SJC turned back to the question before it, whether the officer seized the defendant when he said, in substance, "Hey, come here for a second."[25] The SJC reiterated that a direct command from a police officer, without more, does not amount to a seizure, as it has stated in other cases.[26] There must be more. For example, if the officer had persisted in asking to speak with the defendant, the interaction may have escalated from a consensual encounter into a seizure.[27] The court also pointed to the absence of any other signs of authority, such as the deployment of lights and sirens or any other intimidating acts by the police.[28]

The defendant was seized, however, when the police officer ordered him to stop running away and then gave chase.[29] This conclusion harkens back to an early SJC decision, *Commonwealth v. Thibeau*,[30] as understood by *Commonwealth v. Stoute*.[31] The SJC had declared in *Thibeau* that "a stop starts when pursuit begins."[32] *Thibeau* did not cite *Mendenhall*, and did not state that the rule rested upon either the Fourth Amendment or art. 14.[33] The SJC in *Stoute* constitutionalized the idea of *Thibeau*, and explicitly recast the rule in terms of the free to leave standard.[34] In *Matta*, the SJC directly cited *Thibeau*, indicating that it has again recast the principle that the police effectuate a seizure by pursuing a defendant for the purpose of engaging in a threshold inquiry.[35] *Thibeau* survives, and now seems to stand for the proposition that where a police officer orders a person to stop running away, a seizure occurs because such an order by the police officer would make a reasonable person believe that the police officer will compel the person to stay. The SJC did not actually apply the "compelled to stay" test in *Matta* in determining when the stop occurred, but in light of the earlier reception of *Thibeau* in *Stoute*, that seems to be the best understanding for the SJC's decision.[36]

Did the SJC's newly articulated standard change the moment of seizure in this case? The SJC noted that the change is not a "distinction without a difference," though a court applying the new standard will look to the same facts and circumstances as a court applying the former standard.[37] Instead, the difference in application will come down to "emphasis."[38] It appears that, at least on the facts of *Matta*, even under the old "free to leave" standard as it was practically applied, a court also would have concluded that the defendant was not seized when the officer first asked to speak with him.[39]

The Appeals Court already has begun to apply the new standard.[40] In *Commonwealth v. Spring*, it considered a case involving a custodial interrogation.[41] The defendant in *Spring* was handcuffed in the backseat of a police cruiser, contributing to the conclusion that a reasonable person in the situation would believe that the police would compel him to stay if he tried to leave.[42] It is difficult to see a different result under the old test.[43] The Appeals Court also has applied the standard to search and seizure questions in several unpublished decisions,[44] but so far the standard did not change the outcome: in one case, the Appeals Court even observed that, under the facts of the case, the defendant was seized "under either the old 'not free to leave' standard or the new *Matta* standard."[45] The real work of *Matta*, it seems, will be done at the trial court level; indeed, one of the SJC's reasons for changing the standard appears to be that the old standard did not create relevant factual records for review.[46]

21. *Id*. at 362.
22. *Id*. at 361 n.3, 362.
23. *Id*. at 363.
24. *Id*. at 362.
25. *Id*. at 364.
26. Commonwealth v. Matta, 483 Mass. 357, 364 (2019); *see, e.g.,* Commonwealth v. Martin, 467 Mass. 291, 301, 303 (2014) (defendant not seized where officer simply said, "Hold on a second, I want to talk to you.").
27. *See* Commonwealth v. Barros, 435 Mass. 171, 174-76 (2001) (though police officer did not seize defendant by initially asking to speak with him, seizure occurred where officer persisted in ordering defendant to speak with him).
28. *Matta*, 483 Mass. at 364-65.
29. *Id*. at 365.
30. Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981).
31. Commonwealth v. Stoute, 422 Mass. 782, 789 (1996).
32. *Thibeau*, 384 Mass. at 764.
33. *Stoute*, 422 Mass. at 789 n.15.
34. *Id*. at 789 ("a pursuit, which, objectively considered, indicates to a person that he would not be free to leave the area (or to remain there) without first responding to a police officer's inquiry, is the functional equivalent of a seizure").
35. Commonwealth v. Matta, 483 Mass. 357, 365 (2019).
36. The SJC went on to conclude that the combination of facts known to the officer justified him in ordering the defendant to stop, including the tip suggesting that the defendant had a firearm (even though the tip was not found to be reliable); the defendant's adjustment of his waistband, which suggested that he had a firearm there; the fact that the defendant was walking toward a bush instead of a sidewalk; the fact that the officer was in a high-crime neighborhood; and the fact that the defendant ran away from the officer. *Id*. at 365-67. The court reiterated that none of these factors, taken individually, would have supported reasonable suspicion, but taken together, the officer's action was justified. *Id*. at 367.
37. *Id*. at 363.
38. *Id*.
39. *See* Commonwealth v. Martin, 467 Mass. 291, 301, 303 (2014).
40. Commonwealth v. Spring, 96 Mass. App. Ct. 648 (2019).
41. *Id*. at 650; see Commonwealth v. Groome, 435 Mass. 201, 211-12 (2001).
42. *Id*. at 652.
43. Nor did the new *Matta* standard change the outcome in an unpublished decision by the Appeals Court that also utilized the new language in determining whether a suspect was subjected to custodial interrogation. Commonwealth v. Scharn, 96 Mass. App. Ct. 1113 (2019) (unpublished).
44. *See* Commonwealth v. Polignone, No. 19-P-617, 2019 WL 7171337 (Mass App. Ct.) (Rule 1:28 order); Commonwealth v. Noah N., No. 18-P-1670, 2019 WL 7050137 (Mass. App. Ct.) (Rule 1:28 order).
45. Commonwealth v. Morales, No. 19-P-399, 2019 WL 6487284 (Mass. App. Ct.) (Rule 1:28 order).
46. Commonwealth v. Matta, 483 Mass. 357, 363 (2019).

