Massachusetts Law Review

Volume 104, No. 4 Published by the Massachusetts Bar Association

Massachusetts Law Review

VOLUME 104 NUMBER 4

May 2024

IN THIS ISSUE

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

Cover: The Western Division of the U.S. District Court for the District of Massachusetts. 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.

Case notes, legislative notes, book reviews, and editorials are generally prepared by the Board of Editors or designated members of the Board of Editors of the *Review*. Feature articles are generally prepared by authors who are not members of the board. The selection of feature articles for publication by the Board of Editors does not imply endorsement of any thesis presented in the articles, nor do the views expressed necessarily reflect official positions of the Massachusetts Bar Association unless so stated. MBA positions are adopted by vote of the association's Board of Delegates or Executive Committee. Proposed feature article contributions or outlines of proposed feature article contributions should be sent to Senior Media and Communications Manager Cameron Woodcock at cwoodcock@massbar.org or to *Massachusetts Law Review*, 20 West St., Boston, MA 02111-1204. Unsolicited materials cannot be returned.

Jail and Prison Suicides in Massachusetts

By Jennifer Honig

Overview

In 2013, Aaron Brito hanged himself at the Bristol County House of Correction (HOC) just one day after his arrival.[1] His mother said jail staff should have known that Brito had an increased risk of suicide due to his history of substance abuse dating back to a prescription for Percocet to treat a back injury years earlier.[2] Brito died between checks by tying a sheet to a metal upper bunk-bed frame while alone in his cell. He was experiencing symptoms of opioid withdrawal at the time, a fact of which correctional and medical staff were aware.[3] Two years later, at the same facility, Brandon St. Pierre hanged himself in precisely the same manner.[4] Despite the fact that St. Pierre had revealed his suicidal intentions to a doctor, he had nonetheless been placed in solitary confinement.[5]

Seemingly preventable jail suicides such as these are often the product of one or more well-known risk factors. For example, ligature-related suicides frequently happen early in jail stays, follow a traumatic event, occur when prisoners are alone in a cell, coincide with opioid withdrawal, and/or relate to underlying mental health distress. In the two unfortunate cases above, it appears that many, if not all, of these factors were present.

In light of the broad awareness of such risk factors, experts have repeatedly urged sensible preventative measures. As a 2020 Department of Correction (DOC)-funded report stated, "[a]lthough many suicides are unpredictable, a suicide prevention program can help reduce risks. Inmates may become suicidal at any point during their stay, but high-risk periods include … [a]fter admittance to segregation or single-cell housing."[6] A 2023 report regarding the Bristol County HOC noted that "all of the seven suicides at the HOC between 2017 and January 2023 involved the use of metal bunk beds whereby inmates utilized the metal railing or ventilation holes as an anchoring point in their suicides by hanging" and urged appropriate reforms.[7] As early as 2007, prison suicide prevention experts have recommended that detention facilities avoid isolation, implement close observation for potentially suicidal prisoners, and conduct detailed mortality reviews following suicides to identify opportunities for prevention.[8]

Jennifer Honig is co-director of public policy and government relations at the Massachusetts Association for Mental Health (MAMH), where she works to ensure the full inclusion of people with mental health issues in all aspects of community life. Before coming to MAMH, Honig was a senior staff attorney at the Mental Health Legal Advisors Committee (MHLAC) of the Supreme Judicial Court of Massachusetts.

In spite of this increased awareness of the possibility for effective reforms, no significant change has occurred. In fact, at least some Massachusetts corrections officials have shown significant reluctance to adopt reforms. In March 2019, then-Barnstable County Sheriff James Cummings told WGBH that his jail had made no substantial policy changes to prevent suicides.[9] Then-Bristol County Sheriff Thomas Hodgson said that he did not see "anything unusual" after there were three suicides in his facilities in a single year (2021), adding that the suicide rate at his facilities did not exceed the national average.[10]

1. "Suicides Increasing in Massachusetts Prisons and Jails," Prison Legal News (PLN), (Dec. 5, 2018), https://www.prisonlegalnews.org/news/2018/dec/5/suicides-increasing-massachusetts-prisons-and-jails/.

2. *Id.*

3. Taylor v. Bristol County Sheriff's Dept. and Correctional Psychiatric Services, Inc., Second Amended Complaint (Sup. Ct. Civ. Action No. 1673CV000951, Aug. 9, 2017).

4. PLN, *supra* note 1.

5. *Id.*

6. Falcon, Inc., "Elevating the System: Exploring Alternatives to Restrictive Housing" 16 (Mar. 2021), https://www.mass.gov/doc/falcon-report/download.

7. Lindsay M. Hayes, "Report on Jail Suicide Prevention Practices within the Bristol County Sheriff's Office" 28, 34-56 (Apr. 4, 2023), https://www.wpri.com/wp-content/uploads/sites/23/2023/04/4-4-23_suicidereport.pdf.

8. *See* discussion *infra* pp. 107-108.

