Massachusetts Law Review

Volume 102, No. 1 Published by the Massachusetts Bar Association

Massachusetts Law Review

VOLUME 102 NUMBER 1

December 2020

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CORRECTION TO VOL. 101, NO. 4: 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: Franklin County Justice Center. 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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Out With the Old: The Demise of the Abatement Doctrine in Massachusetts

By Roger L. Michel Jr., Esq.

I. Introduction

The subject of a popular Netflix documentary earlier this year, the story behind the trial and conviction of former New England Patriots player Aaron Hernandez, has captivated the public imagination from the moment of his arrest on June 26, 2013. As *Time* magazine reported recently, "Aaron Hernandez's downfall from football star to convicted murderer is one of the most notorious cases to emerge from not just the NFL, but the sports world at large."[1] For more than a year and a half, every aspect of the trial proceedings was the subject of intense media scrutiny in the run-up to his eventual conviction of first-degree murder and related firearms charges on April 15, 2015. His suicide in prison almost exactly two years later added a final lurid twist to an already sensational story of crime and punishment. It also introduced the possibility that Hernandez might escape the opprobrium of his convictions, with the judgment — even the charges — dismissed under the ancient doctrine of "abatement *ab initio*." As the *New York Times* declared in the wake of Hernandez's suicide: "Now, under the quirks of an archaic legal doctrine used in Massachusetts, Hernandez will most likely get something he and his lawyers had fought for. His conviction is expected to be vacated by a court because of his death."[2] In the end, however, the outcome was otherwise; the Hernandez case provided the Supreme Judicial Court (SJC) with an opportunity to revisit and ultimately revoke an obscure legal principle that it came to doubt had ever been adopted in the first place.

II. Underlying Facts

On the evening of June 16, 2013, Hernandez contacted the victim, Odin Lloyd, and requested that they get together to "step" (i.e., socialize), as the men had done two days before when they visited Rumor, a Boston nightclub. Lloyd reluctantly agreed. Hernandez then contacted his soon-to-be accomplices, Ernest Wallace and Carlos Ortiz,[3] and directed them to come immediately to his house in North Attleboro, where Hernandez met them just before 1 a.m.

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In fact, Hernandez had no intention of socializing with Lloyd. After extensive preparations (all of which were captured on home surveillance video), including obtaining a Glock .45-caliber handgun (the type of gun used in the murder), Hernandez and his associates left the house and drove in a rental car — a Nissan Altima — to Lloyd's home in Dorchester. With Hernandez behind the wheel, the three men picked up Lloyd at approximately 2:30 a.m., at which time all publicly licensed clubs in the City of Boston were closed.

Hernandez then headed back toward his house in North Attleboro, ultimately bringing Lloyd to an isolated field within an industrial park a short distance from Hernandez's home. Video surveillance, cellphone tower information, Department of Transportation photographs, and other records confirmed the route of travel and entry into the industrial park at approximately 3:24 a.m. This timing was subsequently corroborated by a witness who reported hearing gunshots at approximately 3:30 a.m.

According to forensic evidence, while Hernandez was seated

1. "Netflix Docuseries 'Killer Inside: The Mind of Aaron Hernandez' Probes the Secret Life of the Convicted Killer and Ex-NFL Star," Time, Jan. 15, 2020.
2. Bill Pennington, "The Fall of Aaron Hernandez," N.Y. Times, April 19, 2017.
3. In 2016, both men pled guilty to being an accessory after the fact to Lloyd's murder; both received four-and-one-half to seven-year committed sentences.

inside the vehicle, he fired the first of six rounds at Lloyd, who was also inside the car, from a Glock .45-caliber semi-automatic handgun. A rental car company employee later recovered a shell casing with Hernandez's DNA on it from beneath his seat. After firing the first shot, Hernandez stepped out of the car and moved from the driver's side toward the passenger's side where Lloyd sat. A footwear impression of a size 13 Nike "Air Jordan Retro 11" was found at the scene, along the presumptive path that Hernandez had taken around the car. There was evidence that he was wearing that same size and type of shoe at the time of the killing.

Forensic evidence also showed that the next three shots struck Lloyd while he was standing or crouching near the vehicle. The final two shots were fired into Lloyd's chest as he lay helpless on the ground. Those last two rounds penetrated Lloyd's body completely on both the right and left sides of his chest and lodged in the ground underneath him.

Additional inculpatory physical evidence was found at the scene of the murder. A marijuana cigarette containing DNA from both Hernandez and Lloyd was recovered from the ground next to Lloyd's body. Also near the body were tire tracks that were matched and individualized to the rented Nissan Altima.

Video evidence indicated that approximately four minutes after entering the industrial park, Hernandez drove Ortiz and Wallace away from the area. Along the escape route, Hernandez disposed of a small-caliber handgun. Very shortly thereafter, Hernandez and his associates arrived at his nearby house to rest, relax and socialize.

Upon arrival, Hernandez began to direct the actions of Wallace and Ortiz. As before, he was seen on his home surveillance video with a gun identical to the murder weapon. With his fiancée and infant daughter sleeping on the second floor of the house, Hernandez and his cohorts retreated to the basement and deactivated the video surveillance cameras.

The next morning, Hernandez reactivated his home surveillance system. The resulting images show him apparently relaxed, playful and happy. Once again, Hernandez appeared to be directing the actions of his associates. At one point, he is seen removing a handgun ammunition clip (consistent with the type used in a Glock .45) from inside the passenger compartment of the rental car.

Later that day, Hernandez returned the Nissan Altima — despite the fact that it was not yet due back — and obtained a new rental car. He made false statements to representatives of the rental company about damage to the car. Fingerprint and other evidence confirmed that Hernandez, Wallace, Ortiz and Lloyd had all been inside the vehicle.

Lloyd's body was discovered that afternoon, June 17, 2013. Immediately thereafter, Hernandez undertook various actions designed to destroy evidence and so conceal his guilt. While he was at the North Attleboro police station providing a statement, Hernandez contacted his fiancée and asked her to destroy all of the video images captured by his home surveillance system during the previous two days. He also directed Wallace and Ortiz to flee the commonwealth.

On June 18, Hernandez asked his fiancée to dispose of a box that, based on other evidence, inferentially contained the murder weapon. In addition, over the course of the next few days, Hernandez lied to family members, friends, co-workers and his employer about his whereabouts on the night of the murder; he tried to secure the silence of the women who cleaned his home regarding firearms they had observed there; and he continued to assist in the flight/concealment of his accomplices.

Following his convictions on all charges on April 15, 2015, Hernandez was remanded into the custody of the Massachusetts Department of Correction (DOC). After classification, he was assigned to the commonwealth's maximum-security prison, the Souza-Baranowski Correctional Center, in Shirley, Massachusetts. In the early morning hours of April 19, 2017, Hernandez hanged himself inside his single-occupancy cell.[4]

Hernandez had blocked the windows of his cell, apparently to avoid being seen by guards during wellness checks. Further, he jammed cardboard into the track of the cell door to impede access by rescuers or others. He left three handwritten notes evidencing his intention to kill himself. In one of those notes, addressed to his fiancée and the guardian of their child, Hernandez stated: "You're rich!" The death certificate, dated April 20, 2017, lists the manner of death as "suicide."

III. Procedural History

The procedural history in this case is relatively straightforward. As noted, on April 15, 2015, Hernandez was convicted of first-degree murder, unlawful possession of a firearm and unlawful possession of ammunition. His trial had lasted more than three months, during which more than 130 witnesses testified and 439 exhibits were introduced into evidence. As to the murder charge, the defendant was sentenced to the statutory mandatory term of life in prison without the possibility of parole. With respect to the other convictions, the defendant received concurrent determinant committed sentences.

On April 20, 2017, the day after Hernandez had hanged himself

4. Five days earlier, on April 14, 2017, Hernandez had been acquitted by a Suffolk County jury of unrelated first-degree murder charges in connection with the 2012 shooting deaths of Daniel de Abreu and Safiro Furtado.

in prison, his appellate attorneys filed both a suggestion of death and a motion in the Superior Court seeking abatement *ab initio* of his convictions and dismissal of the indictments. In essence, his attorneys asked the court to nullify the jury's verdicts, and restore the defendant's presumption of innocence based foundationally on the premise that a conviction is not final unless and until it is tested on appeal. Although the trial judge (Garsh, J.) acknowledged "the harsh emotional effects of abatement on victims and their families," she indicated that she was "constrained" to allow the defendant's motion, and did so by means of a lengthy written decision.[5]

The commonwealth appealed,[6] asserting *inter alia* and in the alternative that the Superior Court judge's order: (1) gave force to a legal doctrine that lacks any cogent historical, legal or commonsense basis; (2) was inconsistent with the emerging law of both the commonwealth and other jurisdictions that favors striking a reasonable balance between the rights of victims and defendants; (3) rewarded the defendant's deliberate act in taking his own life as a means of obtaining legal advantages, contrary to settled waiver and estoppel principles; and (4) opposed a strong public policy favoring the maintenance of comprehensive and accurate records of criminal proceedings.

By way of remedy, the commonwealth asked the SJC, *inter alia*, to either: (1) abolish the abatement *ab initio* doctrine altogether as contrary to settled law and public policy favoring the finality of verdicts and respect for the rights of the victims of crime; (2) adopt a flexible and case-specific approach to abatement that balances the rights of all parties with a valid interest in the proceedings in proportion to their continuing interest in the case; or (3) determine that the present case, under existing law, evinces sufficient "special circumstances" such that the interests of justice — including well-grounded concerns regarding the defendant's improper manipulation of the trial and ancillary civil proceedings through his suicide — preclude application of the abatement *ab initio* doctrine. Further, in light of the absence (as noted, infra) of any fully articulated rationale for the abatement *ab initio* doctrine in the reported law of the commonwealth, the government also asked the court to provide some statement of its reasoning for whatever approach to abatement it adopted.

In a unanimous published opinion, the SJC sided with the commonwealth. The court began by observing that in its appeal, "the Commonwealth asks us to reconsider the viability of the common-law doctrine of abatement *ab initio*, whereby, as was the case here, a criminal conviction is vacated and the indictment is dismissed after the defendant dies while his direct appeal as of right challenging that conviction is in process."[7] The court then conceded, as the commonwealth had argued, that "justification for the adoption of the doctrine has never been explicated, and several compelling arguments weigh against it. Indeed, many other jurisdictions have, with increasing frequency in recent years, rejected the doctrine and followed alternative approaches."[8]

The court summarized its disposition by stating that "the doctrine of abatement *ab initio* is outdated and no longer consonant with the circumstances of contemporary life, if, in fact, it ever was."[9] Rather, the court determined,

> when a defendant dies irrespective of cause, while a direct appeal as of right challenging his conviction is pending, the proper course is to dismiss the appeal as moot and note in the trial court record that the conviction removed the defendant's presumption of innocence, but that the conviction was appealed and neither affirmed nor reversed because the defendant died.[10]

The SJC concluded that "this approach, which otherwise applies only prospectively, should apply in the present case."[11] With that, the abatement doctrine was erased from the common law of Massachusetts.

IV. History of the Abatement Doctrine in Massachusetts

The doctrine of abatement *ab initio* sparked considerable public debate over the years in Massachusetts as a result of several high-profile cases in which the rule was applied to nullify otherwise valid convictions, including the child sexual abuse convictions of John Geoghan, and the murder convictions of serial killer John Salvi. As Timothy Staggs wrote in "Legacy of a Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement *Ab Initio* in Line with the Victims' Rights Movement," "it came as a shock to many Americans when the state of Massachusetts announced, in the days after Geoghan's death, that the law required that all charges against him be dropped and that he be legally restored to a status equivalent to 'presumed innocence.'"[12]

Both local and national media sources recorded significant public concern over the decision. As the mother of one of Geoghan's victims said to the *Boston Globe*: "How dare our government try

5. Trial court's May 9, 2017 decision at p. 4.

6. The commonwealth's appeal initially took the form of a petition pursuant to Mass. Gen. Laws c. 211, § 3, which the SJC ultimately re-characterized as an appeal from the trial judge's judgment of dismissal, at which time the commonwealth and the defendant were given leave to re-brief the case.

7. Commonwealth v. Hernandez, 481 Mass. 582, 583 (2019).

8. *Id.*

9. *Id.*

10. *Id.* at 583.

11. *Id.* As to application of the new rule articulated by the SJC to the Hernandez case itself, the court stated:

> Here, the Commonwealth objected at the time to the trial judge's abatement *ab initio* order and then pursued this appeal and successfully urged us to abandon and replace that doctrine. Therefore, we see no reason why the Commonwealth should not have the benefit of that new rule in this case. Otherwise, the new rule shall only apply prospectively.

Id. at 602.

12. Timothy Staggs, "Legacy of a Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement *Ab Initio* in Line with the Victims' Rights Movement," 38 Indiana L. Rev. 507 (2005).

to sweep clean such a dirty slate . . . How can they put aside for one second what John Geoghan has done?"[13] Similar public expressions of surprise were aired when the murder conviction of abortion clinic terrorist, John Salvi, was nullified by a Massachusetts Superior Court judge after his apparent prison suicide in 1996.[14]

Following the announcement of the abatement of Hernandez's convictions, the parallel circumstances in the Salvi and Geoghan cases inevitably became part of the public dialogue.[15] As the chief legal counsel of the Massachusetts Bar Association, Martin W. Healy, told news sources: "The public definitely has a right to be surprised by this principle."[16] Healy continued: "Unfortunately, in the Odin Lloyd matter, for the family, there won't be any real closure."[17] "Aaron Hernandez," he said, "will go to his death an innocent man."[18] As Healy's comments suggest, public skepticism of abatement *ab initio* had been fueled, at least in part, by the lack of any clear understanding of its origins or, more important, its justification — matters that, as discussed below, were not at all clear in the governing case law.[19]

The legal authority for the doctrine derives strictly from ancient customary practice — abatement of an underlying conviction is not authorized by either the federal or state constitution, or by any Massachusetts statute.[20] Prior to *Hernandez*, only a few Massachusetts appellate decisions had addressed the legal origins and policy justifications for the practice of abatement *ab initio*.[21]

Commonwealth v. Eisen,[22] the most recent published substantive[23] articulation of the doctrine in Massachusetts prior to *Hernandez*, offered, at best, a very weak explanation, noting simply: "This is the general practice elsewhere."[24] The "elsewhere" in question appears to be *Durham v. United States*[25] and *State v. Carter*,[26] both cited in *Eisen*. However, the Supreme Court later overruled *Durham* in *Dove v. United States* with respect to cases pending there on certiorari.[27] *Carter*, to the extent that it relied upon *Durham*, at least in part, also was of questionable precedential value.[28] Overall, the

13. Brendan McCarthy, "Victims challenge voiding Geoghan record," Boston Globe (Aug. 28, 2003), https://archive.boston.com/globe/spotlight/abuse/stories5/082803_victims.htm.

14. *See* Barry A. Bostrom, Chad Bungard & Richard J. Seron, John Salvi III, "Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence," 5 CUNY L. Rev. 141 (2002).

15. *See* John R. Ellement & Evan Allen, "In wake of suicide, Aaron Hernandez conviction could be voided," Boston Globe (April 19, 2017), https://www.bostonglobe.com/metro/2017/04/19/hernandezdismiss/BvCcJQ1Ubg3mJAze0ttpvJ/story.html (recounting public reaction to prior instances of application of the abatement doctrine); *see also* Des Bieler, "Aaron Hernandez lawyers ask for conviction to be overturned, deny reports of gay lover," Wash. Post (April 25, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/04/25/aaron-hernandez-lawyers-ask-for-conviction-to-be-overturned-deny-reports-of-gay-lover/.

16. *See* Andrew O'Reilly, "Reversal of Aaron Hernandez's murder conviction appalls victim's family," Fox News (April 26, 2017), https://www.foxnews.com/us/reversal-of-aaron-hernandezs-murder-conviction-appalls-victims-family.

17. *Id.*

18. *See* Ellement & Allen, *supra* note 16.

19. Another case (although not a Massachusetts case) that focused national attention — and a firestorm of public criticism — on the abatement doctrine involved former Enron CEO Kenneth Lay.

> On July 5, 2006, Ken Lay died of a heart attack. His lawyers then moved to invoke a Fifth Circuit precedent that calls for the vacation of the conviction of any defendant who dies before having an opportunity to pursue an appeal. The doctrine is called abatement *ab initio*, or simply "abatement." Its effect is to stop all proceedings *ab initio* (from the beginning) and render the defendant as if he or she had never been charged. Since judgment had not yet been entered, and sentencing had not yet occurred, Lay had no opportunity to appeal. Arguing that "the Lay Estate should not be unjustly enriched with the proceeds of fraud," the government opposed the motion. It acknowledged that victims or the government could file a civil action against the estate to have such proceeds disgorged, but that would require the plaintiffs to prove the entire case all over again (albeit at a lower standard of proof) and spend years in litigation.
>
> The combined civil damages were in the hundreds of millions of dollars.

Timothy A. Razel, "Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice — And What Should Be Done Instead," 75 Fordham L. Rev. 2193, 2195, 2208 (2007).

20. *See* Commonwealth v. Latour, 397 Mass. 1007 (1986); *see also* United States v. Rorie, 58 M.J. 399, 405-06 (C.A.A.F. 2003).

21. *See, e.g.,* Commonwealth v. De La Zerda, 416 Mass. 247, 250 (1993); Latour, 397 Mass. 1007; Commonwealth v. Harris, 379 Mass. 917 (1980).

22. 368 Mass. 813, 813-14 (1975).