The purpose of the new test, moreover, appears to be to refocus the factual and legal inquiry upon what the police do, because "while the attending circumstances of a police encounter are relevant, a 'seizure' must arise from the actions of the police officer."[47] This change in emphasis is a salutary one, because it should remove some confusion about what attendant circumstances are relevant in determining whether the police have seized a person. The new articulation also should put to rest some dissonance caused by the "free to leave" standard, whether in legal journals and based upon empirical inquiries[48] or by judges.[49] It matters not that, empirically, people do not subjectively feel free to leave a police encounter, because the subjective state of mind of the person being seized has nothing to do with whether the police's conduct objectively demonstrates that the police intend to effectuate a seizure. The SJC's modified approach is more consistent with the principle that there must be governmental involvement for a person's rights to be free from unreasonable searches and seizures.[50] It also is useful to reiterate that, in general, search and seizure questions look to the objective reasonableness of the conduct of state actors, and not to the subjective intentions of the police.[51] Because the focus should be on the external actions of state actors, the new test is more consistent with the rest of search and seizure jurisprudence than the old test, which may have caused the inquiry to focus too much on the thought process of the person being seized.

Though the *Hodari D.* standard would provide a more straightforward, bright-line rule that would only look to the external actions of the police, the SJC has reiterated its adherence to providing greater protection under art. 14 than exists under the Fourth Amendment to the United States Constitution.[52] This new standard may prove to be a more administrable objective test than that which preceded it.

The Park

The defendant also was convicted of violating G.L. c. 94C, § 32J,[53] for committing an enumerated drug offense within 100 feet of a public park.[54] In 1989, the legislature enacted the predecessor to the statute that would become G.L. c. 94C, § 32J.[55] As originally enacted, the statute provided for additional punishment for drug offenses committed within 1,000 feet[56] of a school.[57] The statute also specifically provided that: "Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section."[58] The 1989 version of the statute was challenged, but the SJC upheld it.[59] In 1993, the legislature added parks to the list of areas within the ambit of § 32J, but parks were not added to the sentence addressing lack of knowledge.[60]

The absence of the word "park" from the lack of knowledge clause, the defense argued, indicated that the commonwealth must prove that the defendant knew that he was within 100 feet of a park.[61] The SJC rejected this argument, pointing to the plain text of the statute, legislative purpose and decisional law.[62]

The plain text of § 32J does not require that the prosecution prove that the defendant knew he was within a certain distance of the enumerated protected zones.[63] The only reference to knowledge

47. *Id.*

48. *See* Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51, 78 (2009) (in survey of people from Boston, Mass., area, people who were aware that they did not have to speak to police nevertheless reported that they would not feel free to leave when police officer attempted to speak with them).

49. *See* United States v. Cardoza, 129 F.3d 6, 16 (1st Cir. 1997) (recognizing that "few people . . . would ever feel free to walk away from any police question").

50. *See In re* Jansen, 444 Mass. 112, 120 (2005).

51. *See* Commonwealth v. Buckley, 478 Mass. 861, 865-66 (2018).

52. *See* Commonwealth v. Franklin, 456 Mass. 818, 821-22 (2010).

53. Mass. Gen. Laws c. 94C, § 32J, as amended by St. 2018, c. 69, § 57, provides:

> Any person who violates the provisions of section 32, 32A, 32B, 32C, 32D, 32E, 32F or 32I while in, on or within 300 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational or secondary school if the violation occurs between 5:00 a.m. and midnight, whether or not in session, or within 100 feet of a public park or playground and who during the commission of the offense: (i) used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so during the commission of the offense; or (ii) engaged in a course of conduct whereby the person directed the activities of another person who committed any felony in violation of this chapter; or (iii) committed or attempted to commit a violation of section 32F or section 32K shall be punished by a term of imprisonment in the state prison for not less than 2 1/2 nor more than 15 years or by imprisonment in a jail or house of correction for not less than 2 nor more than 2 1/2 years. No sentence imposed pursuant to this section shall be for less than a mandatory minimum term of imprisonment of 2 years. A fine of not less than $1,000 nor more than $10,000 may be imposed but not in lieu of the mandatory minimum 2 year term of imprisonment as established herein. In accordance with section 8A of chapter 279 such sentence shall begin from and after the expiration of the sentence for violation of section 32, 32A, 32B, 32C, 32D, 32E, 32F or 32I.
>
> Lack of knowledge of school boundaries shall not be a defense to any person who violates this section.