9. Chris Burrell & Hannah Schoenbaum, "Jail Suicides Drop in Massachusetts After Years of Increases," WGBH (Feb. 4, 2020), https://www.wgbh.org/news/local/2019-03-04/jail-suicides-drop-in-massachusetts-after-years-of-increases. A 2018 media report noted that the Barnstable County Correctional Facility has "a suicide prevention-equipped cell" with breakaway wall hooks and special windows. PLN, *supra* note 1.

10. Kate Robinson, "Dartmouth Jail Sees Third Suicide in Three Months," WBSM (Nov. 24, 2021), https://wbsm.com/dartmouth-jail-sees-third-suicide-in-three-months/. Hodgson continued, explaining that the Bristol County suicide rate did not exceed the national average. *Id.* However, WBSM analyzed the Bristol County rate for 2021 and found it to be 10 times the national rate for local jails in 2019. *Id.* Earlier remarks by Hodgson were also troubling. In December 2018, when asked after a suicide about additional video surveillance equipment, Hodgson said that such equipment was not a top priority for the county's limited budget: "We are still working on trying to get a roof that doesn't leak here." PLN, *supra* note 1.

In the absence of aggressive reforms, per capita suicides and suicide attempts in correctional settings continue to rise nationally. Indeed, the risk of suicide for persons in prisons and jails in the U.S. has grown significantly in the past two decades.[11]

The Bureau of Justice Statistics (BJS) of the U.S. Department of Justice (DOJ), the primary source of data on suicides in domestic detention facilities, has reported gradual increases in the suicide rate in state prisons. From 2001 to 2019, for example, the number of suicides in one year in state prisons nationwide demonstrated a steady climb: from a low of 168 in 2001 to a high of 311 in 2019, an 85% increase.

The BJS's data on Massachusetts prisons for this period is also troubling.[12] There were 61 suicides between 2000 and 2019 in Massachusetts state and federal prisons.[13] That number represents an average rate of 32/100,000 for the period, double the national average rate of 16/100,000 for the period for state and federal prisons.[14]

Part of the explanation for these concerning statistics may lie in the changing face of incarcerated populations. While the total number of prisoners held in U.S. facilities has declined in recent years,[15] the percentage of prisoners with mental health issues has increased.[16] Currently, over 70% of prisoners in U.S. prisons and jails have at least one diagnosed mental illness or substance use disorder and up to a third have serious mental illness (SMI).[17] Implementing a system to treat a carceral population increasingly in need of significant mental health interventions poses a considerable institutional challenge.

A Closer Look at the Problem Within the DOC

The DOC operates the Massachusetts state prison system — as distinct from the county houses of correction (HOCs) and jails — including 13 facilities for prisoners serving sentences for more serious criminal offenses.[18] As of Jan. 1, 2024, the DOC had 5,905 men and 243 women in its custody.[19]

At the end of 2022, 41% of men in the DOC population had an open mental health case, 34% had an SMI, and 29% were on psychotropic medication.[20] For women, 79% had open mental health cases, 74% had an SMI, and 65% were on psychotropics.[21] In November 2019, the DOC estimated that 1,500 of 8,300 state prisoners had a diagnosed opioid use disorder.[22]

Among the DOC's properties is its psychiatric facility, Bridgewater State Hospital (BSH). As a result of reforms beginning in 2017, BSH is now divided between two buildings. The original BSH

11. E. Ann Carson, "BJS, Suicide in Local Jails and State and Federal Prisons, 2009-2019 – Statistical Tables" (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf at Table 1.

12. Suicide in state prisons was certainly a concern before this period as well. Notably, in 1997, the University of Massachusetts Medical Center Department of Psychiatry submitted a report to the DOC on the psychiatric management of John Salvi in DOC facilities. Salvi, convicted of two fatal shootings at abortion facilities, died by suicide at MCI-Cedar Junction. He had a long history of mental illness but received only limited attention to his mental health needs while in custody. The UMass report included detailed recommendations both to improve mental health services and address suicide risk (including stating that the DOC should maintain aggregate data on suicide and an ongoing study of suicides in DOC facilities, and that the DOC should review the practices related to the use of mortality reviews for suicide deaths). U. Mass. Medical Center Dep't of Psychiatry, "Report on the Psychiatric Management of John Salvi in Massachusetts Department of Correction Facilities: 1995-1996" 4 (Jan. 31, 1997), https://static.prisonpolicy.org/scans/1997_salvi_death_report.pdf. The DOC's medical provider at the time of Salvi's death was an out-of-state, for-profit vendor, Correctional Medical Services (CMS), Inc. The DOC renewed that contract in 1998, with CMS subcontracting with UMass Correctional Health at UMass Medical School to provide mental health services. Kenneth L. Appelbaum et al., "A University-State-Corporation Partnership for Providing Correctional Mental Health Services," Psychiatric Services, Psychiatric Services, Feb. 1, 2002, https://ps.psychiatryonline.org/doi/10.1176/appi.ps.53.2.185. In January 2003, the DOC replaced CMS with UMass Medical School as the principal provider. Danielle Drissel, "Massachusetts Prison Mental Health Services: History, Policy and Recommendations," 87 Mass. L. Rev. 115 (2003).

13. Carson, *supra* note 11, at Table 10. This source does not disaggregate this data for state and federal prisons located within a state.