23. An unpublished docket entry in Commonwealth v. Luke, SJC No. SJC-11629 (July 21, 2016), also addressed the abatement doctrine, essentially summarizing the governing law as set out in Eisen:

> After the defendant's appeal was entered in this court, the defendant died. The Commonwealth filed a motion to dismiss the appeal as moot but to prevent or forestall abatement *ab initio* of the underlying convictions. The defendant, in turn, filed a motion to vacate the judgment. It is not the practice of this court to allow a conviction to stand when a defendant dies during the pendency of his direct appeal from a conviction. *See* Commonwealth v. De La Zerda, 416 Mass. 247, 248-249 (1993). Rather, we vacate the judgment and dismiss the complaint or indictment. *See Id.* The Commonwealth's motion is therefore denied, and the defendant's motion is allowed. The judgment of conviction is vacated, the jury verdict set aside, and the case remanded to the Superior Court for entry of an order dismissing the indictment. Nothing in the Commonwealth's submission persuades us to change our longstanding practice in these circumstances.

24. *Eisen*, 368 Mass. at 813.

25. 401 U.S. 481 (1971).

26. 299 A2d 891 (Me. 1973).

27. 423 U.S. 325 (1976). In *Durham*, the defendant came before the Supreme Court on a petition for certiorari after his District Court conviction had been affirmed by the Ninth Circuit Court of Appeals. While his petition was under review, the defendant died. The Supreme Court held that the defendant's death abated the appeal and all prior proceedings in the case — i.e., the court applied the doctrine of abatement *ab initio*. In its order, the Supreme Court stated: "the motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment below is vacated and the case is remanded to the District Court with directions to dismiss the indictment." *Durham*, 401 U.S. at 483. However, five years later in *Dove*, the Supreme Court overruled *Durham* and ended the practice of applying the doctrine of abatement *ab initio* to cases pending on certiorari review before the court at the time of a defendant's death. As the Supreme Court stated in *Dove*: "The Court is advised that the petitioner died at New Bern, N.C., on Nov. 14, 1975. The petition for certiorari is therefore dismissed. To the extent that Durham v. United States, 401 U.S. 481 (1971), may be inconsistent with this ruling, *Durham* is overruled." *Dove*, 423 U.S. at 532. The decision in *Dove* did not affect cases under direct review in the circuit courts of appeal (where abatement is the strong majority practice) — only the procedure for cases on certiorari review in the Supreme Court.

28. *See* 299 A.2d at 895.

Massachusetts case law in this area was exceedingly sparse. As the trial judge noted in her decision allowing the defendant's motion for abatement *ab initio* in the Hernandez case, "[the central arguments pressed by the Commonwealth,] other than with respect to outright abrogation of the abatement *ab initio* practice, do not appear ever to have been made to the SJC."[29] Courts in other jurisdictions, reviewing abatement through the lens of modern sensibilities, had likewise emphasized the practice's lack of any solid basis in law or public policy.[30]

Legal commentators had also noted the absence of any clear basis for the doctrine. For example, legal historian Timothy Razel began his exhaustive analysis of abatement's history by observing that "[t]he origins of the abatement doctrine are unclear."[31] In point of fact, to the extent that there was ever any policy justification for the abatement doctrine, it likely lies in medieval times, when victims were largely left to private remedies, even in the case of criminal matters. When a criminal offense — including murder — occurred, a victim was entitled to seek compensation from the putative defendant.[32] If the latter died before such compensation could be collected, however, the cause was said to "abate" — that is, the injured party lost his right to obtain relief. In an age when legal claims typically survive the death of a tortfeasor, such considerations have no practical relevance. Moreover — and more important — it is difficult to see any justification for applying what was, in effect, a civil law tolling doctrine to an essentially unrelated aspect of the criminal law. The fact that this happened at all speaks largely to the blurred line between criminal and civil law in the Middle Ages.[33]

Apart from failing to articulate the origins of or justifications for the abatement doctrine, the thin case law in Massachusetts at the time of Hernandez's death also failed to determine the precise scope of its application. While abatement was the apparent default rule,[34] its application was by no means required in all cases where a defendant died before he had received appellate review. For example, a defendant who died without asserting a direct appeal was not entitled to have his convictions abated. This happened where a defendant chose not to lodge an appeal, where he neglected to perfect his appeal, or where he chose to withdraw his appeal. Likewise, a defendant who died while his collateral appeal was pending was not entitled to abatement of his convictions.[35] Finally, and more generally, abatement was not required where "special circumstances" were present such that abating the conviction would not be consistent with the "interests of justice."[36] The case law provided few, if any, guideposts for the application of this potentially broad exception.

Based on the foregoing, the commonwealth vigorously argued before the trial judge in the Hernandez case (as it would later before the SJC) that there was, in fact, no strict requirement in Massachusetts that a defendant's conviction had to be abated *ab initio* when he died during the pendency of his direct appeal.[37] Certainly, the court's observation in *Commonwealth v. De La Zerda,*[38] and *Commonwealth v. Squires*,[39] noted above, that abatement is not indicated where it would be inconsistent with "the interests of justice" constituted a possible basis for denying such relief to the defendant. The trial judge, however, was not inclined so to find.[40] After a hearing, she allowed the defendant's motion to abate his convictions, setting the stage for the commonwealth's subsequent appeal.

V. The *Hernandez* Holding: Dismantling the Abatement Doctrine

The SJC, in its decision in the Hernandez case, adopted much of the commonwealth's reasoning — determining that there were no substantial legal or policy bases supporting the doctrine of abatement *ab initio*. Indeed, the SJC went a step further, suggesting that it was, in fact, unclear that Massachusetts had ever formally adopted the abatement doctrine in the first place. As the court stated:

It has been suggested on several occasions, including by the trial judge in her memorandum of decision, . . . that the doctrine of

29. Trial court's May 9, 2017 decision at n.5.

30. *See* State v. Benn, 364 Mont. 153, 156 (2012) ("We conclude that we manifestly erred [in a prior decision] . . . [S]tare decisis does not require that we follow a manifestly wrong decision."). *Cf.* People v. Ekinici, 743 N.Y.S.2d 651 (2002) (noting that the rationale for the abatement rule originates in antiquity and the reasons supporting it are lost there).

31. Razel, *supra* note 20, at 2198. Razel notes that in List v. Pennsylvania, 131 U.S. 396, 396 (1888) (mem.), the Supreme Court acknowledged that the defendant had died and ordered abatement and dismissal of the writ of error. The Court's sole rationale was that "it appear[s] ... that this is a criminal case." *List*, 131 U.S. at 396.

32. *See* Razel, *supra* note 20, at 2200.

33. During this period, English law was in the process of combining elements of Roman civil law with both canon law and various Germanic codes to produce a unified common law. Paolo Carozza, Civil law, Encyclopædia Britannica (Oct. 16, 2019), https://www.britannica.com/topic/civil-law-Romano-Germanic.

34. *See* Commonwealth v. Latour, 397 Mass. 1007 (1986); Commonwealth v. Harris, 379 Mass. 917 (1980).

35. *See* Commonwealth v. De La Zerda, 416 Mass. 247, 249-50 (1993).

36. Commonwealth v. Squires, 476 Mass. 703, 704 (2017); *see De La Zerda*, 416 Mass. at 250.

37. *See* Commonwealth v. Eisen, 368 Mass. 813, 814 (1975) (when a defendant dies while his direct appeal is still pending, conviction should "normally" be dismissed).

38. *See De La Zerda,* 416 Mass. at 250.

39. 476 Mass. at 704.

40. The trial court judge, in her written decision, seemed to understand her broad discretionary authority in applying the doctrine of abatement *ab initio.* Nonetheless, she decided to refrain from exercising that discretion, stating:

> The Court disagrees with the argument of defense counsel that the values that inform the 'interests of justice' calculus have already been 'categorically settled' by the SJC. There is no indication in the case law or reason to assume that, given a sufficiently persuasive reason, an additional ground or grounds to depart from the general practice could not be found to be in the interests of justice.

Trial court's May 9, 2017 decision at n.5. However, in the end, she apparently concluded that her discretion was insufficiently broad to offset whatever unspecified (or, as the SJC would ultimately conclude, nonexistent) policy considerations favored giving Hernandez the benefit of the application of the rule in this particular case.

abatement *ab initio* represents the "longstanding" practice in Massachusetts. The first reported appellate case acknowledging the doctrine in Massachusetts, however, was issued in 1975 . . . . It strains credulity then to suggest that the doctrine has been a long-standing or historic staple of Massachusetts common law . . . ."[41]

The court added that "it also would be a stretch to suggest, as the defendant does here, that the doctrine of abatement *ab initio* was 'formally' adopted by this court in Eisen."[42] Quite unexpectedly, the SJC then asserted that in *Eisen*, a rescript decision "more notable for brevity than insight,"[43] *"[w]e did not declare that we were adopting the [abatement] doctrine, nor did we comment on the potential benefits or shortcomings of its approach or that of any other approach."*[44] Abatement, it seems, may never have been the law in Massachusetts.

The court continued thereafter in much the same vein, noting that in the 44 years since the *Eisen* decision, "we have applied the doctrine to a direct appeal as of right from a conviction in only two reported decisions, both rescripts, both even terser than *Eisen* [itself]."[45] The first was *Commonwealth v. Harris*,[46] in which the SJC "essentially restated [its] holding and reasoning from *Eisen* and remanded for dismissal of the indictment."[47] Similarly, in *Commonwealth v. Latour*,[48] again citing *Eisen*, the court "stated that, '[w]hen a criminal defendant dies pending his appeal, the general practice is to dismiss the indictment,' and concluded, in even briefer terms than either *Eisen* or *Harris*, that '[t]here is nothing about the issues raised in this appeal that leads us to vary this general rule.'"[49] On that basis, the SJC remanded for dismissal of the complaint in *Latour*.[50] As the SJC observed in *Hernandez*, these latter cases "make up the universe of appellate jurisprudence on the doctrine before us."[51] "In sum," the court held, "abatement *ab initio* is 'normally' or 'generally' the rule, although it appears to be so for no other reason than because that was the practice elsewhere."[52]

As for the various possible justifications used "elsewhere" for application of the doctrine, the SJC first examined what is typically referred to as the "finality principle."[53] The court stated that the

> finality principle has been described in many ways, all of which rest upon the premise that a trial and appeal are essential parts of our system of justice and that a conviction should not stand until a defendant has had the opportunity to pursue both.[54]

The court acknowledged that

> [t]he condemnation and punishments of the criminal justice system are awesome and devastating. That is why their imposition is hedged about with presumptions and procedural safeguards that heavily weight [sic] the risk of error in favor of the accused and are designed to assure both the appearance and the reality that the accused had every fair opportunity of defense.[55]

The court observed, however, that it is also the case that "a defendant is no longer presumed innocent after a conviction; rather a convicted defendant is presumed guilty despite the pendency of an appeal."[56] Once a defendant has been convicted at trial, "the resulting imposition of a sentence essentially constitutes a final judgment . . . even if an appeal is [later] taken."[57] In short, "a trial court judgment is final for purposes of *res judicata* or issue preclusion regardless of the fact that it is on appeal."[58] "Abatement *ab initio* runs counter to these well-settled principles, effectively treating a defendant's appeal as though it has been successful, when, in fact, it was never decided."[59] This, the court concluded, was not — and should not be — the law in the commonwealth.

The SJC's reliance on traditional principles of finality with respect to trial court judgments in rejecting the doctrine of abatement *ab initio* aligns squarely with prior Massachusetts law. As the SJC had previously observed: "A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed . . . ."[60] Indeed, respect for the finality of judgments is a well-established value in the law generally. As the United States Supreme Court noted in *McCleskey v. Zant*: "[o]ne of the law's very objects is the finality of its judgments."[61] The high premium placed on finality has especial significance in the context of criminal convictions. As the SJC stated in another recent decision, finality in the criminal context *"is*

41. Commonwealth v. Hernandez, 481 Mass. 582, 585 (2019) (citing *Eisen*, 368 Mass. at 813-14).
42. *Id.* at 586; *see also Eisen*, 368 Mass. at 813.
43. *Hernandez*, 481 Mass. at 586.
44. *Id.* at 585 (emphasis added).
45. *Id.* at 586.
46. 379 Mass. 917 (1980).
47. Commonwealth v. Hernandez, 481 Mass. 582, 586 (2019).
48. 397 Mass. 1007 (1986).
49. *Hernandez*, 481 Mass. at 586.
50. *Id.*
51. *Id.*
52. *Id.* at 586-87 (internal citations omitted).
53. It is important to distinguish the "finality principle" from the far more familiar concept of the finality of judgments. Both terms are used — and fully explained — herein.
54. Commonwealth v. Hernandez, 481 Mass. 582, 593-94 (2019) (emphasis added).
55. *Id.* at 594 (citing Commonwealth v. Amirault, 424 Mass. 618, 636-37 (1997)).
56. *Hernandez,* 481 Mass. at 594-95.
57. *Id.* at 595.
58. *Id.*
59. *Id.*
60. *In re* Enforcement of a Subpoena, 463 Mass. 162, 167 (2012) (quoting Fayerweather v. Ritch, 195 U.S. 276, 307 (1904)). There are many similar formulations: "Unlike a sentence, a finding of guilt, once entered, is 'final and irrevocable except through appeal or motion for a new trial.'" Commonwealth v. McCulloch, 450 Mass. 483, 488-89 (2008) (quoting Commonwealth v. Gomes, 419 Mass. 630, 632 (1995) ("A finding of guilty cannot be revoked")). *See also* Commonwealth v. Dascalakis, 246 Mass. 12, 19-20 (1923) ("The sentence until reversed in some way provided by the law, stands as the final judgment binding upon everybody.").
61. 499 U.S. 467, 542-43 (1991).

defined by a judgment of conviction and the imposition of a sentence."[62]

The judicial policy favoring finality is justified, *inter alia*, by the presumption of regularity with which judgments are clothed from the time they are entered. In *Commonwealth v. Lopez,* the SJC observed that there is a "presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is [the] waiver of constitutional rights."[63] It is precisely because of this presumption that a defendant begins serving his sentence immediately upon entry of the judgment. The relevance of this to abatement *ab initio* is plain: a lawful judgment may not be set aside absent a judicial determination that there was some defect in the trial proceedings. Stated simply, until otherwise determined in subsequent proceedings,[64] a judgment is deemed to have been "validly obtained."[65]

When assessing the foregoing principles from a fairness perspective, it is important to recall that, in order to obtain a conviction in the first place, the government is required to prove each element of the offenses charged beyond a reasonable doubt. Further, every contested aspect of the commonwealth's case is subjected to scrutiny and intra-trial review by the trial judge. There are also ample mechanisms for appropriate interlocutory appellate oversight. In the Hernandez case, as in many criminal cases, there was also *post-trial* review at the trial court level.[66] In short, a judgment is the product of careful proceedings with many built-in safeguards.

As the SJC properly observed, the fact that a criminal judgment is final upon imposition does not by any means suggest that convictions are not properly susceptible to appellate review; rather, it is merely an acknowledgment that the law does not mandate any further judicial process. Stated differently, appellate review is by no means necessary to perfect a judgment. This conception of the relationship between judgments and appellate review is reflected in the fact, emphasized by the SJC in *Hernandez*, that despite the broad array of procedural rights afforded criminal defendants, there is not, and has never been, any constitutional right to an appeal.[67] As the Supreme Court stated in *Evitts v. Lucey*: "Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."[68] In short, appellate review is simply not the *sine qua non* of a final judgment. A judgment is final at the moment it is entered and the absence of appellate review in no way undercuts its legitimacy.

Finally, concepts like the finality of judgments and the presumption of regularity are also crucial to shaping the public perception of trials. The unmistakable message that the doctrine of abatement *ab initio* sends to the public (to the extent that the public is able to perceive any message in such an archaic and confusing procedure) is that verdicts are not to be fully trusted absent additional review.[69] This is patently not the case and judicial policy, as embodied in common law rules, should not suggest otherwise. It is also worth remembering that there is nothing talismanic about direct appeals in terms of correcting trial errors. To the extent that convictions are sometimes set aside on review, this often occurs on the basis of collateral attacks — new evidence is discovered, successor counsel presents new arguments, and the governing law sometimes changes. Direct review, therefore, is ultimately an arbitrary place to draw a procedural "line in the sand" — especially if it comes at a high social and/or institutional cost.[70] In sum, the court concluded that the "finality principle" was simply not an adequate justification for the abatement doctrine.

In addition to the "finality principle," the SJC also examined another potential justification for the abatement doctrine: the so-called "punishment principle." As the SJC explained, "the punishment principle, which is often framed in terms of mootness or loss of jurisdiction, 'focuses on the precept that the criminal justice system exists primarily to punish and cannot effectively punish one who

62. DiMasi v. State Bd. of Retirement, 474 Mass. 194, 200 (2016) (emphasis added) (citing Fort Wayne Books Inc. v. Indiana, 489 U.S. 46, 54 (1989)). This notion that a criminal conviction is final upon imposition of sentence is reinforced by the SJC's recent decision in *DiMasi*:

> The statutory provisions governing retirement benefits for public employees do not include a definition of the term "final conviction" of a criminal offense. However, it is well established that, "[i]n criminal cases, the final judgment is the sentence." *See* Commonwealth v. Brown, 466 Mass. 676, 679 (2013) (criminal conviction not final under Massachusetts law until sentence is imposed on defendant); Commonwealth v. Dascalakis, 246 Mass. 12, 19 (1923).