54. *Matta*, 483 Mass. at 367-68.

55. *See* St. 1989, c. 227, § 2.

56. The legislature has since reduced the area from 1,000 to 300 feet. *See* St. 2012, c. 192, §§ 30, 31. *See also* Commonwealth v. Bradley, 466 Mass. 551, 552 (2012).

57. *See* Commonwealth v. Alvarez, 413 Mass. 224, 225 n.1 (1992).

58. St. 1989, c. 227, § 2.

59. Commonwealth v. Taylor, 413 Mass. 243, 248-50 (1992) (statute not unconstitutionally vague; statute does not violate equal protection); Alvarez, 413 Mass. at 228-36 (lack of *mens rea* for element of knowledge of school boundaries does not violate due process; imposition of consecutive sentences does not violate Massachusetts "same evidence" rule; imposition of mandatory consecutive sentences does not violate prohibition on cruel or unusual punishment).

60. St. 1993, c. 335; *see Matta,* 483 Mass. at 369.

61. *Matta*, 483 Mass. at 368.

62. *Id.* at 370-71.

63. Mass. Gen. Laws c. 94C, § 32J.

in the statute is the disclaimer that lack of knowledge of the location of school boundaries is not a defense.[64] The absence of the word "park" from that clause does not imply that the prosecution must prove that the defendant knew he was within 100 feet of a park, the SJC concluded.[65] Further, the legislature's purpose in enacting 32J was better served with this plain text reading of the statute: the risk of harm posed to children by drug dealing within 100 feet of a park exists whether or not the defendant is subjectively aware of the park.[66]

The Appeals Court had also rejected the same argument in 2007 with respect to preschools, another area that the legislature added to the ambit of § 32J, without adding those areas to the lack of knowledge sentence.[67] In 1998, the legislature added accredited preschools and "headstart" facilities to the statute as protected areas.[68] The Appeals Court noted that despite the addition of parks and preschools to § 32J, the legislature had not amended the lack of knowledge clause to include those new areas.[69] Nevertheless, the legislature did not intend that there be a *scienter* requirement for preschools (and, by extension, parks) because "the imposition of strict liability pursuant to G.L. c. 94C, § 32J, does not turn on the last sentence of the statute."[70]

In *Matta*, the SJC observed that the legislature amended 32J twice in the years between *Lawrence* and the date of the defendant's crimes, but despite reducing the size of the school zone from 1,000 to 300 feet, and other changes, it did not revisit the lack of knowledge clause.[71] The legislature was presumed to have adopted the Appeals Court's construction of the statute, the SJC reasoned.[72] In other words, legislative silence in the face of a judicial construction of the statute as to a *mens rea* requirement, while the legislature in the same period of time amended the statutes in unrelated ways, indicated to the SJC that the legislature adopted the Appeals Court's interpretation.

What function does the lack of knowledge clause serve? The SJC seems to have followed the Appeals Court's *Lawrence* decision, at least in part, in reaching its conclusion; but in that decision, the court's rationale turned on the fact that the lack of knowledge clause is not the reason why § 32J dispenses with a *mens rea* element with respect to the defendant's knowledge that he is within the protected zone.[73] In *Matta*, the SJC pointed to *Commonwealth v. Alvarez*,[74] in which it had discussed the constitutionality of the absence of a *mens rea* requirement in the 1989 version of § 32J.[75] There, the defendant argued that a criminal statute that lacked a *mens rea* element was constitutionally suspect, and relied on cases where appellate courts had read knowledge elements into statutes.[76] The *Alvarez* court rejected this argument: where some other statutes were silent as to *mens rea*, § 32J specifically stated that there was no element of knowledge of presence in the protected zone.[77] This provision avoided the clarity problem that had caused courts to read knowledge elements into statutes.[78]

Besides this, the SJC reasoned in *Alvarez*, § 32J is not truly a strict liability statute, because its predicate offenses have elements of knowledge or intent.[79] In that regard, § 32J is akin to the trafficking statute,[80] which has a knowledge requirement as to possession of the controlled substances, but increases penalties based upon the weight of the controlled substance without any need to prove knowledge of the specific weight of the controlled substance.[81] As long as there is some element of *mens rea* in the statute, the failure to spell out specifically that there is no *mens rea* as to another element will not lead to an appellate court construing the statute to have a *mens rea* in order to allay concerns of due process. Statutes like G.L. c. 94C, § 32E and § 32J avoid the potential due process problems posed by other, truly strict liability statutes that lack clear statements of legislative intent, because at their heart, trafficking controlled substances and park zone violations are not completely lacking in *mens rea*.[82] General Law chapter 94C, § 32J simply is not the type of strict liability statute into which a court would feel compelled to read a *mens rea* requirement, even without a clear statement of legislative intent. The *Matta* court's reliance upon *Lawrence* suggests that the legislature never needed to include the lack of knowledge clause in this statute in order to survive the due process challenge raised against the