14. *Id.* at Table 11. Suicides by persons confined to state prisons continued in Massachusetts after 2019. A man died by hanging at the Souza Baranowski Correctional Center in April 2020. Bridget Conley, "Why Did So Many Incarcerated People Die in Massachusetts Prisons in April 2020?," World Peace Foundation (Sept. 1, 2020), https://sites.tufts.edu/reinventingpeace/2020/09/01/why-did-so-many-incarcerated-people-die-in-massachusetts-prisons-in-april-2020. Another man died by suicide at the Massachusetts Correctional Institution in Norfolk in November 2023. Margot Amouyal, "Suicide in Norfolk State Prison Prompts Concern About Treatment in Specialized Units in Massachusetts," GBH News (Nov. 28, 2023), https://www.wgbh.org/news/local/2023-11-28/suicide-in-norfolk-state-prison-prompts-concern-about-treatment-in-specialized-units-in-massachusetts.

15. Allison Pirog, "Mass. Has Lowest Incarceration Rate in 35 Years. Experts Say There's Room to Improve," MetroWest Daily News (May 23, 2022, 5:18 AM), https://www.metrowestdailynews.com/story/news/2022/05/23/experts-say-massachusetts-should-reduce-its-prison-population-further/9852168002/.

16. *See, e.g.,* Matt Murphy, "Demand for Mental Health Services Spike in Jails," Sheriffs Report, WBUR (Mar. 22, 2022), https://www.wbur.org/news/2022/03/22/massachusetts-jails-substance-use-mental-health. However, not all persons who die by suicide had a current, identified mental health problem. For example, data collected by the Massachusetts Violent Death Reporting System for suicides occurring in 2021 revealed that 60% of men and 79% of women did have a current mental health problem, but that leaves substantial numbers of people who died by suicide who did not. Department of Public Health, "Massachusetts Violent Death Reporting System: Suicide 2021 (2021)," https://www.mass.gov/doc/2021-mavdrs-suicide-data-table-pdf/download.

17. Norm Orenstein & Steve Leifman, "Locking People Up Is No Way to Treat Mental Illness," The Atlantic (May 30, 2022), https://www.theatlantic.com/ideas/archive/2022/05/mental-illness-treatment-funding-incarceration/643115/.

18. Department of Correction, Locations, https://www.mass.gov/orgs/massachusetts-department-of-correction/locations (last visited Feb. 23, 2024). MCI-Concord is slated for closure. John Hilliard, "As MCI Concord Faces Closure, Advocates Say Inmates Should Have a Voice in What Comes Next," The Boston Globe (Feb. 22, 2024), https://www.bostonglobe.com/2024/02/22/metro/mci-concord-prison-inmate-closure/.

19. Department of Correction, Quick Statistics, https://www.mass.gov/service-details/quick-statistics (last visited Feb. 22, 2024).

20. *Id.*

21. *Id.*

22. Department of Correction, "Massachusetts DOC Awarded $1.2M in Federal Funds to Tackle Opioid Addiction" (Nov. 5, 2019), https://www.mass.gov/news/massachusetts-doc-awarded-12m-in-federal-funds-to-tackle-opioid-addiction.

building is the only DOC facility that serves the entire state and is exclusively for male patients with *severe* mental illness. Female patients who meet similar criteria are sent to a Department of Mental Health (DMH) facility.[23] Prisoners at the original BSH building are either civilly committed without an ongoing criminal sentence or are pretrial detainees with pending criminal charges and awaiting criminal responsibility evaluations.[24] The DOC's Old Colony Correctional Center (OCCC), a separate building at the same complex as BSH, has two additional BSH units for sentenced prisoners with serious psychiatric needs.[25]

The DOC is also responsible for other categories of civilly committed prisoners, apart from those served at BSH. The Massachusetts Treatment Center (MTC) in Bridgewater houses, in addition to criminally sentenced men identified as sex offenders, men civilly committed as sexually dangerous.[26] The Massachusetts Alcohol and Substance Abuse Center (MASAC) in Plymouth houses men civilly committed for substance use treatment.[27] Women may be civilly committed as sexually dangerous to Massachusetts Correctional Institution (MCI)-Framingham, but are no longer committed to the DOC for substance use treatment.[28]

The DOC contracts out its mental health services. Since July 2018, the DOC has engaged Wellpath, the nation's largest private, for-profit health care provider, to provide medical and mental health services in its facilities.[29] That contract is set to expire in June 2024.[30]

Despite its specific responsibility for treating people with mental health issues, BSH has seen suicides. Among these events was the 2017 death of Leo Marino. While held on BSH's Intensive Treatment Unit (ITU) under 24/7 suicide watch by a specially trained observer, Marino took his life by swallowing toilet paper, provided by a staff person, even though he had attempted suicide the previous day by the same means.[31]

Civilly committed individuals in the DOC system are also at risk. In 2017, two prisoners who died by suicide were civilly committed individuals.[32] In August 2017, a man civilly committed for treatment of sexual dangerousness hanged himself at MTC.[33] In September 2017, a man civilly committed for substance use treatment hanged himself at MASAC.[34]