DiMasi, 474 Mass. at 200 (internal citations omitted).

63. 426 Mass. 657, 664 (1998) (quoting Parke v. Raley, 506 U.S. 20, 29 (1992)).

64. *See* State v. Clements, 668 So. 2d 980, 981-82 (Fla. 1996) ("[A] judgment of conviction comes for review with a presumption in favor of its regularity or correctness . . . We therefore conclude . . . that the death of the defendant does not extinguish a presumably correct conviction and restore the presumption of innocence which the conviction overcame"). Indeed, as the SJC observed in Hernandez, it is because of this presumption of regularity that, after conviction, a defendant is no longer presumed innocent but, rather, is presumed guilty. *See* Commonwealth v. Hernandez, 481 Mass. 582, 594-95 (2019).

65. *Hernandez*, 481 Mass. at 595.

66. Defense counsel submitted a motion to set aside the verdict pursuant to Mass. R. Crim. P. 25(b)(2), which was decided against the defendant.

67. *Hernandez*, 481 Mass. at 594 (citing Commonwealth v. Bruneau, 472 Mass. 510, 513 (2015)). *See also* Commonwealth v. Alvarez, 69 Mass. App. Ct. 438, 441 (2007). If nothing else, the fact that neither the state nor federal organic documents guarantee any right to appellate review (despite prescribing other essential criminal procedural rights such as jury trials, indictment and local venue) strongly suggests that historically, there was no sense that appellate review was considered an essential ingredient of a final judgment — or required as a matter of fundamental fairness.

68. 469 U.S. 387, 393 (1985) (citing McKane v. Durston, 153 U.S. 684 (1894)).

69. *See* State v. Clements, 668 So.2d 980, 981 (Fla. 1996) (in rejecting abatement *ab initio* doctrine, the court stated that "we have held that a judgment of conviction comes for review with a presumption in favor of its regularity or correctness."); *see also* Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

70. In any case, the reversal rate is unsurprisingly quite low in first-degree murder cases — approximately one case per year is remanded for retrial.

has died.'"[71] However, the SJC took the view in *Hernandez* that "the interests of others, not just of the defendant, should be considered [in determining whether to apply the abatement doctrine]." Specifically, the SJC observed that, while "the defendant is deceased and can no longer be punished, the State, as the representative of the community, continues to have an interest in maintaining a conviction."[72] Further, the court noted that "through State Constitutions, statutes, and other avenues, the justice system acknowledges the rights and interests of the victims of crime."[73] Along these lines, the court recalled that Massachusetts had "enacted a bill of rights for victims . . . and created the Domestic and Sexual Violence Prevention and Victim Assistance Fund."[74] Further, the SJC stated that it had long "recognized [that] '[w]hen a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest that the guilty not only be punished but that the community express its condemnation with firmness and confidence.'"[75]

In this way, the SJC in *Hernandez* emphasized that "a criminal prosecution does not take place in a vacuum."[76] There are, in fact,

> other interests than can be affected by the outcome of that prosecution and, although [the Court] must be mindful not to let any one of those other interests override a defendant's rights, they are worthy of recognition when considering the best approach to follow when a defendant dies during the pendency of a direct appeal.[77]

While the SJC confirmed that "[t]he deceased defendant, of course, has his or her reputation" at stake, it also noted that "if *Eisen*, *Harris*, and *Latour* made anything clear, it was that the vindication of a deceased defendant is not a sufficient basis for considering a criminal appeal."[78] The court also conceded that there might be "other surviving third parties with interests in the outcome of an appeal," including "next-of-kin, an heir, a creditor, or somebody else who shares the interest of the deceased defendant's estate."[79] However, the SJC concluded that the concerns of such potential stakeholders should not — and would not — inform the court's policy analysis. "Undoubtedly, in some cases, the standing conviction may be consequential to such interests."[80] The putative right of such parties, however,

> could not have been a factor for consideration in the trial proceedings and could not have been a factor in the appeal, had it been concluded. . . It, therefore, is our opinion that it would be unwise for us . . . to adopt a policy favoring survivor interests of questionable validity.[81]

Thus, in crafting a new rule with respect to abatement in Massachusetts, the court focused on the interests of "the State, as the representative of society, and . . . the victim.[82] The SJC's approach in this regard — especially its emphasis on the rights of victims — has significant support in the modern era. In a 1987 report to the legislature on the salutary effects of the Massachusetts victims' rights statute,[83] then-Governor Michael Dukakis stated:

> When I signed the Victim Bill of Rights which the legislature passed in December 1983, Massachusetts sent a clear message that the rights of crime victims were every bit as important as the rights of criminal defendants. For too long, victims of crime had been subject to injustices, indignities and indifference by a criminal justice system that was meant to protect the interests of all our citizens.[84]

Among other policy interests embodied by the provision, Mass. Gen. Laws c. 258B emphasizes the value of final dispositions to protecting the rights of victims and witnesses of crimes. As the SJC observed in *Hagen v. Commonwealth*:[85]

71. Commonwealth v. Hernandez, 481 Mass. 582, 596 (2019) (quoting United States v. Estate of Parsons, 367 F.3d 409, 414 (5th Cir. 2004)); *see* State v. Kriechbaum, 219 Iowa 457, 465 (1934) ("Death withdrew the defendant from the jurisdiction of the court"); Carver v. State, 217 Tenn. 482, 486 (1966) ("The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs"). "Some courts have further stated the principle in terms of not visiting 'punishment' upon the innocent family, heirs, or beneficiaries of the deceased defendant." *Hernandez*, 481 Mass. at 596. *See* State v. Campbell, 187 Neb. 719, 720 (1972) ("there appears to be no sufficient reason to make a decedent's estate as distinguished from the decedent himself liable for costs of prosecution where there is no final judgment of conviction"); State v. Webb, 167 Wash.2d 470, 473 (2009) ("object of criminal punishment is to punish the offender, not his or her heirs or beneficiaries").

72. *See* State v. Makaila, 79 Haw. 40, 45 (1995) ("The State has an interest in preserving the presumptively valid judgment of the trial court"); People v. Ekinici, 743 N.Y.S. 2d 651, 658 (2002) ("the State has an interest in maintaining a conviction presumed to be validly obtained and the victim of the crime has an interest in knowing that the perpetrator has been convicted); State v. McGettrick, 31 Ohio St. 3d 138, 141 (1987) (abatement *ab initio* "would not be fair to the people of this state who have an interest in and a right to have a conviction, once entered, preserved absent substantial error.").

73. *Hernandez*, 481 Mass. at 597; *see, e.g.*, Wheat v. State, 907 So.2d 461, 463-64 (Ala. 2005) (rights of victims have been recognized in Alabama Constitution and through extensive statutory protection); State v. Carlin, 249 P.3d 752, 759 (Alaska 2011) ("Alaska's statutes and its constitution now also require the criminal justice system to accommodate the rights of crime victims. The abatement of criminal convictions has important implications for these rights"); State v. Korsen, 141 Idaho 445, 449 (2005) ("In recent years, the state of Idaho has . . . provided substantial constitutional and statutory rights and protections for victims of crime"); Brass v. State, 130 Nev. 318, 322 (2014) ("Vacating the judgment and abating the prosecution from its inception undermines the adjudicative process and strips away any solace the victim or the victim's family may have received from the appellant's conviction").

74. Commonwealth v. Hernandez, 481 Mass. 582, 597 (2019) (citing Mass. Gen. Laws c. 258B, § 3(o) and Mass. Gen. Laws c. 17, § 20).

75. *Hernandez*, 481 Mass. at 597 (quoting Commonwealth v. Amirault, 424 Mass. 618, 637 (1997)).

76. *Hernandez*, 481 Mass. at 599.

77. *Id.*

78. *Id.* at 601.

79. *Id.*

80. Commonwealth v. Hernandez, 481 Mass. 382, 601 (2019) (quoting Whitehouse v. State, 266 Ind. 527, 529-30 (1977)).

81. *Id.*

82. *Hernandez*, 481 Mass. at 601.

83. Mass. Gen. Laws c. 258B.

84. Full text of "The victim bill of rights: the Massachusetts experience," Internet Archive, https://archive.org/stream/victimbillofrig198587mass/victimbillofrig198587mass_djvu.txt (last visited Sept. 1, 2020).

85. 437 Mass. 374 (2002).

> In enacting G.L. c. 258B, § 3(f), the Legislature clearly intended to confer on victims the right to ensure the prompt trial and, if convicted, the prompt sentencing of the perpetrators of the crimes against them. This intention is apparent from the definition of the term "disposition" set forth in G.L. c. 258B, § 1, as "the sentencing or determination of penalty or punishment to be imposed upon a person convicted of a crime or found delinquent or against whom a finding of sufficient facts for conviction or finding of delinquency is made." We can fairly assume that the Legislature was aware that the appellate process may be time consuming, but that sentences are not normally stayed pending appeal. Implicit in the legislative scheme is the expectation that a sentence lawfully imposed will not be avoided because of some inordinate delay in the processing of the appeal. We conclude that the Legislature sought to assure for victims a prompt disposition within the context of the trial process.[86]

In this way, both the court and the legislature have given force to the restorative justice potential of judgments in criminal cases.[87] Indeed, the certainty of dispositions is essential to any system that envisions justice as a principle that requires fairness for both defendants and victims.

Abatement, to the extent that it undercuts the certainty of judgments, directly opposes concepts of restorative justice. As one commentator noted: "It cannot reasonably be said that the victims of a crime, particularly of violent or heinous crimes such as those in the Geoghan case, do not suffer harm or offense to their psychological well-being when their perpetrator is cleared of all charges upon his death."[88] In the past, such concerns might have been disregarded within a regime focused more or less exclusively on protecting the traditional procedural rights of defendants. However, statutes like Mass. Gen. Laws c. 258B make it plain, at least for Massachusetts, that there is a strong legislative intent to broaden that vision of justice to include regard for the rights of victims, as well.

While the question of where to draw lines in striking that balance between defendants and victims is, of course, a difficult matter, abatement presents one of the easier cases. Since the issue of abatement arises perforce after a defendant's death, his interest in the proceedings is necessarily much reduced. Not so for his victims, whose interests survive unabated. A doctrine aimed exclusively at vindicating vaguely defined reputational interests on the defendant's part, while at the same time trenching directly on the very heart of the rights of victims, poses significant concerns. Such a rule, in the words of one commentator, "essentially trades a likely finalized conviction and the well-being of crime victims for a very unlikely result that is offensive both to crime victims and the public at-large, all in the name of protecting the interests of a person no longer able to enjoy such protection."[89]

Compounding the problem of squaring abatement with victims' rights is the fact that abatement, in many cases, burdens victims with a range of adverse financial impacts.[90] For example, restitution orders (as well as orders relating to court costs and fines) might be extinguished by abatement.[91] Further, civil damages awards to victims, at least where liability was established by means of collateral estoppel, might be imperiled — a matter of significant potential concern in the Hernandez case.

Against this backdrop — i.e., as courts and legislatures around the country increasingly have sought to balance the rights of

86. *Id*. at 378-79 (emphasis added). *See also* 18 U.S.C. § 3771 (cognate federal statute).

87. The United Nations defines restorative justice as

> an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community … Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.

"Handbook on Restorative Justice Programmes," United Nations Office on Drugs and Crime, https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf. *See also* Commonwealth v. Stevanovich, 2006 Mass. Super. LEXIS 288 at *44.

88. *Staggs, supra* note 13, at 528.

89. *Id.* at 528-29.

90. In State v. Devin, 158 Wn.2d 157, 170 (2006), the court concluded that "important collateral consequences," at least in this context, including "emotional distress, lessened ability to recover a civil judgment, and potential impacts on family court proceedings."

91. *See* State v. Korsen, 141 Idaho 445, 450 (2005) ("a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums to the victim, or other similar charges, [should] not [be] abated, but [should] remain intact.").

criminal defendants and victims[92] — it is wholly unsurprising that the number of states that resort to the practice of abatement *ab initio* has been steadily shrinking over the past few decades.[93] In the first instance, abatement was never the universal rule in the United States. Indeed, many states have never allowed it.[94] At present, it is a minority rule, with just under half the states persisting with strict application of abatement *ab initio*.[95]

As noted, however, abatement is not just a minority rule, it is an *increasingly* minority view. The national trend over the past three decades — essentially since the enactment of the federal and Massachusetts victims' rights statutes[96] — has been decidedly away from abatement. "In the mid-1990s several states abandoned their previous use of abatement. This trend continued in the mid-2000s, with four states [now seven[97]] and the U.S. military abandoning the doctrine."[98] All told (and glossing over significant detail regarding the precise alternatives adopted) approximately 15 states have retreated in some way from abatement *ab initio* in the past three decades — again, since the advent of national awareness of and legislative support for victims' rights — while only one state (Minnesota) has adopted a strict policy of abatement *ab initio*. In many respects, "the doctrine of abatement *ab initio* provides a perfect illustration of the conflict between defendants' and victims' rights in the American legal system."[99] The national trend simply mirrors a broader shift toward a new approach to resolving that conflict.

Supporting that view is the fact that courts in many jurisdictions that have discarded or modified the abatement doctrine have expressly emphasized that the outcomes in these cases are grounded specifically in evolving views on victims' rights. As the Idaho Supreme Court noted in *State v. Korsen*, en route to rejecting abatement:

92. A very quick summary of the national landscape shows the following: Alabama rejected abatement in 2005, applies mixed remedy (Wheat v. State, 907 So.2d 461, 464 (Ala. 2005); Alaska rejected abatement in 2011, allows substituted parties (State v. Carlin, 249 P.3d 752, 762-63 (Alaska 2011)); Arizona adopted abatement in 1979, suggested possible reconsideration in 2013 (State v. Griffin, 121 Ariz. 538 (1979)); State v. Glassel, 233 Ariz. 353 (2013)); California adopted abatement in 1913 (People v. St. Maurice, 166 Cal. 201 (1913)); Colorado adopted abatement in 1904 (Overland Cotton Mill Co. v. People, 32 Colo. 263 (1904)); Connecticut has never applied abatement, dismisses appeal (State v. Trantolo, 209 Conn. 169 (1988)); Delaware rejected abatement in 1990, dismisses appeal (Perry v. State, 575 A.2d 1154, 1156 (1990)); Florida rejected abatement in 1996, dismisses appeal unless good cause shown (State v. Clements, 668 So. 2d 980, 982 (Fla. 1996)); Georgia never adopted abatement, dismisses appeals (Harris v. State, 229 Ga. 691 (1972)); Hawaii rejected abatement in 1995, allows substitution of parties (State v. Makaila, 79 Haw. 40 (1995)); Idaho rejected abatement in 2005, adopted mixed remedy (State v. Korsen, 141 Idaho 445 (2005)); Illinois adopted abatement in 1978 (People v. Mazzone, 74 Ill. 2d 44 (1978)); Indiana rejected abatement in 1977, dismisses appeals (Whitehouse v. State, 266 Ind. 527 (1977)); Iowa adopted abatement in 1934 (State v. Kriechbaum, 219 Iowa 457 (1934)); Kansas never adopted abatement (State v. Jones, 220 Kan. 136 (1976)); Kentucky adopted abatement in 1979 (Royce v. Commonwealth, 577 S.W.2d 615, 616 (Ky. 1979)); Louisiana adopted abatement in 1976 (State v. Morris, 328 So. 2d 65, 67 (La. 1976)); Maine adopted abatement in 1973 (State v. Carter, 299 A.2d 891, 895 (Me. 1973)); Maryland rejected abatement in 2006, applies mixed remedy (Surland v. State, 392 Md. 17 (2006)); Michigan rejected abatement in 1995, dismisses appeal (People v. Peters, 449 Mich. 515 (1995)); Minnesota adopted abatement in 2013 (State v. Burrell, 837 N.W.2d 459 (2013)); Mississippi rejected abatement in 1983 and began to apply mixed remedy in 1994 (Gollott v. State, 626 So.2d 1297, 1303-04 (Miss. 1994)); Missouri adopted abatement in 1979 (State v. Forrester, 579 S.W.2d 421 (Mo. Ct. App. 1979)); Montana rejected abatement in 2012, dismisses appeals (State v. Benn, 364 Mont. 153 (2012)); Nebraska adopted abatement in 1972 (State v. Campbell, 187 Neb. 719 (1972)); Nevada rejected abatement in 2014, allows substituted parties (Brass v. State, 130 Nev. 318 (2014)); New Hampshire adopted abatement in 1952 (State v. Poulos, 97 N.H. 352 (1952)); New Jersey never allowed abatement, permits substituted parties (State v. Gartland, 149 N.J. 456 (1997)); New Mexico rejected abatement in 1997, allows substituted parties (State v. Salazar, 123 N.M. 778 (1997)); New York adopted abatement in 1967 (People v. Mintz, 20 N.Y.2d 753 (1967)); North Carolina adopted abatement in 1965 (State v. Dixon, 265 N.C. 561 (1965)); North Dakota did not apply abatement doctrine to appeal from motion to withdraw guilty plea in 1994 (State v. Dalman, 520 N.W.2d 860 (1994)); Ohio adopted mixed remedy in 1987 (State v. McGettrick, 509 N.E.2d 378, 382 (Ohio 1987)); Oklahoma adopted abatement in 1950 (Nott v. State, 91 Okla. Crim. 316 (1950)); Oregon rejected abatement in 1984, dismisses appeal (Meissner v. Diller, 69 Ore. App. 518 (1984)); Pennsylvania rejected abatement in 1972 (Commonwealth v. Walker, 447 Pa. 146 (1972)); Rhode Island adopted abatement in 1973 (State v. Marzilli, 111 R.I. 392 (1973)); South Carolina rejected abatement in 1984, dismisses appeal (State v. Anderson, 281 S.C. 198 (1984)); South Dakota decided in 1997 to permit case-specific exceptions to abatement (1997 SD 119 (1997)); Tennessee adopted abatement in 1926 (Wiggins et al. v. State, 154 Tenn. 83 (1926)); Texas adopted abatement in 1879 (March v. State, 5 Texas Ct. App. 450 (1879)); Utah adopted abatement in 1940 (State v. Fanalous, 99 Utah 322 (1940)); Virginia has not adopted a firm rule (Bevel v. Commonwealth, 282 Va. 468 (2011)); Washington abolished abatement in 2006 (State v. Devin, 158 Wn.2d 157 (2006)); Wisconsin abolished abatement in 1988 (despite state constitutional right to appeal) (State v. McDonald, 144 Wis. 2d 531 (1988)); Wyoming adopted abatement in 1927 (State v. Free, 37 Wyo. 188 (1927)).