64. *Id.*
65. *Matta*, 483 Mass. at 370.
66. *Id*. at 371.
67. Commonwealth v. Lawrence, 69 Mass. App. Ct. 596, 600 (2007).
68. *Id*. at 599; *see* St. 1998, c. 194, § 146.
69. *Id*. at 599.
70. *Id*. at 600.
71. *Matta*, 483 Mass. at 371.
72. *Id*.
73. *Lawrence*, 69 Mass. App. Ct. at 600.
74. 413 Mass. 224 (1992).
75. *Matta*, 483 Mass. at 370.
76. *Alvarez*, 413 Mass. at 228-29.
77. *Id*. at 229.
78. *See, e.g.*, Commonwealth v. Buckley, 354 Mass. 508, 511-12 (1968) (reading knowledge requirement into statute criminalizing "being present where a narcotic drug is illegally kept or deposited" to avoid constitutional concerns, in absence of explicit language stating that there is no *mens rea*).
79. *Alvarez*, 413 Mass. at 230. For example, the predicate offense in *Matta* was possession of heroin with intent to distribute it, which requires proof of knowing possession of heroin while also having the intent to distribute the drugs. *See* Mass. Gen. Laws c. 94C, § 32.
80. Mass. Gen. Laws c. 94C, 32E.
81. *See* Commonwealth v. Rodriguez, 415 Mass. 447, 452-53 (1993).
82. Unlike, for example, the predecessor statutes to Mass. Gen. Laws c. 269, § 10(a), criminalizing unlicensed possession of firearms, into which the SJC read a knowledge requirement. *See generally* Commonwealth v. Brown, 479 Mass. 600, 607 (2018) (discussing history of Mass. Gen. Laws c. 269, § 10(a) and predecessor statutes).

statute in *Alvarez*. It also seems that the true rationale behind the rejection of the due process challenge in *Alvarez* is that the statute is not strict liability, as opposed to the argument that the statute contains a clear statement of legislative intent to dispense with *mens rea*. It would seem that the clause serves no purpose other than to demonstrate that the 1989 legislature wished to preserve § 32J from challenges in the nature of *Commonwealth v. Buckley*.[83]

The SJC also continued its broad interpretation of § 32J by rejecting the defendant's contention that the land at issue in this case should not be considered a park because it was a pedestrian walkway.[84] The SJC had not had occasion to determine what a "park" is within the meaning of § 32J, an undefined term in the statute.[85] The court, looking to dictionary definitions and its own case law, settled on "a tract of land maintained by a city or town as a place of beauty or of public recreation."[86] A pedestrian walkway such as the one at issue in this case is not categorically excluded from this definition.[87] The SJC emphasized what the prosecution must prove: both that the land is used for public recreation, and that the land is set aside to be so used.[88] This definition should prevent overreach by the prosecution because, say, a vacant lot that is incidentally used by people for recreation would not be considered a park because it is not intended to be used for recreational purposes. It also will prevent calling a traffic island, which is maintained by a parks and recreation department, a park under § 32J because such a location would not, in practice, be used for recreation.

The SJC cautioned, however, that principles of property law surrounding dedication of land are not necessary elements to be proven in a prosecution under § 32J.[89] The question of whether a tract of land is a park is a question of fact, which may be proven circumstantially by photographs, maps, and the testimony of those involved with maintaining the property.[90] This approach is consistent with an Appeals Court decision that affirmed a conviction under § 32J where that defendant argued that the commonwealth had failed to prove that the particular piece of land near where he had committed his drug offenses was, as a matter of fact, a preschool.[91] The defense, however, is not doomed once the commonwealth puts on circumstantial evidence that a piece of land is a park because one can argue that the land only happens to be used as a park, such as the vacant lot example, and is not actually dedicated to such use by its owner.[92] The SJC suggested, but did not hold, that under its new definition of what a park is, the evidence at trial was insufficient to show that the land at issue was a park, pointing to a dearth of evidence showing the intended use of the walkway, or that it was actually used by members of the public for recreational purposes.[93]

Conclusion

The SJC took the occasion of this case to significantly clarify certain areas of criminal practice. The court has meaningfully modified the *Mendenhall* "free to leave" standard with the apparent hope that the new rule better articulates that the focus of inquiry in determining whether a seizure has occurred is police conduct, and that the question is an objective one. The practicalities of park zone cases under § 32J have also been elucidated by sensibly explaining the meaning of the "lack of knowledge" clause and clarifying the type of evidence that should be adduced to both support and attack such a charge.

— Travis Lynch

The author represented the commonwealth in Matta *before the SJC. Any views expressed herein are those of the author himself and are not the views of any organization with which he works or is affiliated.*

83. *Buckley*, 354 Mass. at 511-12.