Even DOC prisoners identified as being at risk for serious self-harm and placed on mental health watch (MHW) are vulnerable.[35] A DOJ investigation of the DOC's use of MHW made this painfully clear. In its November 2020 report, the DOJ described four suicides during the period of 2018 to 2019 of persons who were on MHW or who died shortly after being released from that status — fully half of all the suicides in DOC facilities during that period.[36] The four included a transgender man who lodged a stress ball in his throat while on MHW at MCI-Framingham[37] and three men who died by hanging after release from MHW.[38]

In its investigation, the DOJ found that correctional officers neglected those prisoners on MHW and even encouraged prisoners to engage in self-injury: "During a time when prisoners are most in need of treatment, the DOC fails to properly treat suicidal prisoners and prisoners who self-harm."[39] Moreover, staff "fail to remove instruments they use to commit acts of self-harm."[40] Additionally, the DOC did not provide appropriate training to security staff on supervising and protecting prisoners from self-harming or adequate mental health care to prisoners in mental health crisis.[41]

In part to prevent such failures, the DOC is subject to a statutory mandate to "establish and enforce standards for all state correctional facilities" and "make and promulgate necessary rules and regulations incident to the exercise of [the DOC commissioner's] powers and the performance of his duties, including but not limited to rules and regulations regarding . . . safety . . . care, and custody for all

23. "Letter from Disability Law Center to Gov. Deval Patrick" (July 11, 2014), http://www.dlc-ma.org/wp-content/uploads/2017/09/BSHReport.pdf.

24. Department of Correction, "Bridgewater State Hospital," https://www.mass.gov/locations/bridgewater-state-hospital (last visited Feb. 22, 2024).

25. *See* Scott Allen, "Tentative Deal Reached in 2d Bridgewater Hospital Lawsuit," The Boston Globe (Dec. 30, 2014), https://www.bostonglobe.com/2014/12/30/tentative-settlement-reached-lawsuit-alleging-abuse-bridgewater-state-hospital-patients/aa6F0oGl1ALonDmJwhrt2I/story.html.

26. G.L. c. 123A, § 2.

27. G.L. c. 123, § 35.

28. Department of Correction, "Quarterly Snapshot of the Prison Population — Massachusetts Department of Correction 1" (data based on Dec. 31, 2022), https://www.mass.gov/doc/quarterly-jurisdiction-population-june-2022-december-2022/download.

29. Department of Correction, "Request for Responses, Comprehensive Health Services to MA Prison Population" (Jan. 3, 2018), https://www.commbuys.com/bso/external/purchaseorder/poSummary.sdo?docId=PO-19-1025-DOCFS-FISCM-13798&releaseNbr=0&parentUrl=contract.

30. Anticipating DOC's solicitation of bids for a new contract for health care services in its facilities, U.S. Sens. Elizabeth Warren and Edward Markey wrote to Wellpath and the private equity firm that owns it to raise concerns regarding quality of care and to demand information. Letter from U.S. Sens. Elizabeth Warren & Edward Markey to Ben Slocum, CEO, Wellpath, Tony Tamer, Founder and Co-CEO, H.I.G. Capital, & Sami Mnaymneh, Founder and Co-CEO, H.I.G. Capital (Dec. 15, 2023), https://www.warren.senate.gov/imo/media/doc/2023.12.15%20Wellpath%20letter%20MA.pdf; *see also* John Micek, "Company That Runs Healthcare at Mass. Prisons Under Scrutiny as Contract Nears Renewal," MassLive (Dec. 19, 2023), https://www.masslive.com/news/2023/12/poor-mass-prison-care-inspires-letter-to-healthcare-giant-wellpath-from-warren-markey.html.

31. Michael Rezendes & Jan Ransom, "Group Blasts Bridgewater State after Patient Suicide," The Boston Globe (June 27, 2016), https://www.bostonglobe.com/metro/2016/06/27/watchdog-group-makes-recommendations-bridgewater-state-hospital-report-suicide/zRgZ8ZvAek8queofp6CHhK/story.html; Shira Schoenberg, "Report Blames State Government for Suicide of Mentally Ill Inmate at Bridgewater State Hospital," MassLive (June 27, 2016), https://www.masslive.com/politics/2016/06/report_state_government_to_bla.html.

32. Christopher Burrell & Jenifer McKim, "Suicides on the Rise at Massachusetts Prisons, Jails," WGBH (Mar. 20, 2018), https://www.wgbh.org/news/2018/03/20/suicides-on-the-rise-at-massachusetts-prisons-jails.

33. PLN, *supra* note 1.

34. *Id.*

35. DOC now calls MHW by the term "therapeutic supervision."

36. U.S. Department of Justice (DOJ) & U.S. Attorney's Office, District of Mass., Investigation of the Massachusetts Department of Correction (Nov. 17, 2020), https://www.justice.gov/opa/press-release/file/1338071/download.

37. *Id.* at 20.

38. *Id.* at 21-24.

39. *Id.* at 1.