93. As noted, the shift in perspective on victims' rights nationally and locally began in the mid-1980s — i.e., more than 30 years ago.

94. *See, e.g.*, State v. Trantolo, 549 A.2d 1074, 1074 (Conn. 1988) (per curiam).

95. *See* State v. Carlin, 249 P.3d 752, 762-63 (Alaska 2011) (By "[o]ur own count . . . [i]t appears that the highest courts in 41 states have addressed abatement in some manner. The courts in 19 states have continued to apply strictly the doctrine of abatement *ab initio*."). Since *Carlin* was decided, Montana and Nevada have rejected abatement, while Minnesota has adopted it, further skewing the numbers against abatement.

96. According to the U.S. Department of Justice, the federal Victim and Witness Protection Act of 1982 (VWPA) was enacted

> to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the Federal government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of defendants; and to provide a model for legislation for state and local governments.

Victim Witness, U.S. Dept. of Justice, https://www.justice.gov/usao-wdla/programs/victim-witness (last visited Sept. 7, 2020).

97. Including, as noted already, Montana and Nevada — and now Massachusetts.

98. Razel, *supra* note 20, at 2208.

99. Staggs, *supra* note 13, at 531.

> The State points out in its briefing that, while the defendant will never be able to appreciate the benefits of abatement, such a result "is particularly unfair to crime victims who have participated in often times painful trials only to see a hard won conviction overturned, not because of any error in the criminal proceedings, but simply as a matter of routine procedure based upon the arbitrary timing of the defendant's death."[100]

The court in *Korsen* went on to observe that it had originally adopted abatement in 1946, a time in which the conception of criminal convictions was purely punitive, rather than, at least in part, restorative: "Clearly, a person could not be incarcerated after he died and a fine no longer served a punitive purpose. Therefore, there was no good reason for not abating the proceeding."[101] The court determined, however, that this approach in no way matched the "modern trend."[102] This notion of a "modern trend" was echoed in *Carlin*,[103] where the court observed that "[i]t is clear that the legal landscape [today] is very different than it was [in 1967] when *Hartwell* [in which the court originally adopted abatement] was decided."[104] The Alabama Supreme Court was even more direct about the policy basis for its abandonment of abatement in *Wheat v. State:* "We . . . recognize . . . 'the callous impact [vacating a conviction *ab initio*] necessarily has on the surviving victims of violent crime.'"[105] The Nevada Supreme Court in *Brass v. State* took a broader view of the policy interests militating against the abatement doctrine: "a challenge to the regularity of Nevada's criminal process presents a live controversy regardless of the appellant's status because . . . society has an interest in the constitutionality of the criminal process. Therefore, we deny [the defendant's] motion for abatement *ab initio*. . . ."[106] In sum, the emerging approach to abatement, in jurisdictions where the practice has been seriously tested in recent years, has been either to abandon the doctrine altogether, or to transform a needlessly rigid and legally unsupportable rule into a flexible standard attuned to modern conceptions of victims' rights. As a result of the *Hernandez* decision, Massachusetts has now joined that emerging trend.

VI. The Remedy and Related Record-keeping Principles

Courts that have rejected abatement have adopted a range of different approaches in its place. The specific alternative practices include: (1) dismissing the appeal but leaving the underlying judgment intact; (2) dismissing the appeal and abating the conviction, but leaving any restitution orders in place; (3) resolving the appeal, either with or without a substituted party; and (4) dismissing the appeal "and direct[ing] that a note be placed in the record that the judgment of conviction removed the presumption of the defendant's innocence, that an appeal was noted, and that, because of the death of the defendant, the appeal was dismissed and the judgment was neither affirmed nor reversed."[107] Each of these options attempts to balance competing public policies; each has its own merits. It was the last one, however, that was adopted by the SJC in *Hernandez*.

As noted, the court determined that, when a criminal defendant dies while an appeal is pending, "the proper course is to dismiss the appeal as moot and note in the trial court record that the conviction removed the defendant's presumption of innocence, but that the conviction was appealed and neither affirmed nor reversed because the defendant died."[108] For all of the reasons already canvassed, this outcome aligns with Massachusetts' law relating to finality and the presumption of regularity with respect to judgments, and also with the commonwealth's current approach to respecting the rights of crime victims. It is also important, however, to observe that it is consistent with cognate law in the closely allied area of judicial record keeping.

In the commonwealth, there is a well-settled judicial and public policy in favor of maintaining accurate records of prior proceedings. Indeed, in sharp contrast to the relative paucity of case law

100. State v. Korsen, 141 Idaho 445, 449 (2005).

101. *Id.*

102. *Id.*

103. State v. Carlin, 249 P.3d 752, 755 (Alaska 2011).

104. *See id.* at 762 (overruling Hartwell v. State, 423 P.2d 282 (Alaska 1967), and rejecting abatement).

105. 907 So.2d 461, 464 (Ala. 2005), (quoting People v. Robinson, 298 Ill. App.3d 866, 873 (1998)).

106. 130 Nev. 318, 322 (2014) (citing Commonwealth v. Walker, 447 Pa. 146 (Pa. 1972)).

107. Surland v. State, 392 Md. 17, 19-20 (2006). In Surland, Maryland — typical of many states that have moved away from a strict abatement rule in recent years to a more nuanced and flexible approach — rejected the abatement doctrine, putting in place the following new procedure:

> Upon notice of the death of the appellant and in conformance with Md. Rule 1-203(d), all time requirements applicable to the deceased defendant and the setting of the case for argument (if that has not already occurred) will be automatically suspended in order to allow a substituted party (1) to be appointed by the defendant's estate, and (2) to elect whether to pursue the appeal. If a substituted party is appointed and elects to continue the appeal, counsel of record will remain in the case, unless the substituted party, contemporaneously with the election, obtains other counsel. If no substituted party comes forth within the time allotted by Rule 1-203(d) and elects to continue the appeal, it will be dismissed, not for mootness but for want of prosecution, and, as with any appeal that is dismissed, the judgment will remain intact.

Id. at 36.

108. Commonwealth v. Hernandez, 481 Mass. 582, 583 (2019).

on the topic of abatement in Massachusetts, other forms of post-hoc manipulation of the official records of judicial proceedings have been the subject of careful appellate scrutiny and, often, significant criticism. In many important practical respects, abatement is closely related to expungement. Both procedures involve permanently altering, after the fact, the records of trial proceedings. Both are undertaken, ostensibly, for the benefit of criminal defendants. However, notwithstanding the fact that abatement almost always involves the wholesale excision of records as to which there is absolutely no reason to presume any irregularity (indeed, as noted, the law imposes a strong presumption of regularity with respect to judgments), expungement necessarily applies only in the context of records as to which there is some strong basis for believing them to be inaccurate. Paradoxically, however, it was expungement, not abatement, that met with the strongest appellate opposition in Massachusetts — at least until the *Hernandez* decision.

As the SJC held in *Police Commissioner of Boston v. Municipal Court of Dorchester Dist.*, police and judicial "records play an integral role in the over-all function of the criminal justice system in terms of the investigative, prosecutorial, and dispositional phases of a transaction in the system of criminal justice."[109] Expungement — like abatement — essentially deletes such records for all time. As the SJC warned in *Commonwealth v. Boe:* "When a record is expunged, all traces of it vanish, and no indication is left behind that information has been removed."[110]

Mindful of such concerns, "[t]he Supreme Judicial Court has cautioned that, before a court may invoke its inherent power to expunge a record, it must ensure that the government's interest in maintaining the record does not outweigh the harms suffered by the maintenance of the record."[111] Typically, this balance will be struck in favor of maintaining the historical records of the court and against expungement. "When a motion to expunge a criminal record is filed on behalf of a person who was charged with, but not convicted of, a crime, the proper response in all but the most exceptional circumstances will be to deny relief" in favor of merely sealing the record.[112] In short, expungement is reserved for "rare" and "exceptional cases," where the record at issue is a complete "fiction" and so serves no useful purpose — indeed, where the contested record is, in fact, capable of producing significant mischief.[113]

To the extent that it likewise involves wholesale, post-hoc modification of otherwise proper records, abatement poses all of the same hazards as expungement. In fact, given its revisionist (as opposed to merely obfuscationist) quality, abatement arguably constitutes a much graver insult than expungement to the strong public policy favoring the maintenance of accurate records of prior proceedings. While the latter merely operates to hide the records of the past, abatement rewrites history, substituting a false narrative in place of the true story of what transpired at a public trial.

It is this fundamental misrepresentation embodied by abatement that the public does — and should — find most troubling. For example, in *Hernandez*, the world watched as the defendant received an exemplary trial before an experienced judge. Jurors drawn from the local community spent weeks listening to evidence and deliberating their verdict. Then, through application of a medieval doctrine, the public was told that the defendant is once again presumed innocent and the outcome of the trial must be disregarded. This offends not only the same public policy interests that resist lesser forms of revisionism like expungement, but also offends the public's sense of fundamental fairness. More specifically, it makes the law look pedantic and belittles the role of trial judges and jurors within our system of justice. Finally, it blurs the historical record — a practice the past has taught is fraught with risk. As the SJC concluded, it simply has no place in the modern era.

VII. Conclusion

The *Hernandez* decision occasioned surprise in some quarters — if for no other reason than, accurate or not, the doctrine of abatement *ab initio* was perceived by many practitioners to be long-settled law in Massachusetts. However, mere venerability was, in fact, unlikely to have been dispositive of the outcome here. The SJC has never been averse to discarding or revising old-fashioned legal principles that advance no proper purpose or that do not embody modern conceptions of justice. In recent years, the SJC has revisited and either abolished or modified a large number of outmoded legal doctrines.

Many of these concepts, like abatement *ab initio*, date from the earliest days of the English common law, their continued enforcement a product mostly of momentum, inattention and the law's reflexive respect for pedigree and provenance. By way of discarding one such "anachronistic" doctrine recently — the "year and a day rule" relating to causation in homicide cases — the SJC observed that "[i]f . . . the rule can be said still to exist in a large number of jurisdictions in this country, this is accounted for by the perdurability of statutes in some of them stating the rule, by the fact that over past years there have been few occasions on which the issue has been raised and presented squarely to the courts for decision, and by a tendency to regard so old a dogma as peculiarly suitable for interment by Legislatures not courts."[114] By coincidence or otherwise, the "year and a day" rule dates back to the 13th century and the statutes of King Edward — just like the doctrine of abatement *ab initio*.[115]

109. 374 Mass. 640, 656 (1978).

110. 456 Mass. 337, 338 n.2 (2010).

111. Comm'r of Prob. v. Adams, 65 Mass. App. Ct. 725, 735 (2006). *See also* Police Comm'r of Boston, 374 Mass. at 658-61. Cf. Vaccaro v. Vaccaro, 425 Mass. 153, 157 (1997).

112. Commonwealth v. Alves, 86 Mass. App. Ct. 210, 212-13 (2014) (emphasis added).

113. *Id.* at 213 & 215. *See also* Commonwealth v. Gavin G., 437 Mass. 470, 482 (2002).

114. Commonwealth v. Lewis, 381 Mass. 411, 415 (1980).

115. *In Lewis,* the SJC noted:

> Any discussion of the subject begins with the antique statute 6 Edw. 1, c. 9 (1278), which declares as to the private form of prosecution for murder called "appeal," that it shall not be abated so soon as it has been heretofore; but if the appellor declare the "Deed" and the time when it was done, and with what weapon the victim was slain, the appeal shall stand and not abate "if the Party shall sue within the Year and the Day after the Deed done."

Id. at 413.

Unsurprisingly, these ancient — often literally medieval — doctrines have been deemed by the SJC to be inconsistent with contemporary conceptions of justice and sound public policy. As the court noted in *C.C. v. A.B.*,[116] on its way toward jettisoning the historic presumption of spousal access during marriage for the purposes of paternity suits: "Modern trends in the law, combined with changes in social attitudes, have brought into question the continuing validity of archaic rules which obfuscate the truth-seeking principles our system of jurisprudence strives to achieve."[117] Similarly, in *Young v. Garwacki,*[118] the court declared: "Today, we do away with the ancient law that bars a tenant's guest from recovering compensation from a landlord for injuries caused by negligent maintenance of areas rented to the tenant . . . The practical result of this archaic rule has been to discourage repairs of rented premises."[119]

In similar fashion, the SJC has applied its discretionary authority to amend or abolish such long-established concepts as *caveat emptor*,[120] fresh (as opposed to "first") complaint;[121] and the time-honored but sometimes nonsensical traditional categories of accessorial liability.[122] Additionally, the court has decided a "number of cases clearly announcing a trend away from 'archaic common law rules' in the area of tort immunities."[123] In short, over the past few decades, the SJC has been assiduous in identifying and weeding out dusty legal principles that either no longer serve the purposes for which they were intended or that fail to promote the fair administration of justice — or both.

While all of these changes might have been abolished through legislative action, the SJC has made it clear that common law reform is equally well suited to that task. As the SJC observed in *Lombardo v. D.F. Frangioso & Co.*,[124] "This court . . . has reversed prior decisions supporting archaic rules of law in the absence of legislative action when it has determined the rule to be incompatible with modern legal thinking."[125] Along similar lines, the court said in *Commonwealth v. Lewis*: "We share the view that the rule is no longer supportable in reason, and that its relegation to the shades of history may be accomplished by court decision."[126] Certainly, that is the approach the court took in *Goodridge v. Department of Public Health*,[127] with respect to same-sex marriage. While *Goodridge* was decided on the basis of constitutional principles, the court's observation about the scope of such protection — and its evolution over time — seems equally germane here: "The history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.'"[128] Victims were long ignored and excluded from consideration in fixing the procedures for criminal trials. That is simply no longer the case, and the law must yield to the new reality.

In the end, the survival of the abatement doctrine, designed as it was to accommodate the exigencies of another time, perhaps is best attributed to the fact that it represented the path of least resistance. Before courts, legislatures and the public began to take the rights of victims seriously, abatement might well have been seen as a "zero-cost" means of extricating appellate courts from an otherwise thorny practical problem — what to do with an inchoate case with no obvious path to resolution. With the defendant dead, and victims largely abstracted from the trial process, who would complain about such a disposition? It was, in short, the easy way out. Today, however, such a view is significantly misaligned with modern conceptions of justice, including prescriptive norms like the aforementioned Mass. Gen. Laws c. 258B, that expressly seek to balance the rights of victims and defendants. Through this modern lens, the high social costs of abatement are now visible. With the *Hernandez* decision, the court has recalibrated its line-drawing to adapt to these changed priorities.

In a precedent-driven and inherently conservative environment like the law, there is nothing more dangerous than confusing the familiar with the necessary. Abatement was not just unnecessary, it trenched squarely on important old values like finality, and emerging new values like recognition of the importance of tempering criminal procedure with respect for the rights of the very people whom the law exists to protect. It is worth recalling the words of a former chief justice of the SJC: "But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion."[129]

As the SJC observed more than 150 years ago: "The common law is 'designed to meet and be susceptible of being adapted "to new institutions and conditions of society . . . new usages and practices, as the progress of society in the advancement of civilization may require."'"[130] There was nothing about the doctrine of abatement *ab initio* that comported with a contemporary sense of justice. The Hernandez case, challenging as it did virtually every possible justification for the abatement rule, provided a timely and appropriate occasion to make a long overdue and salutary change to an artifact of a different age.

116. 406 Mass. 679 (1990).

117. *Id.* at 688.

118. 380 Mass. 162 (1980).

119. *Id*. at 168.

120. *See* Albrecht v. Clifford, 436 Mass. 706, 709 (2002).

121. *See* Commonwealth v. King, 445 Mass. 217, 228, 247-48 (2005) ("[u]nder English common law, victims of violent crime were required to make 'hue and cry' (hutesium et clamor) as a prerequisite of prosecution.").

122. *See* Marshall v. Commonwealth, 463 Mass. 529, 535 (2012); *see also* Mass. Gen. Laws c. 274, §§ 2-3 for relevant statutory reform; *Cf.* Frederick Pollock, *The History of English Law Before the Time of Edward I* 578-579 (Oxford, 1899).

123. Spooner v. General Acci. Fire & Life Assurance Corp., 379 Mass. 377, 379 (1979) (quoting Soule v. Massachusetts Electric Co., 378 Mass. 177, 184 (1979)).

124. 359 Mass. 529 (1971), rev'd on other grounds, *see* Diaz v. Eli Lilly & Co., 364 Mass. 153, 156 (1973).