84. Commonwealth v. Matta, 483 Mass. 357, 372-73 (2019).

85. *Id*. at 372.

86. *Id.; see also* Commonwealth v. Davie, 46 Mass. App. Ct. 25, 28 (1998) (adopting same dictionary definition).

87. *Id*. at 373.

88. *Id*.

89. *Id*. For a case where the dedication of a public park was an issue, *see* Smith v. City of Westfield, 478 Mass. 49, 58-59 (2017). *Smith* and *Matta* had the same trial court judge.

90. Commonwealth v. Matta, 483 Mass. 357, 373 (2019).

91. *See* Commonwealth v. Cruz, 90 Mass. App. Ct. 60, 63-64 (2016).

92. *Matta*, 483 Mass. at 373.

93. *Id*. at 375. The SJC also did not address what instructions should be given to the jury, but noted that those given by the trial judge were in accordance with the definition of park that the SJC derived from the dictionary and its own cases. *Id*. at 373 n.16. The court did not say, however, whether such an instruction is strictly necessary.

Book Review

Confirmation Bias

By Carl Hulse (Harper-Collins 2019), 310 pages

On June 25, 1987, after 15 years of service, Justice Lewis F. Powell unexpectedly resigned from the Supreme Court of the United States.[1] Five days later, President Ronald Reagan nominated Robert H. Bork to replace him. Bork was then a judge on the United States Court of Appeals for the District of Columbia Circuit, a position to which Reagan had appointed him six years earlier. Before that, Bork had had a distinguished career. He was a professor at Yale Law School, a prominent proponent of a form of constitutional interpretation known as "originalism," and a keynote speaker at a gathering of lawyers hosted at Yale in April 1982, which many view as the beginning of the Federalist Society.[2] In addition to his academic achievements, Bork had served as the solicitor general under President Richard Nixon. In October 1973, in what became known as the Saturday Night Massacre, Bork carried out Nixon's order to fire Special Prosecutor Archibald Cox after both Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than comply with President Nixon's order.

Bork's "originalist" approach to constitutional interpretation had at least as many strong opponents as it had supporters and, though many years had passed, his role in firing Cox still generated anger among many in Washington and beyond. Senator Edward Kennedy was among them. Within hours of Reagan's announcement, Kennedy took to the Senate floor to tell his assembled colleagues and the nation how he felt about the nominee. "Robert Bork's America," Kennedy said,

> is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy. America is a better and freer nation than Robert Bork thinks. Yet in the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.[3]

President Reagan, he concluded, "should not be able to . . . reach into the muck of Watergate, and impose his reactionary vision of the Constitution on the Supreme Court and on the next generation of Americans."[4]

Thus began a confirmation clash that ended four months later when the Senate rejected Bork's nomination by a vote of 58-42 largely, though not entirely, along party lines.[5] Kennedy's rhetoric, and the ensuing fight over Bork, created deep and sustained wounds on many fronts. As Carl Hulse sees it, the fight also began what has become the highly partisan confirmation process we see today. Hulse is the chief Washington correspondent for the *New York Times*, and has been reporting from the Capitol for more than three decades. *Confirmation Bias* is his exploration of the political forces that changed a judicial appointment process historically characterized by substantial Democrat and Republican deference to presidential choice into the often ferociously partisan process we see today.

In Hulse's telling, hints of the transformation actually began to appear in 1985, when Democrats resisted the nomination of Alex Kozinski to the United States Court of Appeals for the Ninth Circuit, albeit on grounds of temperament, not ideology. Kozinski was confirmed but only by what then was a narrow margin for a court of appeals nominee. Energized by their near success, the Democrats

1. Al Kamen, *Justice Powell Resigns, Was Supreme Court's Pivotal Vote,* Wash. Post (June 27, 1987), https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell062787.htm.

2. Carl Hulse, Confirmation Bias, 60 (Harper-Collins, 2019).

3. *Robert Bork's America*, Wikisource (March 20, 2016), https://en.wikisource.org/wiki/Robert_Bork%27s_America.

4. *Id.*

5. Hulse, *supra* note 2, at 59.

successfully fought the 1986 nomination of Jeff Sessions to a federal district court seat in Alabama, an almost unheard-of rejection of a nomination that had the support of both senators from the state where the nominee resided. The fight over Bork rested heavily on ideology, as did the 1991 struggle over the nomination of Clarence Thomas, at least until his confirmation hearings were consumed by the testimony of Anita Hill and its ramifications.