40. *Id.*

41. *Id.*

42. G.L. c. 124, § 1(c), (q).

persons committed to correctional facilities."[42] While the DOC has not promulgated comprehensive regulations aimed at reducing prisoner suicides, several protocols directed at that goal have been put into place in recent years.[43]

The DOC's Mental Health Services policy includes provisions regarding suicide prevention.[44] Among the relevant provisions are requirements for mental health evaluation after suicidal threats,[45] suicide-resistant "therapeutic supervision" cells in Health Services Units (HSUs),[46] therapeutic supervision and emergency mental health treatment for suicidal prisoners,[47] mental health team-developed and implemented treatment plans,[48] site-specific suicide prevention plans,[49] DOC annual training of at least two hours per year on mental health issues and suicide prevention,[50] and mental health contractor training for clinicians regarding preventing and managing chronic self-injurious behavior.[51]

In addition, the DOC's disciplinary regulations prohibit punishment for suicidal feelings or intentions,[52] require staff in restrictive housing (RH) units to be trained in "suicide prevention,"[53] and prohibit the transfer of inmates to the segregation unit without a physical examination, followed by "psychiatric services" for inmates who attempt suicide or appear to have emotional difficulties.[54]

In the past two years, these rules have been complemented by improvements to the disciplinary system more broadly. Between April and May 2022, the DOC replaced RH units with Behavior Assessment Units (BAUs) at eight maximum- and medium-security DOC facilities.[55] BAUs serve persons who present an "unacceptable risk to facility safety and operations."[56] "While there, an interdisciplinary appraisal team identifies the underlying causes of behavior, defines the individual's potential needs, and refers the person for placement in an appropriate setting."[57]

Finally, the DOC has created mental health diversion units, originally conceived of as alternatives to RH, with behavioral health treatment for people with suicide ideation, self-injurious behavior, SMI, or other behaviors that place them at special risk or otherwise make alternative placements difficult.[58] Unfortunately, demand currently outstrips capacity for these special units. In its January 2022 final report, the Massachusetts Correctional Funding Commission recommended that the DOC expand the use of these specialty units across the DOC (and county) facilities.[59]

A Look at County Facilities

Thirteen of the commonwealth's 14 counties operate HOCs for persons convicted of offenses for which the statutory penalty is two and a half years or less.[60] Most also operate jails for persons awaiting trial. County jails also may house individuals who have been civilly committed for substance use treatment.[61]

Both types of county facilities are under the effective control of locally elected sheriffs who serve six-year terms.[62] As of January 2024, the average daily population of the county correctional facilities (including community residential programs) was 6,660 — approximately the same number of persons as in DOC custody.[63]

Like their state prison counterparts, county prisoners also evince high rates of behavioral health issues. In 2022, Hampden County Sheriff Nick Cocchi estimated that 75% of the prisoners in county jails required substance use and mental health services, and Middlesex County Sheriff Peter Koutoujian said that about 53% of prisoners in his custody had a diagnosed mental health disorder and 75% needed mental health treatment.[64]

43. Whether the DOC would promulgate strong regulations is questionable. The agency has demonstrated itself unwilling to institute sought-after prisoner protections with respect to regulations required to implement the 2018 Criminal Justice Reform Act (CJRA), Chapter 69 of the Acts of 2018. *See* Sarah Betancourt, "New Rules on Solitary Confinement Coming Under Fire," Commonwealth Beacon (Feb. 20, 2019), https://commonwealthmagazine.org/criminal-justice/new-rules-on-solitary-confinement-coming-under-fire-2/; Margo Schlanger, "Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies," 115 Nw. U. L. Rev. 273, 293-94, 298 (2020).

44. 103 DOC 650 Mental Health Services (eff. July 4, 2021).

45. 103 DOC 650.05 I.3.

46. 103 DOC 650.08 B.1. Cells used for therapeutic supervision outside of an HSU require constant observation. 103 DOC 650.08 B.1, B.3.

47. 103 DOC 650.09E.

48. 103 DOC 650.09E.

49. 103 DOC 650.09G. The policy includes a laudable list of plan requirements. *Id.*

50. 103 DOC 650.09H.

51. 103 DOC 650.09I. Annual training shall include a minimum of eight hours of instruction on suicide prevention strategies, actuarial suicide risk assessment tools, and structured clinical interviews. *Id.*

52. 103 CMR 430.06.

53. 103 CMR 423.15(2). The CJRA of 2018 defines RH status as confinement to a cell for more than 22 hours per day.

54. 103 CMR 421.20(2)(a).

55. Department of Correction, Monthly Behavior Assessment Unit Report (Sept. 2022), https://www.mass.gov/doc/behavior-assessment-unit-report-september-2022/download.

56. *Id*.

57. *Id.*

58. These diversion units are the Secure Treatment Units (STUs) at Souza Baranowski and MCI-Cedar Junction and the Intensive Treatment Unit (ITU) for women and transgender women at MCI-Framingham.

59. Correctional Funding Commission, Report of the Special Commission on Correctional Funding (Jan. 31, 2022), https://correctionalfunding.com/wp-content/uploads/2022/01/Final-Report-of-the-Special-Commission-on-Correctional-Spending-For-Filing.pptx, at slide 28.