125. *Lombardo*, 359 Mass. at 538.

126. Commonwealth v. Lewis, 381 Mass. 411, 418 (1980).

127. 440 Mass. 309 (2003).

128. *Id.* at 339 (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).

129. Oliver Wendell Holmes Jr., "Common Carriers and the Common Law," 13 Am. Law Rev. 608, 630 (1879).

130. C.C. v. A.B., 406 Mass. 679, 688-89 (1990) (quoting Commonwealth v. Gallo, 275 Mass. 320, 333 (1931) (quoting Commonwealth v. Temple, 80 Mass. 69, 74 (1859))).

Case Comment

Applying the Mosaic Theory to Determine Whether Use of Automatic License Plate Readers Constitutes a Search

Commonwealth v. McCarthy, 484 Mass. 493 (2020)

Commonwealth v. McCarthy[1] and the cases involving surveillance through the use of emerging technology raise this question: is search the right way to think about Article 14 and the Fourth Amendment?[2] In Massachusetts, the answer is no. The Supreme Judicial Court (SJC) makes it clear that the lens through which to look at Article 14 and Fourth Amendment protections in the context of police surveillance is to see whether the police have invaded a person's reasonable expectation of privacy by creating a mosaic of the whole of a person's movements.[3] The SJC has adopted a two-pronged privacy test to see if a mosaic emerges from the universe of locational information that the police have available to query or assemble.

The SJC has repeatedly been ahead of the United States Supreme Court in tackling privacy issues arising from police use of emerging technologies to investigate crime — in GPS,[4] cell-site location information (CSLI),[5] PING[6] and, in *McCarthy*, automatic license plate readers (ALPRs). Now, the SJC has unanimously adopted the mosaic theory.[7] Under this approach, if the technology provides a clear picture of a person's daily doings, the police may only gather such evidence by first obtaining a search warrant. In *McCarthy*, the SJC reviewed a 50-year history of cases involving police searches in public places beginning with *Katz v. United States*.[8] Although the SJC ultimately concluded that the Barnstable Police Department's use of ALPRs was lawful in this case, in the future, police should expect that when they deploy technology that "intrudes on a person's reasonable expectation of privacy," such as covert cameras, facial recognition software and, presumably, cell-site simulators, drones and yet-to-be-imagined technology, to precisely locate a person or construct a mosaic of the private acts of a person's life, they must do so with a search warrant.[9]

Case Summary

In *McCarthy*, historical travel data gleaned from ALPRs on the Bourne and Sagamore bridges and stored by the commonwealth revealed that McCarthy had traveled to Cape Cod on four dozen dates over the course of about 11 weeks, consistent with the police theory that he was traveling there to distribute heroin.[10] The system

1. 484 Mass. 493 (2020).

2. Article 14 of the Massachusetts Declaration of Rights states that:

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

MA. Const. art. XIV.

The Fourth Amendment of the U.S. Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. art. IV

3. In Commonwealth v. Connolly, 454 Mass. 808, 823-24 (2009), the SJC held that monitoring and use of data from GPS devices surreptitiously installed on a car constitutes a seizure requiring a warrant under Article 14. The concurring opinion agreed that Article 14 required a warrant, but because installation and monitoring of a GPS device on a car was a search, the police had "invaded the reasonable expectation of privacy of any person authorized to drive that vehicle." *Id.* at 833 (Gants, C.J., concurring). Previewing the evolution of the case law, the concurring opinion stated that the SJC's

> constitutional analysis should focus on the privacy interest at risk from contemporaneous GPS monitoring, not simply the property interest. Only then will we be able to establish a constitutional jurisprudence that can adapt to changes in the technology of real-time monitoring, and that can better balance the legitimate needs of law enforcement with the legitimate privacy concerns of our citizens.

Id. at 836.

In Commonwealth v. Almonor, 482 Mass. 35 (2019), there is a similar debate as in *Connolly* between the lead opinion and the first concurrence about the emphasis on property rights versus privacy rights.

4. *Compare Connolly,* 454 Mass. 808, *with* United States v. Jones, 565 U.S. 400 (2012).

5. *Compare* Commonwealth v. Augustine, 467 Mass. 230 (2014), with Carpenter v. United States, 138 S. Ct. 2206 (2018).

6. *See Almonor,* 482 Mass. 35. A ping is when "a cellular service provider … cause[s] a cell phone to transmit its global positioning system (GPS) coordinates to the provider[.]" *Id.* at 36 n.1.

7. The SJC first touched on the mosaic theory in Commonwealth v. Johnson, 481 Mass. 710 (2019). In *Johnson*, the defendant was a probationer wearing a GPS bracelet as a condition of his sentence whom the SJC concluded had a diminished expectation of privacy, and the police had made only targeted use of the GPS data, such that it had not created a "full mosaic of his personal life[.]" *Id.* at 722, 727. The "mosaic theory," as it has come to be known, was first described in United States v. Maynard, 615 F.3d 544, 560 (D.C. Cir. 2010).

8. 389 U.S. 347 (1967).

9. Commonwealth v. McCarthy, 484 Mass. 493, 513 (2020) (Gants, C.J., concurring).

10. *McCarthy*, 484 Mass. at 496.

that stores and organizes the ALPR data also notified the Barnstable Police in real time that McCarthy's car had just traveled over one of the Cape Cod bridges.[11] The ALPR data that police gathered served as the foundation for a car stop that yielded other incriminating evidence and served as substantive evidence of the drug dealing offenses for which McCarthy was indicted.[12] In the end, the SJC concluded that McCarthy did not have a reasonable expectation of privacy with respect to the information captured, stored and transmitted about his travel to Cape Cod, and so the police did not conduct a search under Article 14 and the Fourth Amendment.[13]

Background on ALPRs Used in this Case

The SJC described the ALPR system as

> cameras combined with software that allows them to identify and 'read' license plates on passing vehicles. When an ALPR identifies a license plate, it records a photograph of the plate, the system's interpretation of the license plate number, and other data, such as the date, time, location, direction of travel, and travel lane.[14]

The ALPRs in this case were owned and maintained by the State Police, and the information was maintained by the Massachusetts Executive Office of Public Safety and Security (EOPSS), the secretariat that oversees the State Police.[15] "While these cameras are not infallible, they essentially create a comprehensive record of vehicles traveling onto or off of Cape Cod."[16] In terms of functioning, "ALPR systems produce two types of information: real-time alerts and historical data."[17] An investigator can log into the system and create a "hot list" of license plate numbers about which the investigator will receive real-time alerts when it has been detected by an ALPR.[18] Police can also "search by license plate number for any historical matches" stored by EOPSS.[19] "EOPSS currently has a one-year retention policy for ALPR data."[20] The record before the SJC contained no information about how many such cameras EOPSS owned and maintained or otherwise received ALPR data, say, from other state agencies, private parties, cities, towns or the federal government.[21] The investigating police agency in *McCarthy*, the Barnstable Police Department, adopted a policy promulgated by the State Police restricting police use of ALPR information.[22]

Details of the Investigation

Barnstable Police assembled "substantial evidence" through surveillance, controlled buys and confidential sources "that a co-defendant" of McCarthy "was distributing heroin" from his home.[23] While surveilling the co-defendant, the police observed a black Hyundai (the Hyundai) at the co-defendant's home.[24] "After further surveillance, and a tip from a confidential informant," the police saw McCarthy driving the Hyundai and "began to suspect that he was supplying heroin to his co-defendant."[25]

With this much information in their possession, on Feb. 1, 2017, Barnstable Police added the license plate of the Hyundai to the ALPR hot list so that it would alert the police each time the system detected the vehicle crossing the Bourne or Sagamore bridges. As the investigation continued, the police also made a historical list of each time that the ALPR system detected the Hyundai driving over the Bourne and Sagamore bridges between Dec. 1, 2016, and Feb. 12, 2017.[26] The data revealed four dozen trips to Cape Cod over the course of about 11 weeks, including multiple trips on some days.[27]

After receiving real-time ALPR alerts from the "hot list," the police conducted live physical surveillance of McCarthy driving the Hyundai on Feb. 8 and 22, 2017.[28] On each date, the police watched McCarthy drive to the area of the co-defendant's home and saw McCarthy meet his co-defendant for about 30 seconds.[29] On neither date did the police see a physical exchange.[30]

On the second date, Feb. 22, 2017, the police stopped both McCarthy's and the co-defendant's vehicles "on suspicion that a drug

11. *Id.*
12. *Id.*
13. *Id.* at 509.
14. *Id.* at 494.
15. *Id.*
16. Commonwealth v. McCarthy, 484 Mass. 493, 494-95 (2020).
17. *Id.* at 495.
18. *Id.* The SJC did not draw any distinction between real-time alerts and historical ALPR. Contrast the distinction that the SJC drew between historical CSLI when the records cover less than six hours and a single ping revealing real-time location in *Almonor*.

    > Historical "telephone call" CSLI is collected and stored by the service provider in the ordinary course of business when the cell phone user voluntarily makes or receives a telephone call. In this context, the six-hour rule is consistent with reasonable societal expectations of privacy. In contrast, there is nothing voluntary or expected about police pinging a cell phone, and the six-hour rule therefore does not apply.

    Almonor, 482 Mass. at 49.
19. *McCarthy*, 484 Mass. at 495.
20. *Id.*
21. The opinion noted that "amici submit that, in 2015, there were 168 ALPR cameras in operation in Massachusetts. The information provided by the amici was not before the motion judge and remains untested by the adversarial process." *Id.* at 508 n.14.
22. The policy did not factor into the court's decision-making. "Detailed policy guidelines for police use of ALPRs well may be a 'good idea,' but their existence or lack thereof does not determine the constitutional question." *Id.* at 510 (quoting Riley v. California, 573 U.S. 373, 398 (2014)).
23. Commonwealth v. McCarthy, 484 Mass. 493, 495 (2020).
24. *Id.*
25. *Id.* at 495-96.
26. In the colloquial sense, which in many instances is also the constitutional sense, this is when the police searched for information. As described throughout, "search" is no longer the critical term.
27. *McCarthy*, 484 Mass. at 496.
28. *Id.* at 495-96.
29. Commonwealth v. McCarthy, 484 Mass. 493, 495-96 (2020).
30. *Id.*

transaction had taken place."[31] After stopping the co-defendant, the police found heroin and elicited an incriminating statement.[32] After stopping McCarthy, the police arrested and transported him to the police station, where he "waived his *Miranda*[33] rights and made various incriminating statements."[34] The police found no drugs in McCarthy's possession, but discovered other incriminating evidence.[35]

Procedural Posture

Before the Superior Court, *McCarthy* moved to suppress the ALPR data and the fruits of the arrest. The Superior Court judge held an evidentiary hearing and denied the motion. *McCarthy* sought interlocutory relief, and the single justice "allowed the appeal to proceed in this court."[36]

State and Federal Constitutional Framework

The SJC resolved the central issue of "whether the use of ALPR technology by police constitutes a search under the Fourth Amendment or art. 14" of the Massachusetts Declaration of Rights.[37] The SJC immediately turned to the familiar and workable framework for analyzing police use of emerging technology to conduct surveillance — reasonable expectation of privacy. The word search appears in Article 14 and the Fourth Amendment, but the operative standard from *Commonwealth v. Johnson* is: "An individual has a reasonable expectation of privacy where, (i) the individual has manifested a subjective expectation of privacy in the object of the search, and (ii) society is willing to recognize that expectation as reasonable."[38] In Massachusetts, this standard serves as the starting point.

The SJC worked through the problem of whether that expectation of privacy is reasonable by starting with "constitutional jurisprudence governing the technological surveillance of public space [that] has developed rapidly in the last decade."[39] The protection of reasonable expectations of privacy in light of emerging technology finds its foundation in "the courts' overarching goal [] to 'assure [the] preservation of that degree of privacy against government that existed when the Fourth Amendment [and art. 14] were adopted.'"[40] The SJC and "the Supreme Court have recognized how advancing technology undercuts traditional checks on an overly pervasive police presence because it, (1) is not limited by the same practical constraints that heretofore effectively have limited long-running surveillance, (2) proceeds surreptitiously, and (3) gives police access to categories of information previously unknowable."[41] The practical constraints on police work that existed at the time that Article 14 was drafted no longer exist.[42] Consequently, the SJC concluded that "when the duration of digital surveillance drastically exceeds what would have been possible with traditional law enforcement methods, that surveillance constitutes a search under art. 14."[43]

The SJC drew from the foundation of *Katz v. United States*,[44] in which the Supreme Court held that the police must obtain a search warrant in order to surreptitiously record private conversations occurring in public.[45] As the SJC observed, the *Katz* court recognized the "tension" between the idea that "whether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been exposed to the public" and that "a person does not surrender all Fourth Amendment protection by venturing into the public sphere."[46] It is here that the SJC drilled closer to the facts. McCarthy had exposed himself to the public: driving on major highways, over major bridges, hardly an activity that society recognizes as private.

The SJC unanimously embraced the so-called Mosaic Theory, stating: "[w]hen new technologies drastically expand police surveillance of public space, both the United States Supreme Court and this court have recognized a privacy interest in the whole of one's public movements."[47] Surveillance has evolved since the "relatively primitive beeper used in *Knotts*" such that the SJC now asks not whether a search has occurred, but rather, whether the form of surveillance "produce[s] a detailed enough picture of an individual's movements so as to infringe upon a reasonable expectation that the Commonwealth will not electronically monitor that person's comings and goings in public over a sustained period of time."[48] "In determining whether a reasonable expectation of privacy has been invaded, it is not the amount of data that the Commonwealth seeks to admit in evidence that counts, but, rather, the amount of data

31. *Id.* at 496.
32. *Id.*
33. Miranda v. Arizona, 384 U.S. 436 (1966).
34. *McCarthy*, 484 Mass. at 496.
35. Commonwealth v. McCarthy, 484 Mass. 493, 496 (2020).
36. *Id.* at 497.
37. *Id.*
38. *Id.* at 497 (quoting Commonwealth v. Johnson, 481 Mass. 710 (2019)). In a footnote, the SJC too quickly addressed the first prong: "We infer from the undisputed record … that the defendant manifested a subjective expectation of privacy in his location by choosing to meet his codefendant in a quiet residential area." *McCarthy*, 484 Mass. at 497 n.5. Although not dispositive in this case, this conclusion is a large leap. The object of the search was ALPR data from the Bourne and Sagamore bridges, not where McCarthy ultimately met his co-defendant. Most drug dealers expect that they are being followed and wish (but do not expect) that they are not. As here, they distribute drugs in places in which they feel safe and expect privacy only after exposing themselves to the world in order to get to that seemingly safe and private place.
39. *McCarthy*, 484 Mass. at 497.
40. *Id.* at 498 (quoting *Almonor,* 482 Mass. at 54 (Lenk, J., concurring) quoting Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018)).
41. Commonwealth v. McCarthy, 484 Mass. 493, 499 (2020).
42. *Id.* at 500.
43. *Id.* (citing Commonwealth v. Augustine, 467 Mass. 230, 253 (2014)).
44. 389 U.S. 347 (1967).
45. *McCarthy*, 484 Mass. at 501.
46. *Id.* (citing *Katz*, 389 U.S. at 351).
47. Commonwealth v. McCarthy, 484 Mass. 493, 502 (2020) (citations omitted).
48. *Id.* at 503, 505 (referencing without explicit citation United States v. Knotts, 460 U.S. 276, 281-85 (1983)).

that the government collects or to which it gains access."[49]

As surveillance technology continues to evolve, resolving whether a search has occurred will be a fact-based analysis as to "the extent to which a substantial picture of the defendant's public movements are revealed by the surveillance."[50] Yet, physical locations are not wholly irrelevant; the SJC will consider "constitutionally sensitive locations — the home, a place of worship, etc.," which reveal more about a person's life than an ALPR on a highway.[51] The SJC's discussion of the placement and number of cameras foreshadows one location where the expectation of privacy is most acute and where we can expect the SJC to provide the greatest protection afforded by Article 14: the home.[52]

In the future, the ubiquity of ALPR would make a difference to the SJC. It prescribed that

> with cameras in enough locations, the hot list feature could implicate constitutional search protections by invading a reasonable expectation of privacy in one's real-time location. If deployed widely enough, ALPRs could tell police someone's precise, real-time location virtually any time the person decided to drive, thus making ALPRs the vehicular equivalent of a cellular telephone "ping."[53]

Here, the SJC concluded that the mosaic was insufficiently detailed. Therefore, it failed to "invade a reasonable expectation of privacy."[54] Although the SJC found that ALPRs provided "enhancements of what reasonably might be expected from" a police officer sitting roadside in a cruiser taking careful notes, they failed to "monitor the whole of the defendant's public movements, or even his progress on a single journey," and to "track enough of his comings and goings so as to reveal 'the privacies of life.'"[55] The SJC stated that "[w]hile we cannot say precisely how detailed a picture of the defendant's movements must be revealed to invoke constitutional protections, it is not that produced by four cameras at fixed locations on the ends of two bridges."[56] In other words, the mosaic was incomplete, and therefore the police did not conduct a search.[57]

Chief Justice Gants' concurrence not only anticipated future constitutional challenges as surveillance technologies advance, but also described a framework for resolving them.[58] He "suggest[ed] an analytical framework that might prove useful in future cases."[59] Future cases[60] would not be limited to those involving ALPR, but would include law enforcement possession of "comparable historical locational data that could produce a mosaic of an individual's movements equivalent to that produced by CSLI, whether because it purchased bulk CSLI data from a vendor or because it had a vast array of ALPRs or surveillance cameras using facial recognition[.]"[61]

As to process, the chief justice suggested two alternatives. The first would require a search warrant "when the locational mosaic of a

49. *Id.* at 505; *see* Commonwealth v. Estabrook, 472 Mass. 852, 858-59 (2015) (citing *Augustine*, 467 Mass. at 254).