But whenever the deeply partisan approach began, the gloves clearly came off in late 2000, after the Supreme Court ordered a halt to the recount of presidential votes in Florida, thus assuring the election of George W. Bush as the nation's 43rd president. To Democrats, the order was a frankly political act that was likely to produce appointments of "right-wing after right-wing after right-wing judges" as Chuck Schumer, then-chair of a Senate Judiciary Subcommittee on the Courts, put it.[6]

To address the onslaught he described, Schumer convened a Judiciary Committee hearing he titled "Should Ideology Matter," ostensibly to explore the extent to which the Senate could and should consider a judicial nominee's ideology during the confirmation process. His own answer to the question was clear. The Senate, he said, is justified in opposing "judicial nominees whose views fall outside the mainstream and have been selected in an attempt to further tilt the courts in an ideological direction."[7] Indeed, to Schumer, the Senate's historic,

> unwillingness to openly examine ideology has sometimes led Senators who oppose a nominee to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their position. This, in turn, has led to an escalating war of 'gotcha' politics that, in my judgment, has warped the Senate's confirmation process and harmed the Senate's reputation.[8]

In a preview of differences that continue to resonate today, Mitch McConnell, then a member of the subcommittee, voiced a distinctly different view. "[W]hat I fear is going on here," he said,

> is an effort to establish a new standard under which nominees are judged and a litmus test is established that substantially is at variance with the majority of the American people. . . . What appears to be happening — and I hope this will not prove to be the case — is that some on the left are increasingly dedicated to shutting down the vibrant marketplace of ideas and replacing it with a monopoly of thought where the only commodity to be bought is a kind of liberal orthodoxy. . . . . That is why the safest place to be and the sound place to be, and the place where the Senate has been most of the history of our country is largely deferring to the president on the question of ideology and judging the competence and integrity of the nominee.[9]

At that time, though, several factors retarded the incipient impulse to view judicial nominations on purely ideological grounds. The Senate was not driven by partisan political impulses to the extent that it later became. Indeed, in rejecting Bork's nomination, six Republicans had joined the Democrats in the negative vote and two Democrats had joined the Republicans in voting to confirm. Moreover, two structural barriers — the filibuster and the blue slip — were respected by both sides and provided circuit breakers against fully partisan or ideological proceedings. The filibuster, long a feature of the Senate's interest in looking after rights of the chamber's minority members, required a vote of 60 members to cut off debate on an issue, including a judicial confirmation, so that an up-or-down vote could be held. As a practical matter, the rule meant that 60 favorable votes were necessary to confirm judicial nominations. The blue slip rule, a Judiciary Committee custom dating from 1917 and rigorously enforced by Judiciary Committee chairs of both parties, provided that a judicial nominee would not receive a hearing before the Judiciary Committee unless both senators from the nominee's home state affirmatively notified the chair, via a blue slip of paper, that they had no objection to the nominee.[10] Over many years, both Republicans and Democrats had been well served by those rules, and both had been committed to their observance.

But after the 2000 election of President Bush, that commitment began to waver. Deeply offended by what they viewed as the Supreme Court's partisan decision in the Florida recount case, Democrats, beginning in 2003, held up 10 different Bush nominations to federal appeals courts over the course of 20 votes. In frustration, Republicans began to talk of a "nuclear option," which would change the filibuster rule so that 50 votes would be sufficient to end debate on judicial nominations and allow the Senate to proceed to an up-or-down vote on specific nominees.

Some senators on both sides of the aisle thought that abolition of the 60-vote requirement was a terrible idea. Their desire to preserve

6. *Id.* at 67.
7. *Id.* at 68.
8. *Id.*
9. *Id.* at 69.
10. *Id.* at 98.

at least some aspects of the requirement led to formation of what came to be known as the "Gang of 14," a combination of seven Republicans and seven Democrats who valued the brake on majority rule the filibuster provided. After extended discussions, they ultimately agreed on a plan that would preserve the rule but restrict its use to "extraordinary circumstances." While they did not define "extraordinary circumstances," thus leaving each member free to determine for him or herself whether such circumstances existed, they did effectively pledge to allow a bare majority of senators to confirm presidential nominees in the ordinary course while retaining a brake for use on appointment of nominees who presented what they determined were "special circumstances." As a result of that compromise, a series of President Bush's long-pending appeals court nominations, including that of Brett M. Kavanaugh, were finally confirmed.[11]

With President Barack Obama's election in 2008, however, positions began to change. To be sure, Obama's Supreme Court nomination of Sonia Sotomayor in 2009, and of Elena Kagan the following year, were confirmed by substantial majorities. However, the "Gang of 14" disbanded and Republicans began frequent use of the filibuster to prevent votes on lower court nominations. With respect to the United States Court of Appeals for the District of Columbia Circuit, for example, none of Obama's first-term nominees was confirmed. In his second term, there were four vacancies on the 11-member court but only one of his nominees, Sri Srinivasan, who had worked in the office of the Solicitor General under both Presidents Bush and Obama, was confirmed.[12]

Early in his second term, Obama, clearly frustrated by his inability to obtain a vote on his D.C. Circuit nominations, simultaneously sent the Senate nominations for the three open seats on that court.[13] In response, Republicans initially took the position that the court was not very busy and did not need additional judges.[14] That approach echoed the Democratic response to President Bush's 2006 nomination of Peter Keisler to the same court. Keisler's nomination had been returned to the president without action after the Democratic-controlled Judiciary Committee, citing the D.C. Circuit's low workload, declined to give him a hearing.[15] Ultimately, though, Obama's three nominations came to the floor for a vote. All three were filibustered and no up-or-down votes occurred.