60. In-custody operations for Nantucket County occur in Barnstable County. *Id*. at slides 34 and 35.

61. G.L. c. 123, § 35. Hampden County serves men committed under Section 35 in its carceral facility. Mass. Bureau of Substance Addiction Services, DPH, Section 35: The Process (last visited Feb. 22, 2024), https://www.mass.gov/service-details/section-35-the-process#:~:text=Section%2035%20is%20a%20Massachusetts,alcohol%20or%20substance%20use%20disorder.

62. With respect to abolished counties, *see* G.L. c. 34B, § 12 ("the sheriff shall retain administrative and operational control over the office of the sheriff, the jail, and the house of correction … Said administrative and operational control shall include, but not be limited to, the procurement of supplies, services and equipment"). With respect to counties not abolished, *see* Chapter 61 of the Acts of 2009, Sections 15 and 13(f), and Pearson v. Sheriff of Bristol County, 489 Mass. 691 (2022) (pursuant to the 2009 provision, the Bristol sheriff has the power to enter into contracts and also require the contractor to pay him commissions).

63. Massachusetts Sheriffs' Association (MSA), County Population Reports, Mass.gov (Jan. 2024), https://www.mass.gov/lists/county-population-reports#fy2024-county-population-reports-.

64. Murphy, *supra* note 16. In 2018, Koutoujian said that about 42% of newly jailed prisoners needed detoxification and 50% had a history of mental illness. PLN, *supra* note 1.

In terms of suicide specifically, data shows that nationwide, the rates of occurrence are higher in HOCs/jails than in state prisons. Comparing data from 2001 with that from 2019, the number of deaths by suicide in local facilities across the U.S. grew by 13%.[65] The increases were even more pronounced in Massachusetts HOCs and jails; data between 2000 and 2019 shows 14 suicides in the first five years, 18 in the next five, 22 in the next five, and 26 in the final five.[66] These 80 suicides represented an average rate over this period of 36/100,000.[67] While the Massachusetts county rate is lower than the U.S. average rate in similar facilities for this period (43/100,000),[68] it is substantially higher than the suicide rate for the state's entire population, during years within that period.[69] Further, in 2017 alone, there were 10 suicides in Massachusetts county jails.[70]

While complete official data of Massachusetts jail suicides since 2019 is not readily available, sheriff-reported and media accounts indicate that suicides have continued in those settings. In 2020, the Massachusetts Sheriffs' Offices, required to report on suicides of prisoners on RH status, identified four suicides in that year (two in Bristol, one in Essex, and one in Suffolk).[71] There are media accounts of four county prisoner suicides in 2021,[72] three suicides in 2022[73] and one suicide in 2023.[74]

Due to their high degree of local autonomy, it is not surprising that the county sheriffs have historically taken very different approaches to addressing prisoners' mental health needs. This includes significant differences in spending,[75] which, in turn, has implications for the quality of mental health care.[76] Sheriffs also have taken different approaches as to how health care is delivered.[77] Eight of the state's 13 county facilities contract out part or all of their medical and mental health care to private, for-profit companies. Until recently, Wellpath was providing medical and mental health services in Worcester and Essex counties, but both counties have now made other arrangements for mental health care.[78] Barnstable Sheriff Donna Buckley ended her county's contract with Wellpath in August 2023, moving medical care in-house.[79] Suffolk also replaced Wellpath in recent years.[80] Correctional Psychiatric Services, Inc. provides all or some of such care in Middlesex, Norfolk, Plymouth,

65. Carson, *supra* note 11, at 1.

66. *Id.* at Table 2.

67. *Id.* at Table 2, Table 3.

68. *Id.* at Table 3.

69. The DPH has reported yearly suicide data for the commonwealth for 2012 to 2021. In 2012, the rate for men was 14.6/100,000 and for women, 4.5/100,000. DPH, "Suicides and Self-Inflicted Injuries in Massachusetts: Data Summary (winter 2015)," https://www.mass.gov/doc/2012-suicide-data-update-0/download. In 2019, the rate for men was again 14.6/100,000 and for women, 4.4/100,000. DPH, "Massachusetts Violent Death Reporting System: Suicide 2019," https://www.mass.gov/doc/2019-suicide-data-table/download.

70. PLN, *supra* note 1.

71. Massachusetts Sheriffs' Offices, Restrictive Housing Annual Report, 2019-2020, https://www.mass.gov/doc/20192020-msa-restrictive-housing-reporting/download (at Bristol Table, Essex Table, and Suffolk Table tabs). There is a potential discrepancy, however, regarding the Bristol County data if one compares the report's Bristol Table tab, indicating that two people died by suicide in 2020, to the Bristol '20 tab, which contains raw data, including on "Completed Suicides." While the Bristol '20 tab also documents that two persons died by suicide in 2020, the details suggest that the two entries may be the same person. Both entries share all the same data, such as booking date (5/29/20), age (28), race (white), and gender (female).

In November 2020, a man died by hanging in the Nashua Street Jail after a two-day stay. Letter from Berky Gray, Suffolk County Sheriff's Department, to Joshua Dankoff, Citizens for Juvenile Justice (June 21, 2021), https://www.muckrock.com/foi/suffolk-county-11/jail-deaths-2020-21-suffolk-county-sheriffs-department-113951/. It is unclear if this Nashua Street prisoner was the Suffolk County prisoner identified by the Massachusetts Sheriffs' Offices as having died by suicide while on RH status in 2020.