50. *Id.* at 506.

51. *Id.*

52. *Id.* at 507. "Rather, we conclude that the cameras installed to surveil the defendants' homes were of greater constitutional significance than those, as in *McCarthy*, that were directed at a public highway." Commonwealth v. Mora, 2020 LEXIS 471, *15 (2020).

53. Commonwealth v. McCarthy, 484 Mass. 493, 507 (2020).

54. *Id.* at 508.

55. *Id.* at 508-09 (citations omitted).

56. *Id.* at 509.

57. The SJC resolved all additional appellate claims in favor of the commonwealth.

58. *McCarthy*, 484 Mass. at 512 (Gants, C.J., concurring).

59. Commonwealth v. McCarthy, 484 Mass. 493, 512-13 (2020) (Gants, C.J., concurring).

60. Future cases applying the mosaic theory to modern surveillance are already being reported. The SJC issued its decision in Commonwealth v. Mora, 2020 Mass. LEXIS 471 *2 (2020), on Aug. 6, 2020, a matter in which law enforcement employed so-called "pole cameras" to conduct long-term covert surveillance of suspected drug dealers. The SJC applied the mosaic theory to law enforcement use of cameras targeting Mora's and another defendant's homes and other cameras placed elsewhere in the community. The SJC concluded "that the continuous, long-term pole camera surveillance targeted at the residences of Mora and Suarez well may have been a search within the meaning of the Fourth Amendment, a question we do not reach, but certainly was a search under Article 14." The SJC also concluded that the cameras placed away from the defendants' homes "did not collect aggregate data about the defendants over an extended period. Without such data, the cameras similarly did not allow investigators to generate a mosaic of the defendants' private lives that otherwise would have been unknowable." *Id.* at *16 (citing *McCarthy*, 484 Mass. at 502). The decision in Mora presents a clear contrast between the SJC's application of Article 14 and the First Circuit's application of the Fourth Amendment to covert surveillance. On June 16, 2020, in United States v. Moore-Bush, a majority of a First Circuit panel concluded that eight months of warrantless pole camera surveillance did not violate the Fourth Amendment because it was quantitatively and qualitatively different than CLSI addressed in *Carpenter*: "There is no equivalent analogy to what is captured by the pole camera on a public street, which is taking images of public views and not more. A pole camera does not track the whole of a person's movement over time." 2020 U.S. App. LEXIS 18886 *24-25 (1st Cir. 2020). The majority concluded that "[p]ole cameras are a conventional surveillance technique and are easily thought to be a species of surveillance security cameras" that *Carpenter* "did not call into question[.]" *Id.* at *22. Concurring in the judgment, Judge David Barron focused closely on the facts of the case and their privacy implications and wrote:

> I do not see how *Carpenter's* reference to 'security cameras' is best read impliedly to bless a police department's warrantless and suspicionless use of a video pole camera continuously and secretly to surveil the entryways of a private home in an effort to make a criminal case rather than merely to keep watch over its own parking lots or station houses as a standard safety precaution that property owners now routinely take.

Id. at *48. On May 29, 2020, the SJC solicited amicus briefs in the matter of Commonwealth v. Zachery, SJC-12952, as to "[w]hether a person has a reasonable expectation of privacy in information relating to his or her use of a public transportation card known as Charlie Card, or in any data the Charlie Card may contain or generate." The case has not yet been argued. The defendant's brief challenges law enforcement's warrantless access to data held by the MBTA associated with the defendant's Charlie Card, specifically referencing the mosaic theory.

61. *McCarthy*, 484 Mass. at 513 (Gants, C.J., concurring).

targeted individual's movements crosses the threshold of the reasonable expectation of privacy."[62] "A mosaic above that threshold would require a search warrant based on probable cause, but a mosaic below that threshold would not require any court authorization."[63] This alternative invites law enforcement to leave much to chance. Longer periods of surveillance — whether real-time or historical — tend to be employed in more consequential, time-consuming and costly investigations of sophisticated criminal enterprises. Often, surveillance is part of the foundation of the investigation. Thus, if warrantless surveillance techniques reveal a mosaic, they will be suppressed and could cause the collapse of the evidence built upon this foundation under the "fruit of the poisonous tree" doctrine suppressing evidence that "has been come at by the exploitation" of an unlawful search or seizure.[64]

The chief justice's second alternative is better for privacy rights, police work, and analysis by reviewing courts. This alternative recognizes that the idea of a mosaic is amorphous. But to protect the reasonable expectation of privacy in the context of locational information, mosaic makes more sense than search. In an effort to protect privacy and address the gray area between four cameras on a highway (no mosaic) and a mosaic of, for instance, more than six hours of CSLI, the chief justice suggested that the court could

> strike a balance analogous to that struck by the United States Supreme Court in *Terry v. Ohio*,[65] and decide that there are two locational mosaic thresholds: a lesser threshold that may be permissibly crossed with a court order supported by an affidavit showing reasonable suspicion, and a greater threshold that is permissibly crossed only with a search warrant supported by probable cause.[66]

To meet the reasonable suspicion threshold, the court "would require 'specific and articulable facts' demonstrating reasonable suspicion that the targeted individual has committed, is committing, or will commit a crime, and that there are reasonable grounds to believe that the data obtained from the query are relevant and material to an investigation of the crime."[67]

"This second alternative would mean that law enforcement agencies would need to obtain court authorization more often before retrieving targeted individual historical locational information in their possession because queries that would not require a showing of probable cause might still require a showing of reasonable suspicion."[68] Planning ahead and obtaining a court order would avoid suppression when "law enforcement could have met the applicable standard."[69]

Next, the chief justice described data that law enforcement will need to preserve and courts then consider to draw legal conclusions as to whether the reasonable suspicion or probable cause mosaic thresholds have been crossed.[70] In the absence of "prior court approval to search for particularized locational data in its possession," a police "agency will have to preserve each and every search query for the retrieval of historical locational information regarding a targeted individual."[71] The chief justice emphasized that the key considerations are the number of data collection points and the period of time for preserving such queries.[72] An example discussed in the concurrence was if "the State Police maintain 1,000 ALPRs at different locations throughout the Commonwealth, it matters whether they searched for a suspect's vehicle from the data yielded by all 1,000 cameras or only by four cameras, and it matters whether they gathered this data for one day or one hundred days."[73]

Lastly, the chief justice clarified that his view is that a reviewing court must have the details of the law enforcement query in order to know whether the results created such a clear mosaic that a court order would be required, and this information must be preserved and produced in discovery.[74] "Only then will a court have the information it needs to determine whether the retrieval of locational information regarding a targeted individual crossed a constitutional threshold that requires court authorization and either reasonable suspicion or probable cause."[75]

The takeaway from the majority opinion and the concurrence is that if police and prosecutors wish to protect the evidence that they gather through technology that reveals a mosaic of a person's life, they should seek a court order or search warrant. Although the SJC sanctioned warrantless harvesting of ALPR data here in *McCarthy*, the SJC did so while explicitly adopting the mosaic theory. The SJC gave notice that locational information is entitled to the same privacy protections of traditional searches, yet adopted the reconceptualization of the mosaic theory. Law enforcement should expect that if locational information — including locational information obtained by multiple means of surveillance — creates a mosaic, a private citizen has a reasonable expectation of privacy pursuant to Article 14. In future cases, especially as technology inevitably improves with clearer tracking equipment and data processing to follow people, law enforcement should follow Chief Justice Gants' recommendation to obtain a court order or search warrant.[76]

— Patrick Hanley

62. *Id.*
63. *Id.*
64. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
65. 392 U.S. 1, 21 (1968).
66. Commonwealth v. McCarthy, 484 Mass. 493, 514 (2020) (Gants, C.J., concurring).
67. *Id.* (quoting Terry v. Ohio, 392 U.S. at 21-22).
68. *Id.* at 514.
69. *Id.*
70. *Id.* at 514-15.
71. *Id.* at 515.
72. Commonwealth v. McCarthy, 484 Mass. 493, 515 (2020) (Gants, C.J., concurring).
73. *Id.*
74. *Id.*
75. *Id.*
76. In order to make this suggestion into a practical reality, the legislature should amend Mass. Gen. Laws c. 276, § 2B, "to permit warrants to be applied for and approved remotely through reliable electronic means so that judicial approval may be sought and obtained in a timely manner." Commonwealth v. Almonor, 482 Mass. 35, 69 (2019) (Gants, C.J., concurring). This need is highlighted by the court closures caused by the coronavirus pandemic.

Case Comment

Supreme Judicial Court Applies Successor Liability Doctrine to Sole Proprietorship

Smith v. Kelley, 484 Mass. 111 (2020)

Perhaps you have encountered this frustrating situation. You hire a contractor or other professional to perform a service. You make an advance payment to the professional, but the service is performed poorly or not at all. You sue the professional's business and secure a judgment against it. Facing this judgment, the professional closes the business, then starts a new business performing the same services using the same equipment for many of the same customers, but under a different name.

This scenario raises the question of whether the new business is liable for the defunct business's transgressions. The answer depends on whether the doctrine of successor liability can be invoked against the new business. Massachusetts, like most jurisdictions, observes the traditional rule of corporate law that predecessor businesses' liabilities are not imposed upon successor businesses, unless

> (i) the successor expressly or impliedly assumes liability of the predecessor, (ii) the transaction is a de facto merger or consolidation, (iii) the successor is a mere continuation of the predecessor, or (iv) the transaction is a fraudulent effort to avoid liabilities of the predecessor.[1]

The public policy underlying successor liability is the fair compensation of innocent corporate creditors.[2] When considering whether to impose successor liability, no single factor is dispositive.[3] Courts examine the relevant facts independently.[4] The courts' major focus in these cases is "whether one company has become another for the purpose of eliminating its corporate debt."[5]

In *Smith v. Kelley,* the Supreme Judicial Court (SJC) recently imposed successor liability against a law firm.[6] In that case, the sole officer, director and stockholder of a professional corporation tried to sidestep the professional corporation's liabilities by closing it down, and then reopening his law practice as a sole proprietorship.[7] The Superior Court ruled that the sole proprietorship was not legally responsible for the defunct professional corporation's liabilities.[8] On appeal, the SJC disagreed, reversed the Superior Court's decision, and determined for the first time that a predecessor corporation's liabilities can be imputed to a successor sole proprietorship under the "mere continuation" theory of successor liability.[9]

Background

Robert Smith (Smith) was a hard-luck case.[10] Although a Marine veteran, he also was a former drug addict, and an occasional resident at the New England Shelter for Homeless Veterans in Boston.[11] Smith suffered from debilitating mental health ailments, and his reading and writing skills were below average.[12] While living out of his car and working as a trash collector in 2005, Smith drew the attention of Laurice Taylor (Taylor) and Dwight Jenkins (Jenkins).[13] Taylor and Jenkins recruited Smith into a "special investment program," assuring him that he would earn $10,000 per transaction, without investing any money of his own.[14] This special investment program was, in reality, a mortgage fraud scheme, where Jenkins signed contracts to buy property, then assigned his rights as buyer to straw purchasers for fraudulent higher prices.[15] Jenkins engaged unscrupulous mortgage brokers to obtain financing for the straw purchasers, who then closed loans based on the fraudulent higher prices, but only paid the lower prices for the properties, with Jenkins collecting the difference as a "release fee."[16] The straw purchasers received modest payments for participating.[17]

1. *See* Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008) (quoting Guzman v. MRM/Elgin, 409 Mass. 563, 566 (1991)); *see also* McCarthy v. Litton Indus. Inc., 410 Mass. 15, 21 (1991) and Dayton v. Peck, Stow & Wilcox Co. (Pexto), 739 F.2d 690, 692 (1st Cir. 1984) (both construing Massachusetts law).
2. *See* Cargill Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 362 (1997).
3. Milliken & Co., 451 Mass. at 558.
4. *Id.*
5. *Id*. at 556.
6. Smith v. Kelley, 484 Mass. 111 (2020).
7. *Id.* at 114-17.
8. *Id.* at 117.
9. *Id.* at 127.
10. *Id.* at 112 (citing Smith v. Jenkins, 818 F. Supp.2d 336, 340 (D. Mass. 2011) (*Smith I),* aff'd in part, vacated in part, rev'd in part, 732 F.3d 51 (1st Cir. 2013) (*Smith II*).
11. *See Smith I*, 818 F. Supp.2d at 340-41.
12. *Id.*
13. *Smith I,* 818 F. Supp.2d at 341.
14. *Id.*
15. *Smith II,* 732 F.3d at 58-59 (1st Cir. 2013).
16. *Id.* at 59-61.
17. *Id.* at 58.

Smith agreed to participate in Jenkins' program, whereupon Jenkins and Taylor created a false financial profile for him and provided it to mortgage brokers who completed loan applications in Smith's name using false information, then forwarded false applications to residential mortgage lenders who approved the loans.[18] Jenkins engaged Louis Bertucci (Bertucci), an attorney at RKelley-Law, P.C. (P.C.) in Braintree, to close the loans.[19]

In February of 2005, Taylor twice sent Smith to the P.C.'s office for real estate closings, one for property in Dighton and the other for property in Boston.[20] Jenkins met Smith at the P.C.'s office for the closings. Jenkins promised to manage the property, collect rent, pay bills and later sell the property at a profit for Smith's benefit.[21] Bertucci directed Smith to sign mortgage documents and completed loan applications for more than $800,000 in loans.[22] Smith had no understanding of the documents, but he later received $20,000 for his participation.[23] Jenkins pocketed $83,500 of the proceeds from the loans to Smith as "contract release fees."[24]

Months later, lenders began dunning Smith for missed mortgage payments.[25] Tenants called to complain that utility bills were left unpaid.[26] Jenkins performed none of his promised management services.[27] Smith lost the Dighton and Boston properties to foreclosure.[28] His credit history was ruined, and his fragile mental health deteriorated.[29] Bertucci, the attorney who presided over the sham transactions, received a two-year suspension from the practice of law from the SJC for his role in Jenkins' scheme.[30]

Federal Litigation

Smith sued Jenkins, Bertucci, the P.C., and various mortgage lenders, mortgage brokers and real estate brokers, for fraud and breach of fiduciary duty.[31] He also sued Robert E. Kelley (Kelley), the sole officer, director and stockholder of the P.C.[32] Although Smith originally filed this lawsuit in Massachusetts Superior Court, the lawsuit was removed to federal court.[33] The District Court initially entered a directed verdict in favor of the P.C. and Kelley, concluding that they were not liable because Kelley was unaware of the scheme being conducted in his office.[34] On appeal, however, the First Circuit Court of Appeals held that there was reason to find the P.C. vicariously liable for Bertucci's misconduct, and it reversed the District Court's dismissal of Smith's claims against the P.C. but affirmed the dismissal of Smith's claims against Kelley personally.[35] On remand, the District Court entered a judgment for over $200,000 against the P.C.[36]

During the federal court proceedings, Kelley caused the P.C. to terminate all employees, except himself.[37] The day after the District Court entered judgment against the P.C., Kelley dissolved the P.C. and began operating his law practice as a sole proprietorship, at the same office with the same email address and similar letterhead.[38] When Smith was unable to collect his judgment against the P.C., he filed a separate lawsuit in Norfolk County Superior Court against Kelley under a successor liability theory.[39] In May of 2017, while the successor liability lawsuit was ongoing, Kelley filed a bankruptcy petition for the P.C. under Chapter 7 of the United States Bankruptcy Code.[40] Kelley himself did not file a personal bankruptcy petition.[41]

P.C.'s Bankruptcy Filing

The P.C.'s bankruptcy trustee determined that the P.C. had $74,000 in claims against Kelley because Kelley had taken business assets from the P.C. and accepted payments on the P.C.'s accounts receivable without paying the P.C. for them.[42] Kelley agreed to purchase the claims from the bankruptcy estate for $85,000, and the trustee moved for an order from the bankruptcy court authorizing the sale.[43] The trustee's motion specifically stated that "the Claims were being sold to Kelley without any representation or warranty that any claim in the Successor Liability Action [Smith's Superior Court lawsuit against Kelley], or any other particular claim or 'imputed' claim, is or is not property of the bankruptcy estate that would be included in the Claims being sold."[44]

The bankruptcy trustee's motion stated that the trustee was "not aware of any instance in which an individual attorney has been found liable as a successor to his previous professional corporation."[45] The bankruptcy court allowed the trustee's sale motion, but