At that point, the Democrats, whose effective 53-47 majority was insufficient to end the filibusters and who saw no sign of Republicans who were willing to allow up-or-down votes on any of the nominees, began to discuss the "nuclear option." Joining many of his Republican colleagues, Chuck Grassley, then the ranking member of the Judiciary Committee, warned against it. "Be careful about what you wish for," he said. "There are a lot more Scalias and Thomases out there that we'd love to put on the bench."[16] Mitch McConnell blamed the Democrats for the position in which they found themselves, recalling the earlier Democratic filibusters that had produced the "Gang of 14." Anticipating that the Democrats would seek to exclude Supreme Court nominations from their exercise of the nuclear option, he told them that "this sort of gerrymandered version of the nuclear option is wishful thinking."[17] He concluded by saying, "to my friends on the other side of the aisle, you will regret this, and you may regret it a lot sooner than you think."[18]

Undeterred, on Nov. 21, 2013, the Democrats brought forward the nomination of Patricia Millett, an experienced appellate lawyer who had represented both the Clinton and Bush administrations before the Supreme Court, and who was one of the three nominees Obama had sent to the Senate earlier that year. The Republicans began to filibuster her proposed confirmation and Harry Reid, the Senate majority leader, moved that the votes required to end a filibuster be reduced from 60 to 51. Under Senate rules, Reid's motion could not be filibustered and required only a majority vote for approval. Reid's motion passed by a margin of 52-48, with three Democrats siding with Republicans in opposition. The nuclear option had been detonated and Millett was confirmed.[19]

Control of the Senate changed in 2015 after Republicans won nine Democratic seats in the 2014 midterm elections. A year later, on Feb. 13, 2016, Justice Antonin Scalia died suddenly while vacationing with friends at a Texas resort.[20] Upon learning of his death, McConnell, who with the change in control had become the Senate majority leader, almost instantly decided that the Senate would not consider a nomination to fill his seat until after the presidential election scheduled for later that year. Nevertheless, President Obama nominated Merrick Garland, a judge on the United States Court of Appeals for the District of Columbia Circuit, to fill Scalia's seat. Garland was highly respected in Washington legal circles and had received significant Republican support for his appointment to the Court of Appeals.

But storm warnings were flying. Not only had McConnell said that the Senate would not entertain any nominations, but Texas

11. Hulse, *supra* note 2, at 86-93.
12. *Id.* at 102.
13. *Id.*
14. Chuck Grassley, *D.C. Circuit Caseload Doesn't Justify Additional Judges,* (Oct. 31, 2013), https://www.grassley.senate.gov/news/news-releases/dc-circuit-caseload-doesnt-justify-additional-judges.
15. Hulse, *supra* note 2, at 104.
16. *Id.* at 107.
17. *Id.* at 111.
18. *Id.*
19. *Id.*
20. *Id.* at 7.

Senator John Cornyn, then the Senate's number two Republican, announced that whoever Obama selected would be treated like a "piñata" when his or her nomination reached the Senate. Explaining his position, Cornyn said that the Democrats had created a new set of rules when they "Borked" Robert Bork's nomination 28 years earlier and later exercised the "nuclear option" so that they could pack the D.C. Circuit with judges who would not question Obama's use of "executive orders [to circumvent] the role of Congress."[21] He concluded by saying, "this is a playbook that has been written by the Democratic leader and our colleagues across the aisle. Do they expect us to operate under a different set of rules?"[22]

Garland, of course, was not confirmed and the Scalia seat remained open for the rest of the year, with Republicans explaining that the voters should have a say on who should be allowed to fill the open seat. Indeed, after Donald Trump won the Republican nomination, he released a list of 21 people[23] from which he pledged to choose a successor to Justice Scalia. According to polling data, the list and Trump's pledge to nominate Scalia's successor from it were significant factors in the decision many voters made to support him.

After his inauguration, Trump promptly nominated Neil Gorsuch to fill Justice Scalia's seat. Gorsuch was on the list and had been appointed to the United States Court of Appeals for the 10th Circuit by President George W. Bush. Viewing Gorsuch as far too conservative, Democrats resisted his confirmation. After a failure of efforts by some to resurrect a modified version of the "Gang of 14" approach, the nomination reached the floor of the Senate. Democrats started to filibuster and, in a mirror image of the earlier Democratic effort, Republicans by a majority vote changed the cloture requirements for Supreme Court nominations to a bare majority. With that change, Gorsuch was approved by a vote of 54-45.[24] By eliminating the filibuster rule, Republicans also were able to obtain confirmation of Brett Kavanaugh when Justice Anthony Kennedy unexpectedly retired a little more than a year later.