72. In 2021, the press reported three suicides in as many months at Bristol County facilities. Ken Paiva, "Concerns Continue With More Suicides at Bristol County, Massachusetts Correctional Facilities," Fall River Reporter (Dec. 1, 2021), https://fallriverreporter.com/concerns-continue-suicides-bristol-county-facilities/; Robinson, *supra* note 10. There also was a suicide at the Berkshire County Jail and HOC in November 2021. "Berkshire Jail Inmate Died by Suicide," The Berkshire Eagle (Nov. 9, 2021), https://www.berkshireeagle.com/crime/berkshire-jail-inmate-suicide/article_7fabd3a4-4042-11ec-8a2d-5bce2e8e1479.html.

73. There were two deaths in two days in August 2022, presumably by suicide, at Barnstable County Correctional Facility. Michael Rausch, "Investigations Underway Into Inmates' Deaths At County Jail," The Enterprise (Sept. 2, 2022), https://www.capenews.net/regional_news/investigations-underway-into-inmates-deaths-at-county-jail/article_cdf65a29-4ca8-5a98-9f32-16bfeee67b4b.html. There was one suicide in October 2022 in Bristol County, while the individual was on 15-minute checks and clothed in a rip-resistant smock. Dugan Arnett et al., "Sent to Jail Instead of a Mental Health Facility, Truro Man Dies of Apparent Suicide," The Boston Globe (Oct. 3, 2022), https://www.bostonglobe.com/2022/10/03/metro/family-reeling-after-truro-man-dies-new-bedford-jail-following-his-arrest-charges-killing-his-mother/?p1=BGSearch_Advanced_Results.

74. There was a January 2023 suicide at the Bristol County HOC. Frank Mulligan, "New Bedford Man Dies in Apparent Bristol County Jail Suicide," The Standard Times, Jan. 6, 2023, https://www.southcoasttoday.com/story/news/2023/01/06/new-bedford-man-dies-in-apparent-bristol-county-jail-suicide/69784697007/.

75. *See* Correctional Funding Commission, *supra* note 59, at slide 10 (slide titled "Direct Appropriation plus non-MMARS spending per Average Daily Supervisory Population" shows per-inmate costs vary widely across counties) and slide 40 (slide titled "Based on data the Commission collected, we were able to compare overall program spending levels: 2019 Direct Program Spending per Inmate (excludes related custody costs)" shows spending variation in that year from $1,097 in Bristol to $7,227 in Berkshire).

76. *See* Mass. Against Solitary Confinement, "Asymmetrical Funding of Jails and House of Correction and Prisons" (Jan. 4, 2022), https://correctionalfunding.com/wp-content/uploads/2022/01/Josh-Beardsley-Written-testimony_data-slides-on-asymmetrical-funding.pdf at slides 16 and 17 (comparing Hampden County's educational and mental health staff to Suffolk, Worcester, and Middlesex counties' staffing levels and revealing Hampden's greater depth and breadth of capacity).

77. *See* Jason Tan de Bibiana et al., "Preventing Suicide and Self-Harm in Jail: A Sentinel Events Approach," Vera 9 (July 2019), https://www.vera.org/downloads/publications/preventing-suicide-and-self-harm-in-jail.pdf (noting that an increasing number of jails contract with private vendors to provide at least some health care services, rather than relying on a directly employed staff or another public provider).

78. Adam Piore, "Wellpath, the Health Care Company that Provides Services to Mass. Inmates, Faces Scrutiny Ahead of Contract Renewal," The Boston Globe (Jan. 2, 2024), https://www.bostonglobe.com/2024/01/02/metro/wellpath-contract/.

79. Sam Pollack, "County Jail Ends Contract With Medical Provider Wellpath," The Provincetown Independent (Oct. 4, 2023), https://provincetownindependent.org/local-journalism-project/next-generation/2023/10/04/county-jail-ends-contract-with-medical-provider-wellpath/.

80. Piore, *supra* note 78.

81. Partners, CPS Healthcare, https://www.cpshealthcare.org/ (last visited Feb. 22, 2024).

Bristol, Dukes and Suffolk counties.[81] The remaining counties with jails have a mix of arrangements, with some having direct employees and some working with local nonprofits.

Some sheriffs have had significant success working directly with consultants. Facing a high number of suicides in his facility in the 2010s, Middlesex Sheriff Peter Koutoujian engaged a recognized mental health expert to conduct an audit of the Middlesex Jail and HOC and issue recommendations. After his March 2018 review of the facility, the consultant recommended increasing initial suicide prevention training for staff from 45 minutes to a four- to eight-hour workshop and two hours of additional training annually, improving mental health screening, and ensuring privacy during interviews.[82] In October 2018, Sheriff Koutoujian reported that he had followed up on most of the consultant's recommendations, with some efforts ongoing.[83] The county increased training for staff, employing eight trainers, including two role-playing actors from the National Institute of Corrections (NIC), to conduct a week-long crisis training for all jail staff.[84]