18. *Id.* at 60-61.
19. *Id.*
20. *Id.*
21. *Smith II,* 732 F.3d 51, 60-61 (1st Cir. 2013).
22. *Id.* at 58-59.
23. *Id.*
24. *Id.* at 61.
25. *Id.*
26. *Id.*
27. *Smith II*, 732 F.3d 51, 61 (1st Cir. 2013).
28. *Id.*
29. *Id.*
30. *See In re Louis G. Bertucci III*, 31 Mass. Att'y Disc. R. 29 (2015).
31. *See Smith II,* 732 F.3d at 61.
32. *Id.*
33. *Id.*
34. Smith v. Kelley, 484 Mass. 111, 113-14 (2020) (citing *Smith I*, 818 F. Supp.2d at 339 n.1); *see Smith II*, 732 F.3d at 72.
35. Smith v. Kelley, 484 Mass. at 114 (citing *Smith II, supra,* 732 F.3d at 72-73).
36. *See* Smith v. Kelley, 484 Mass. at 114.
37. *Id.*
38. *Id.* at 114-15.
39. *Id.* at 115. Smith also sued Kelley personally, seeking to pierce the P.C.'s corporate veil, but the SJC did not rule on that theory because of its ruling against Kelley on the successor liability theory. *Id.* at 127 n. 15.
40. *Id.* at 115-16.
41. Smith v. Kelley, 484 Mass. 111, 116 n.9 (2020).
42. *Id.* at 116.
43. *Id.*
44. *Id.*
45. *Id.*

warned that its ruling was not a determination that the successor liability claims against Kelley were assets of the bankruptcy estate included in the sale to Kelley.[46] The bankruptcy court noted that Smith withdrew an objection to the sale based on this clarification, and that Kelley's attorney stated on the record that Kelley did not insist that those claims be deemed assets of the estate.[47]

Smith's Successor Liability Claims

After the bankruptcy judge's ruling on the sale motion, Smith and Kelley filed cross motions for summary judgment in the successor liability case.[48] The parties disputed whether Kelley's sole proprietorship was liable for the final judgment against the P.C., either under a successor liability theory or under the doctrine of piercing the corporate veil.[49] The Superior Court disagreed with Smith and ruled that the doctrine of successor liability could not be applied "where the successor in interest was a natural person, rather than a corporate entity."[50] Smith appealed, and the SJC transferred the case to itself on its own motion.[51]

As a preliminary matter, the SJC discussed S.J.C. Rule 3:06(3)(a) and (b), which address attorneys' liability for misconduct attributable to professional corporations engaged in the practice of law.[52] The SJC noted that owners of professional corporations performing legal services generally are held personally liable for "damages resulting from 'any negligent or wrongful act, error, or omission' performed by an owner or employee of the professional corporation if the tortious conduct (1) occurred in the course of performing legal services and (2) resulted in damages to the person for whom the legal services had been performed."[53] According to the SJC, however, this rule was not available to Smith because Smith was not a client of the P.C. or Bertucci.[54]

The SJC also noted that its rules impose personal liability on owners of professional corporations for "damages which arise out of the performance of legal services on behalf of the entity and which are caused by [the owner's] own negligent or wrongful act, error, or omission,"[55] but the SJC recognized that the federal court's judgment established that Kelley had not personally engaged in misconduct toward Smith.[56] Therefore, according to the SJC, the circumstances of Smith's claims against Kelley were beyond the scope of the SJC's rules, even though the underlying misconduct involved the P.C.'s legal services.[57] In any event, the SJC noted that Smith had not argued that S.J.C. Rule 3:06 provided a basis for recovery against Kelley.[58]

The SJC next considered Kelley's argument that the federal court proceedings precluded Smith from advancing his successor liability claim against Kelley in state court.[59] The SJC noted that under the federal doctrine of claim preclusion, "a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'"[60] The SJC observed that Smith's successor liability claim against Kelley did not involve the "very same claims" at issue in the prior federal litigation.[61] According to the SJC, the federal litigation concerned whether Kelley personally engaged in tortious conduct toward Smith.[62] In contrast, Smith's successor liability lawsuit in Superior Court involved whether Smith could collect from Kelley's sole proprietorship the judgment entered against the P.C. in the federal litigation.[63] The SJC noted that Kelley started his sole proprietorship because of the federal court's final judgment against the P.C., and that the sole proprietorship did not exist while the federal litigation was pending.[64] Therefore, according to the SJC, Smith never had a "full and fair opportunity to litigate" the successor liability issue in the federal litigation.[65]

The SJC also rejected Kelley's argument that the P.C.'s bankruptcy case precluded Smith's claims against Kelley.[66] The SJC noted that the bankruptcy judge "created a carve-out for the very claims at issue" and that Kelley "did not insist" that Smith's claims be deemed assets of the estate.[67] Therefore, the SJC ruled that the bankruptcy judge's order allowing the trustee's sale of claims to Kelley had no preclusive effect on Smith's successor liability claim.[68]

Having rejected Kelley's issue preclusion defense, the SJC analyzed the merits of Smith's successor liability claim against Kelley.[69] As mentioned above, when considering whether to apply successor liability, Massachusetts courts determine whether one of the following four conditions is met: (i) the successor assumes its predecessor's

46. *Id.* at 116-17.
47. Smith v. Kelley, 484 Mass. 111, 116-17 (2020).
48. *Id.* at 117.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 117-18.
53. Smith v. Kelley, 484 Mass. 111, 117-18 (2020) (citing S.J.C. Rule 3:06(3)(b), as amended, 423 Mass. 1302 (1996)).
54. *Id.*
55. *Id.* at 118 (citing S.J.C. Rule 3:06 (3)(a), as amended, 423 Mass. 1302 (1996)).
56. *Id.*
57. *Id.*
58. *Id.*
59. Smith v. Kelley, 484 Mass. 111, 118-19 (2020) at 118-119.
60. *Id.* at 118-19 (citing Taylor v. Sturgell, 553 U.S. 880, 892 (2008), quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)).
61. *Id.* at 119.
62. *Id.*
63. *Id.*
64. *Id.*
65. Smith v. Kelley, 484 Mass. 111, 119 (2020) (citing Taylor v. Sturgell, *supra*, quoting Montana v. United States, 440 U.S. 147, 153 (1979)).
66. *Id.* at 119.
67. *Id.*
68. *Id.*
69. *Id.* at 119-26.

liabilities, (ii) the transaction is a merger or consolidation, (iii) the successor is a mere continuation of the predecessor, or (iv) the transaction is a fraudulent effort to avoid the predecessor's liabilities.[70] The SJC confirmed this approach in analyzing Smith's successor liability claim that Kelley was liable for the P.C.'s debts to Smith.[71]

While acknowledging its respect for "the integrity of corporate structures," the SJC also expressed disapproval "that by merely changing its form, without significantly changing its substance, a single corporation can wholly shed its debts to unsecured creditors, continue its business operations with an eye toward returning to profitability, and have no further obligation to pay such creditors."[72] According to the SJC, the doctrine of successor liability is "designed to remedy this fundamental inequity."[73] The SJC noted the "essence" of the successor liability doctrine is that "[u]nder principles of equity, a court will consider a transaction according to its real nature, looking through its form to its substance and intent."[74] In other words, if a business entity conducts business as usual after a "formalistic change of name or corporate form," liability may be imposed on the successor for the debts of its predecessor.[75]

The SJC focused on whether Kelley's sole proprietorship was a "mere continuation of the predecessor."[76] The SJC described this "mere continuation" component of successor liability as "reinforc[ing] the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor."[77] The SJC discussed factors to consider when determining if the "mere continuation" component applies.[78] It mentioned that one such factor is the "continuity or discontinuity of the ownership, officers, directors, stockholders, management, personnel, assets, and operations" of the predecessor and successor entities.[79] According to the SJC, "no single factor is dispositive, and the facts of each case must be examined independently," and the ultimate issue is "whether one company has become another for the purpose of eliminating corporate debt."[80]

The SJC noted that although Kelley terminated many employees from the P.C. prior to dissolving it, Kelley remained the sole shareholder, officer and director of the P.C., and the leadership of the P.C. and Kelley's sole proprietorship was "functionally identical."[81] The SJC also deemed it significant that both before and after the dissolution of the P.C., Kelley's sole proprietorship received legal fees from the P.C.'s clients.[82] According to the SJC, Kelley simply "rolled over" the P.C.'s client fee agreements to his sole proprietorship, "as though nothing had changed," and Kelley took the P.C.'s equipment and supplies without paying for them.[83] Observing that the sole proprietorship used the same email address, physical address, IOLTA account and health insurance as the P.C., and maintained relationships with the same creditors and vendors, the SJC characterized the sole proprietorship as a "reincarnation" of the P.C.[84]

After listing the similarities between the P.C. and Kelley's sole proprietorship, the SJC turned to the Superior Court's ruling denying successor liability because the successor entity was a sole proprietorship instead of a corporation.[85] The SJC noted that if Kelley had established a new corporation as a successor to the dissolved P.C., the SJC would "have little difficulty in finding the successor entity liable."[86] The SJC realized that it was charged with determining "whether a different set of rules applies when the successor is a sole proprietorship."[87]

The SJC acknowledged that it was unaware of any Massachusetts cases addressing the issue of whether a sole proprietorship can be required to answer for debts of a predecessor corporation.[88] Nevertheless, the SJC would not allow a scarcity of Massachusetts case law prevent it from giving Smith some redress, after describing Kelley's actions as "troubling."[89] The SJC cited as persuasive a 2017 Washington case, *Columbia State Bank v. Invicta Law Group PLLC*.[90]

In *Columbia State Bank,* a bank sued a lawyer whose professional limited liability company (PLLC) had defaulted on a loan.[91] The lawyer, who was the PLLC's sole owner and managing partner, filed a personal bankruptcy petition and promptly ceased operating the PLLC.[92] On the following day, he opened a new law practice as a sole proprietorship.[93] The sole proprietorship continued using the same engagement letters, letterhead, website, signage, telephone number, offices, insurance, employees and equipment that had been used by the PLLC, and the lawyer continued representing the same

70. *See* Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008).
71. Smith v. Kelley, 484 Mass. 111, 120 n.10 (2020).
72. *Id.* at 120 (quoting Milliken & Co., 451 Mass. at 561).
73. *Id.* at 120 (quoting Milliken & Co., 451 Mass. at 561).
74. *Id.* at 120 (quoting Milliken & Co., 451 Mass. at 560).
75. *Id.*
76. *Id.* at 120-26.
77. *Id.* at 120 (quoting 15 W.M. Fletcher, Cyclopedia of Corporations § 7124.10, at 321 (rev. 2017)).
78. *Id.* at 120-21.
79. Smith v. Kelley, 484 Mass. 111 (2020) (citing Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 359 (1997); McCarthy v. Litton Indus. Inc., 410 Mass. 15, 23 (1991); and Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. 306, 312-14, 402 P.3d 330 (2017).
80. *Id.* at 121 (quoting Milliken & Co., 451 Mass. at 556, 558).
81. *Id.*
82. *Id.* at 121-22.
83. *Id.* at 122.
84. *Id.* (citing Bud Antle Inc. v. Eastern Foods Inc., 758 F.2d 1451, 1458 (11th Cir. 1985).
85. Smith v. Kelley, 484 Mass. 111, 122-26 (2020).
86. *Id.* at 122.
87. *Id.*
88. *Id.* at 123.
89. *Id.* at 120.
90. *Id.* at 123 (citing Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. 306, 402 P.3d 330 (2017)).
91. Smith v. Kelley, 424 Mass. 111, 123-124 (2020).
92. *Id.* at 123 (citing Columbia State Bank v. Invicta Law Group PLLC, *supra*, 199 Wash. App. at 312-13, 402 P.3d 330 (2017))
93. *Id.* (citing Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. at 312-14, 402 P.3d 330).

clients, without timely notifying them of the new legal structure.[94]

The Washington appeals court used the "mere continuation" theory of successor liability to hold that the bank could recover against the sole proprietorship.[95] That court concluded that even though the sole proprietorship had no officers, directors or shareholders, the sole proprietorship had a "continuity of individuals in control of the business."[96] The court explained that "successor liability exists in equity to protect creditors from debtors that attempt to change corporate form, sell off their assets, or merge with another company in an attempt to avoid their debts."[97] According to the Washington appeals court, the successor's status as a sole proprietorship did not change its analysis in imposing successor liability on the sole proprietorship.[98]

Adopting this analysis, the SJC held that Kelley could be held liable for the P.C.'s debts to Smith under successor liability theory.[99] According to the SJC, "given that Kelley tried to avoid the P.C.'s liabilities while continuing the P.C.'s business, the equities of this case weigh in favor of imposing successor liability."[100] The SJC added that "Kelley's attempt to avoid the P.C.'s liabilities is 'precisely the kind of harm to innocent creditors that the successor liability doctrine was designed to prevent.'"[101]

In reaching this decision, the SJC offered some caveats.[102] It cautioned that "the facts of each [successor liability] case must be examined independently," noting that "successor liability would not be warranted" if there had been multiple shareholders in Kelley's P.C. and each had formed his or her own business after the dissolution.[103] The SJC also suggested that it would have viewed the case differently if Kelley had dissolved the P.C. and then went to work at a different law firm.[104] According to the SJC, under the current facts, Kelley clearly planned to dissolve the P.C., then continue his law practice as if nothing had happened, unimpeded by the final judgment in federal court against the P.C.[105] Based on the facts of the case, the SJC imputed successor liability from the P.C. to Kelley's sole proprietorship.[106]

Limit of Kelley's Personal Liability

While holding Kelley liable to Smith under successor liability theory, the SJC was unwilling to expose all of Kelley's personal assets to Smith's claims.[107] Instead, recognizing that successor liability is an equitable remedy, the SJC decided that it would impose an equitable limit on which of Kelley's assets would be available to Smith to satisfy a judgment against Kelley.[108]

The SJC noted that sole proprietors, such as Kelley, are personally liable for the debts of their sole proprietorships.[109] The SJC observed that Kelley's sole proprietorship generated revenues that should have been available to pay Smith's judgment against the P.C.[110] Under these circumstances, the SJC required that an equitable remedy be fashioned for Smith that would "distinguish between the revenues generated by the ongoing practice and Kelley's other assets."[111] This remedy would examine whether the P.C., if continued, could have paid the debt owed to Smith, without imposing "undue personal liability and hardship" on Kelley.[112]

The SJC observed that the federal court held the P.C. vicariously liable for Bertucci's misconduct, and that Kelley was not personally liable for fraud.[113] According to the SJC, because Kelley dissolved the P.C. and then continued his law practice as a sole proprietorship for Kelley's personal benefit, the revenues generated by Kelley's sole proprietorship should be available to satisfy Smith's federal court judgment, but not Kelley's other assets.[114] The SJC stated that "drawing that line here best achieves equity in the instant case."[115]

The SJC offered specific instructions to the Superior Court on how to assess damages against Kelley on remand.[116] The SJC

94. *Id.* (citing Columbia State Bank v. Invicta Law Group PLLC, *supra*, 199 Wash. App. at 314, 402 P.3d 330).

95. *Id.* (citing Columbia State Bank v. Invicta Law Group PLLC, *supra*, 199 Wash. App. at 320-32, 402 P.3d 330).

96. *Id.* (citing Columbia State Bank v. Invicta Law Group PLLC, *supra*, 199 Wash. App. at 320, 402 P.3d 330) (quoting Cambridge Townhomes LLC, 166 Wash.2d at 482-83, 209 P.3d 863 (2009))).

97. Smith v. Kelley, 484 Mass. 111, 123 (2020) (citing Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. at 334, 402 P.3d 330).

98. *Id.* at 124.

99. *Id.* at 124-26.

100. *Id.* at 125 (citing Cargill Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 362 (1997)).

101. *Id.* (quoting Milliken & Co., 451 Mass. at 560).

102. *Id.* at 125-26.

103. Smith v. Kelley, 484 Mass. 111, 125 (2020).

104. *Id.*

105. *Id.* at 125-26 (citing DeJesus v. Bertsch Inc., 898 F. Supp.2d 353, 362 (D. Mass. 2012), aff'd sub nom. DeJesus v. Park Corp., 530 Fed. Appx. 3 (1st Cir. 2013) ("The successor liability doctrine is an equitable doctrine, and the Court considers whether the shareholders used a disguised mechanism to transfer the legal ownership of the corporation but ultimately retain the same effective control")).

106. *Id.* at 126.

107. *Id.* at 126-27.

108. *Id.* at 126-27 (quoting Demoulas v. Demoulas, 428 Mass. 555, 580 (1998) ("Equitable remedies are flexible tools to be applied with the focus on fairness and justice"); Milliken & Co., 451 Mass. at 559-60 ("The doctrine of successor liability is equitable in both origin and nature"); and Musikiwamba v. ESSI Inc., 760 F.2d 740, 749 (7th Cir. 1985) ("Nature and extent of [successor] liability is subject to no formula, but must be determined upon the facts and circumstances of each case").

109. Smith v. Kelley, 484 Mass. 111, 126 (2020) (citing Ladd v. Scudder Kemper Inv. Inc., 433 Mass. 240, 243 (2001)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Smith v. Kelley, 484 Mass. 111 (2020).

116. *Id.* at 126-27.

instructed the Superior Court to calculate such damages "as if the P.C. had been continued, not converted, so as to place Smith in the same position as he would have been in had the improper conversion not occurred."[117] The SJC encouraged the Superior Court to examine Kelley's income tax returns during his operation of the sole proprietorship, to identify the sole proprietorship's revenues, and to identify Kelley's income that should be available to pay the judgment.[118] The SJC recommended that the Superior Court establish a repayment plan for Kelley.[119] Finally, the Superior Court should disregard the fact that Kelley spent the sole proprietorship's revenues for his personal needs because those funds should have first been paid to Smith for the debt owed by the P.C.[120]

In summary, the SJC's decision in *Smith v. Kelley:* (i) determined that a predecessor corporation's liabilities can be imputed to a successor sole proprietorship under the "mere continuation" theory of successor liability;[121] (ii) held Kelly liable for the P.C.'s debt to Smith under successor liability theory;[122] and (iii) imposed an equitable limit on Kelley's assets available to pay the judgment against the P.C., with guidance on how to accomplish that goal.[123] Accordingly, the SJC reversed the Superior Court's summary judgment order in favor of Kelley, and remanded the case to the Superior Court for further proceedings consistent with its opinion.[124]

Conclusion

This decision is significant for small businesses generally, not just lawyers. Contractors, architects, physicians and other business owners cannot escape their debts simply by closing one business, then opening another at the same location and with the same clientele, especially if the predecessor and successor business entities are owned and controlled by a single individual. In *Smith v. Kelley*, the SJC was careful to advise that it might have arrived at a different ruling based on different facts, such as if Kelley's P.C. had multiple owners or if Kelley had joined a firm with multiple owners after dissolving the P.C.[125] When structuring business operations, lawyers and other professionals should consider the SJC's guidance and think about protections for professionals who affiliate together instead of "going solo."