That left in place only the "blue slip" rule as a mechanism for minority senators to exercise some control over appointments to lower federal courts. As noted earlier, that rule, though informal, had been rigorously enforced for nearly 100 years. After President Obama's election, rumors began to circulate that he and the Democrats would abandon the rule, and the rumors sufficiently concerned Republican senators that they all signed a letter to Obama urging that he and the Senate Democrats adhere to the rule when making nominations and confirmation decisions. Democrats thereafter scrupulously honored the blue slip process even though they were unable to fill a number of lower federal courts seats because of Republicans' use of negative blue slips regarding Obama nominations.

When they won control of the Senate in 2014, Republicans reciprocated. Indeed, when he chaired the Judiciary Committee, Senator Grassley wrote a 2015 op-ed for the Des Moines Register in which he said,

> Over the years, Judiciary Committee chairs of both parties have upheld a blue-slip process, including Sen. Patrick Leahy of Vermont, my immediate predecessor in chairing the committee, who steadfastly honored the tradition even as some in his own party called for its demise. I appreciate the value of the blue-slip process and also intend to honor it.[25]

But that was then. After Gorsuch was confirmed, McConnell announced that "the blue slip, with regard to circuit court appointments, ought to simply be a notification of how you're going to vote, not the opportunity to blackball."[26] Following the same theme, Grassley said that "Democrats seriously regret that they abolished the filibuster, as I warned them they would. But they can't expect to use the blue slip courtesy in its place. That's not what the blue slip is meant for."[27]

The net effect of all of this is that, if it chooses to do so, a political party in control of the White House and the Senate can do as it pleases with respect to judicial nominations without needing assistance from the other party and, to the extent that those in control wish to use ideology or a candidate's view of an issue that has some political significance as the test for appointment, they can do so freely. In the past three years Republicans have done so[28] and have even begun to suggest that sitting judges appointed by Republican presidents retire now so that they be assured of successors also appointed by Republicans.[29] "That is the collateral damage that is going to flow over time from abandoning the 60-vote requirement," said Lindsey Graham, in an address to Senate Democrats after he assumed chairmanship of the Judiciary Committee in 2019.

21. Hulse, *supra* note 2, at 117.

22. *Id*.

23. Jeremy Berke, *Here's president-elect Donald Trump's list of potential Supreme Court nominees*, Business Insider (Nov. 9, 2016, 4:26 PM), https://www.businessinsider.com/president-elect-donald-trump-supreme-court-list.

24. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. Times (April 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html. Three Democrats joined their Republican colleagues in voting to confirm the nomination.

25. Hulse, *supra* note 2, at 191.

26. *Id*. at 187.

27. *Id*. at 190.

28. *See, e.g.,* Rebecca R. Ruiz, Robert Gebeloff & Ben Protess, *These Judges Are Shifting the Appeals Courts to the Right,* N.Y. Times (March 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-takeaways.html?searchResultPosition=2.

29. Carl Hulse, *McConnell Has a Request for Veteran Federal Judges: Please Quit,* N.Y. Times (March 16, 2020), https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html?action=click&module=Top%20Stories&pgtype=Homepage.

> Right now we don't need any of you all, and there will come a day when you don't need any of us. Judges are going to be more ideological because you don't have to reach across the aisle to get anybody's input, and it is going to have an effect over time on the judiciary that I very much regret. The worst is yet to come.[30]

Confirmation Bias is an even-handed and highly readable description of a process that has become deeply partisan over the last 40 years and that is now badly broken, perhaps irreparably. To be sure, there have been fights in the past over Supreme Court decision-making. President Franklin Roosevelt, for example, was ferocious in his criticism of the Court when, in case after case, it struck down New Deal legislation with which he sought to combat the depression the country was then experiencing. His threat to change the Court's composition is widely, though probably wrongly, regarded as influencing Justice Owen Roberts to switch his approach to cases involving New Deal economic legislation. "Impeach Earl Warren" signs abroad in the land throughout 1950s and 1960s reflected popular anger in some quarters over the Court's civil rights and criminal justice decisions.

But today's fights feel different and not just because we are living through them. The Court is involved in a broad range of social issues that deeply divide the nation and the outcome-oriented appointment and confirmation process utilized both by Republicans and Democrats has created a view in the minds of many that the Court is just another political power center, not a place for thoughtful and impartial resolution of constitutional problems through even-handed application of neutral principles. That perception has consequences. Chief Justice John Roberts undoubtedly was thinking of those consequences when he issued his November 2018 statement that

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.[31]

As a nation committed to the rule of law, we have time and time again seen politicians carry out unpopular judicial orders and support unpopular judicial decisions because to do otherwise was unthinkable, something for which the public simply would not stand. It is not unrealistic to fear that if more and more Americans begin to view the Court simply as a power center and its rulings as exercises in power, not interpretations of law, respect for those rulings will weaken, weakening with it the imperative for adherence. That is probably not what Senator Graham had in mind when he said, "the worst is yet to come," but that is what he should have had in mind. After all, he and his colleagues on both sides of the aisle are in a position to stop it.

— James F. McHugh

30. Hulse, *supra* note 2, at 285.

31. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. Times (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

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