— Christopher R. Vaccaro

117. *Id.* at 126.
118. *Id.* at 126-27.
119. *Id.* at 127.
120. *Id.*
121. Smith v. Kelley, 484 Mass. 111, 122-26 (2020).
122. *Id.*
123. *Id.* at 126-27.
124. *Id.* at 127.
125. *Id.* at 125-26.

Book Review

Financial Exposure: Carl Levin's Senate Investigations Into Finance and Tax Abuse

By Elise J. Bean (Palgrave Macmillan 2018, 444 pages)

With a tip of the hat to Captain Obvious, we live in an era of discord. At this moment in time, Congress is unable to reach bipartisan agreement on the legislative measures necessary to protect Americans and preserve the economy. *Democrat v. Republican* is a constant dynamic on Capitol Hill. The willingness of Congress to conduct inquiries and implement necessary reforms also divides sharply along party lines. As former Congresswoman Gabrielle Giffords, herself a survivor of an assassination attempt, observed last year: "[t]oday we find ourselves at another moment where discord, disagreement and suspicion have taken center stage in our public life."[1]

Congressional oversight has been divisive in the past, including, most notoriously, the investigations conducted during the early 1950s by Senator Joseph McCarthy, the first chairman of the Senate's Permanent Subcommittee on Investigation (PSI). Leading an anti-Communist investigation, McCarthy conducted 161 hearings to pursue allegations of Communist subversion of federal agencies.[2] His conduct eventually resulted in censure by the Senate for conduct "contrary to senatorial traditions." The Senate also adopted rules to prevent some of the unfairness in committee investigations for which McCarthy was criticized.[3]

However, there was a time in the more recent past when some very important congressional inquiries were undertaken in a bipartisan manner. Senators on both sides of the aisle joined together, albeit sometimes with prodding and negotiation, to conduct fact-driven, in-depth oversight and legislative reform. In an exceedingly clear and well-written style, Elise Bean, counsel to former PSI chairman Senator Carl Levin of Michigan, recounts these investigations in her book *Financial Exposure: Carl Levin's Senate Investigations Into Finance and Tax Abuse*.[4] As we follow Bean's chronicle, we recognize that many of these investigations found their way onto the front page of newspapers across America. Her chapters detailing PSI investigations are page-turners and identify areas that were badly in need of reform: American banks helping to launder alleged drug cartel and corrupt foreign government money;[5] Enron hiding huge losses with the willful blindness of its board;[6] whistleblowers revealing shady accounting practices;[7] offshore tax havens hiding funds from the government;[8] unfair credit card practices;[9] the "London whale" credit derivatives scandal that lost billions;[10] and the deconstruction of the 2008 financial crisis.[11]

Bean did not gather her facts simply by reading staff reports. Rather, she was directly involved in many of the investigations. A former trial attorney in the civil fraud division of the Department of Justice (DOJ), she served as legal counsel for nearly 30 years to Senator Levin. For most of the investigations recounted, Senator Levin held the position of PSI chairman, though he would at times, depending upon the Senate's composition, serve as ranking minority member. In meticulous detail, Bean recounts, with a special focus upon the 15-year period in which Senator Levin principally held the subcommittee chairmanship at PSI (1999–2014), some of the Senate's most prominent investigative successes. Bean also acknowledges significant investigations in which legislative reforms fell short. Still, all in all, Levin's PSI efforts were impressive. Levin retired from the Senate in 2015. Bean also retired and now serves as the Washington co-director of the Levin Center at Wayne Law.

Bean manages to unwrap complex business schemes and identifies areas where reforms were required. These range from money laundering to tax dodges. The reader has a front-row seat to bipartisan congressional investigations, undertaken by a tough and shrewd senator from the Midwest who maintained a willingness to confront powerful interests and work across the aisle to accomplish legislative reform that truly worked.

Throughout her book, Bean gives substantial credit to the principled leadership and direction of Senator Levin. Though the book's

1. Robert G. Boatright et al., *A Crisis Of Civility? Political Discourse and Its Discontents* 20 (Taylor & Francis Group, 2019).
2. Elise J. Bean, *Financial Exposure: Carl Levin's Senate Investigations Into Finance and Tax Abuse* 31 (Palgrave Macmillan 2018).
3. *See* Bean, *supra* note 2, at 30-33. The Senate developed rules for PSI that required quorums, gave majority and minority members access to committee information and permitted ranking members to hire their own staff. Senators in the minority were able eventually to commence their own investigations.
4. Bean, *supra* note 2.
5. Bean, *supra* note 2, at 94-97; 99-101.
6. Bean, *supra* note 2, at 98-101.
7. Bean, *supra* note 2, at 125.
8. Bean, *supra* note 2, at 142-46.
9. Bean, *supra* note 2, at 235-58.
10. Bean, *supra* note 2, at 373-78.
11. Bean, *supra* note 2, at 260-70.

focus is chiefly upon the investigative initiatives of Senator Levin, it is not insignificant that these investigations were undertaken and supported largely with bipartisan cooperation.[12] She is not sparing of praise when discussing the Republican senators and staff who reached across the aisle to support and, in several cases, to initiate their own bipartisan investigations. The names of the Republican PSI senators who joined Senator Levin on the various initiatives are familiar ones: Senator Susan Collins (R-Maine), former Senator Norm Coleman (R-Minnesota), and the late Senators Tom Colburn (R-Oklahoma) and John McCain (R-Arizona).

At a granular level, Bean's book teaches how areas of Senate inquiry are sometimes determined, what is involved in getting bipartisan buy-in and, significantly, how to squeeze the facts out of those bitterly opposing a PSI investigation once the investigation is underway. That this work is undertaken by a tiny investigative team — typically two or three staff members — is all the more remarkable, as PSI investigated the wrongdoing of corporations with substantial resources at their disposal to oppose the investigations. PSI somehow managed to extend its examinations to include corrupt foreign officials thousands of miles away who were wrongly using American financial institutions to hide their ill-gotten gains.

Bean's recounting of these investigations shows clever tactical strategies that lawyers can appreciate. For example, by making use of existing government resources like DOJ closed files, Federal Reserve studies, and the General Accounting Office, the PSI staff was able to punch above its weight. When existing resources were not enough, the PSI staff developed and distributed surveys and hired bright interns to delve into the surveys and documentation. We can readily appreciate some of the low-tech methods employed to make sense of thousands of documents that may have been produced in a manner sometimes designed to delay or obfuscate. What is not formally acknowledged, but comes through clearly, is the need for patience and determination to pursue multi-year investigations with many stops and starts and the not-inconsiderable pressures from the rich and powerful who do not always welcome accountability.

In discussing the tools available to investigators, Bean highlights the importance of the congressional subpoena to Levin's investigations. Although the scope and authority of Congress to enforce subpoenas pertaining to investigations, particularly those of the president and members of the executive branch who may be invoking executive privileges, are now the subject of various appeals,[13] the ability of Congress to conduct investigations and to impose sanctions upon those who decline to comply with congressional subpoenas has long been recognized as within the inherent constitutional powers of Congress. This authority emanates from the constitutional power of the Congress to legislate.[14] Courts, however, are reluctant to referee these intergovernmental disputes, and thus the effectiveness of a congressional subpoena lies with Congress's ability to enforce it.

The book is loaded with stories that cannot be fully appreciated until one delves into the complexity of the issues in which Bean participated. Bean spares little candor as we learn that one highly successful investigation into the credit card industry began simply with Senator Levin being charged $35 in interest on a bill he mistakenly underpaid by $15. Bean is deferential and credits now-Senator Elizabeth Warren with sharing detailed helpful information on the credit card industry.[15] Bean also offers ample kudos to her PSI staff colleagues across the aisle who themselves undertake substantive investigations on important issues such as Social Security fraud. The repartee is tangible. Who would have thought that simple acts of collegiality, such as occasional after-work martinis in a conference room, would have led to so much cooperation? Though Bean is largely optimistic in the retelling, she nevertheless readily acknowledges the reach of political influence. For example, Bean calls out and repudiates lobbyists when a successful private banking investigation that exposed significant wrongdoing was thwarted in the short term by lobbyists who opposed certain private banking reform measures.[16]

In another chapter, Bean writes at length about significant oversight and legislative achievements that occurred as a result of PSI's investigation into money laundering, which was badly in need of legislative reform. While anti-money laundering (AML) programs are now well-established areas of accountability, this was not always the case. Accountability as to the origin of suspicious funds was difficult, in part, because of the complicity of certain U.S. banks, which, according to Bean, acted in a culture of secrecy to advocate both internally within the banks and externally by sometimes assisting in the creation of fictious companies to obscure the origin and ownership of the suspicious funds. Senator Levin's PSI investigations exposed the need for legislative reform using case studies of private banking and correspondent banking relationships.[17] Bean's account details how these investigations shined a bright light on the misconduct of U.S. banks and revealed how U.S. bankers were facilitating the transfer of suspicious funds.

The PSI investigation of money laundering also uncovered that some foreigners, including purportedly the brother of the former president of Mexico, were using U.S. private banking accounts to launder millions of dollars, the origin of which was suspected of being the proceeds of bribery, drug trafficking and other crimes.[18] Using the resources of the congressional watchdog, the General Accounting Office, and, subsequently, federal regulatory reports, the PSI team assembled thousands of pertinent bank records and emails, drafted detailed witness questions and conducted many interviews — all in preparation for PSI hearings on private bank activity. These hearings were conducted by Senator Levin in cooperation with his Republican colleague, Senator Collins, and were very successful in

12. Bean, *supra* note 2, at 6.

13. *See* Trump v. Mazars USA, LLP, 941 F.3d 1180 (D.C. Cir. 2019); Trump v. Vance, 941 F.3d. 631 (2d Cir. 2019); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019) (per curiam, en banc); and Comm. on the Judiciary v. McGahn, 391 F. Supp. 3d 116 (D.D.C. 2019).

14. Anderson v. Dunn, 19 U.S. 204 (1821).

15. Bean, *supra* note 2, at 238.

16. Bean, *supra* note 2, at 66.

17. Bean, *supra* note 2, at 47.

18. Bean, *supra* note 2, at 49.

identifying areas needed for reform.

In Bean's retelling, the compendium of emails, compliance analysis, and regulatory examination reports still presented a puzzle of disparate facts to be pieced together. Errant bankers at Citigroup had sought to protect and put beyond reach funds alleged to be from drug cartels from a former president of Mexico's brother and placed with Citigroup. Bean's temerity is particularly on display as she recounts getting a fuller picture as she and a PSI colleague conducted interviews at a federal prison in upstate New York with a former Citigroup private banker. Bean and her PSI colleagues' work proved most effective when Senator Levin and Senator Collins held some of the Citigroup private bankers' feet to the fire as they tried to duck tough questions at the hearings. These efforts eventually led to legislative and regulatory steps that must now be followed when opening a bank account.

According to Bean,[19] similar PSI investigations of Omar Bongo, the longtime dictator of Gabon, revealed Citigroup's assistance with shell corporations, secret accounts and wire transfers to facilitate the transportation of funds across international lines. Speaking with budget experts at the International Monetary Fund and reviewing information at the Library of Congress, Bean and her team were able to debunk the claims that the millions deposited in U.S. banks were, in fact, lawfully collected from legitimate sources. Notwithstanding the bribery allegations surrounding the source of the funds, no U.S. bank regulator called for closing of Bongo's accounts. Bean surmises: "[p]erhaps that was because, at the time, it wasn't against the law for U.S. banks to knowingly accept corruption proceeds as bank deposits so long as the corrupt acts took place outside U.S. borders."[20]

In a later chapter, Bean recounts another engaging PSI investigation commenced to ferret out exactly how dictators moved dirty money through a Washington, D.C., bank located across from the White House.[21] While it would be several years before these legislative investigations actually led to reform AML laws, eventually, they took hold, culminating in the legislative underpinnings of the U.S. Patriot Act. Senator Levin and his PSI team succeeded in their efforts to strengthen AML procedures, prohibit the use of shell banks[22] and further regulate correspondent banking relationships.[23] These AML efforts are signature achievements of congressional oversight.

PSI's achievements were not limited to AML. PSI took on investigations of Enron's board of directors and their apparent willingness to allow Enron's accountants to audit their own consulting work and receive fees in addition to their substantial board compensation. Her narrative offers exacting detail of the games played by Enron in using shell entities to purchase and puff up poorly performing Enron assets.[24] Much of this work led to the Securities and Exchange Commission strengthening requirements for both corporate boards and company auditors.[25]

PSI also delved into the world of offshore tax shelters. Bean reveals the backstory to the investigation of abusive tax shelters, including those maintained for the benefit of Texas billionaires.[26] Her examination of the use of offshore-administered trusts at the Isle of Man dissects a complex series of financial maneuvers so complicated and secret that they had circumvented serious scrutiny for many years.

Equally compelling is Bean's recount of PSI's investigation into unfair credit card practices. Too often, these onerous practices were weighing on ordinary working families who were subjected to penalty interest rates, hidden fees and other abusive practices.[27] Bean reports the investigation tactics that ultimately led to massive regulatory reforms.[28] Using the Government Accountability Office to assemble key data, the PSI team was able to identify higher late fees, hidden fees, penalty interest rate hikes, and increased profits, all of which were being inadequately disclosed. From the investigation and the hearings that were conducted, Senator Levin was able to introduce legislation prohibiting, among other things, credit card companies from charging interest on debt that had been repaid on time and from retroactively applying increased interest rates to past credit card debt.[29]

Bean has a knack for not only simplifying and summarizing complex schemes, but for identifying the important takeaways in this sea of business machinations.[30] Through it all, the determination of the PSI staff to get to the truth and do the right thing comes through unabashedly. *Financial Exposure: Carl Levin's Senate Investigations Into Finance and Tax Abuse* is truly a satisfying and worthwhile read for those who hope for greater bipartisan accomplishments and more civility in political discourse.[31]

— Robert J. Kerwin

19. Bean, *supra* note 2, at 58-61.

20. Bean, *supra* note 2, at 62.

21. Bean, *supra* note 2, at 292-93.

22. Bean, *supra* note 2, at 76-78. A "shell bank" is a bank that has no physical presence.

23. Bean, *supra* note 2, at 66, 82. According to Bean, correspondent banking relationships were sometimes used to further obfuscate the true source of the suspicious funds to be deposited.

24. Bean, *supra* note 2, at 95.

25. Bean, *supra* note 2, at 106-07.

26. Bean, *supra* note 2, at 138-46.

27. Bean, *supra* note 2, at 235.

28. Bean, *supra* note 2, at 235.

29. Bean, *supra* note 2, at 245.

30. *See* Carl Levin & Tom Coburn, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse,* United States Senate (April 13, 2011), https://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2. This was no small feat, as each investigation was followed by the preparation of hundreds of pages of information and reports often penned in large part by Bean. These reports included a 635-page report on the financial crisis. *See id.* The hearings on offshore profit shifting and the U.S. Tax Code encompassed 644 pages of statements and testimony. *See Hearing Before the Permanent Subcommittee on the Investigations of the Committee on Homeland Security and Governmental Affairs,* United States Senate (Sept. 20, 2012), https://www.govinfo.gov/content/pkg/CHRG-112shrg76071/pdf/CHRG-112shrg76071.pdf. The Levin-McCain report on credit derivatives trading was 306 pages. *See U.S. Senate Committee on Homeland Security & Governmental Affairs*, U.S. Senate, https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20JPMorgan%20Chase%20Whale%20Trades%20(4-12-13).pdf (last visited May 23, 2020).

31. *See, e.g., The National Institute for Civil Discourse,* University of Arizona, https://nicd.arizona.edu/ (last visited May 23, 2020). Several nonprofit organizations have been formed to encourage the reduction of political dysfunction and incivility.

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1. Publication Title	2. Publication Number	3. Filing Date
Massachusetts Law Review	0163-1411	Sept. 29, 2020
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	4	members - FREE Libraries - $50 Non-members - $75

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*

20 West St.
Boston, MA 02111-1204

Contact Person: Jason Scally

Telephone *(Include area code)*: (617) 338-0682

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

Same as pub. office

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Massachusetts Bar Association
20 West St., Boston, MA 02111-1204

Editor *(Name and complete mailing address)*

Jason Scally
20 West St., Boston, MA 02111-1204

Managing Editor *(Name and complete mailing address)*

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13. Publication Title			14. Issue Date for Circulation Data Below	
			aug. 5, 2020	
15. Extent and Nature of Circulation			**Average No. Copies Each Issue During Preceding 12 Months**	**No. Copies of Single Issue Published Nearest to Filing Date**
a. Total Number of Copies *(Net press run)*				
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	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	Ø	Ø
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c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			8,343	8,754
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f. Total Distribution *(Sum of 15c and 15e)* ▶			8,343	8,754
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))* ▶			200	200
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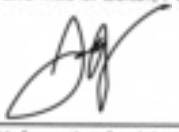	9/24/20

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