Based on the expert's recommendations, the Middlesex County facility also improved mental health screening at reception by posing a more carefully targeted slate of questions and conducting the screenings in private. Jail administrators increased checks on suicidal prisoners, encouraged family members to contact the jail if they had reason to believe that an imprisoned family member was at risk of self-harm, and added a message providing a suicide prevention hotline number that plays whenever a prisoner makes or receives a telephone call.[85] Additionally, staff "covered wall ventilation grates and fixed holes in the metal frames of bunks to prevent hangings in cells."[86] In its 2019 Annual Review of Middlesex County's Evaluation and Stabilization Unit, the DMH reported that top bunks had been removed to improve safety.[87] Sheriff Koutoujian encouraged such reforms in other counties while he was president of the Massachusetts Sheriffs' Association from 2017 to 2020 and president of the Major County Sheriffs of America from 2020 to 2022.[88]

Hampden County also took suicide prevention measures. In 2017, trained prisoners retrofitted 2,000 steel bed frames to prevent their use in suicides.[89] In addition, new programs were introduced that incentivized prisoners to engage with job training in order — it was hoped — to counter feelings of hopelessness. Hampden stands out among the counties for operating a mental health program with a deep and broad array of services operated by Hampden County employees.[90]

In addition to these positive steps, there are other signs that the pace of reform may be quickening at the county level in Massachusetts. In November 2022, Paul Heroux was elected sheriff in Bristol County after campaigning specifically on a promise to improve jail conditions.[91] By April 2023, Heroux had taken concrete actions to address suicide risks, including hiring an outside consultant — the same expert used by the Middlesex sheriff — to write a report on Bristol's suicide prevention practices.[92] The expert noted that the county had recently taken some corrective measures, including requiring rounds at 30-minute intervals, follow-up assessments for inmates discharged from MHW, installation of larger windows in cell doors on some units, and better screening of inmates assigned to RH.[93] The consultant's recommendations included: additional training; improved intake screening/segregation assessment;

82. K. Sophie Will, "Middlesex Jail Steps Up Suicide-Prevention Efforts," WGBH (Oct. 3, 2018), https://www.wgbh.org/news/local-news/2018/10/03/middlesex-jail-steps-up-suicide-prevention-efforts.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. DMH, "Annual Review of Evaluation and Stabilization Unit 2" (2019) (on file with author).

88. "Biography of Middlesex Sheriff Peter J. Koutoujian," Middlesex Sheriff's Office, https://www.middlesexsheriff.org/sheriffs-executive-office/pages/sheriff-koutoujian-biography (last visited Feb. 23, 2024).

89. Christopher Burrell, "How Hampden County Is Working To Prevent Inmate Suicides," WGBH (May 10, 2017), https://www.wgbh.org/news/2017/05/10/news/how-hampden-county-working-prevent-inmate-suicides.

90. *Id.* In 2017, Hampden had 10 full-time mental health clinicians for 1,400 prisoners, more than triple the number of other similarly sized counties. *Id.* Further, Middlesex and Hampden are the only counties that receive state funding to operate a "regional behavioral evaluation and stabilization unit to provide forensic mental health services within existing physical facilities for incarcerated persons in the care of correctional facilities." *See* Budget Line Items 8910-1010, Hampden Sheriff's Regional Mental Health Stabilization Unit, and 8910-1101, Middlesex Sheriff's Mental Health Stabilization Unit. However, the Disability Law Center (DLC) has concluded that these regional mental health units are underutilized by other county correctional facilities and under-resourced. Press Release, Disability Law Center, "Disability Law Center Again Calls for Bridgewater State Hospital Reform on the Basis of Serious Concerns About Facility Conditions and Rights Violations" (July 29, 2022), https://www.dlc-ma.org/2022/07/29/disability-law-center-again-calls-for-bridgewater-state-hospital-reform-on-the-basis-of-serious-concerns-about-facility-conditions-and-rights-violations/.

91. Ben Berke, "Bristol Republican Sheriff Tom Hodgson Concedes Defeat to Democrat Paul Heroux," WBUR (Nov. 9, 2022), https://www.wbur.org/news/2022/11/09/sheriff-hodgson-defeat-democraat-heroux-bristol-sheriff-election.

92. Hayes, *supra* note 7, at 96.

93. *Id.* In March 2019, "[f]acing lawsuits and a call from the state attorney general … for a state investigation," then-Bristol County Sheriff Hodgson told WGBH that his department had hired a new clinician to work with prisoners coming out of suicide watch. Burrell & Schoenbaum, *supra* note 9.

suicide-resistant, protrusion-free cells for potentially suicidal prisoners; and more rigorous mortality review practices.[94]

This last point deserves special mention. Massachusetts currently requires mortality reviews — a key tool for assessing quality of care and identifying areas in need of improvement — in cases of prisoner suicide at both the state and county levels. However, observers have faulted the implementation process. These post-mortem reviews often appear cursory in nature, lacking a fair assessment of wrongdoing or recommendations for reform. As a 2018 media investigation revealed, "[t]here is no state office that collects death data in county jails or any regulator that requires county sheriffs to report the results of internal mortality reviews."[95] The result, according to some critics, are reviews that are "self-congratulatory" and that tend to place the blame on factors outside the institution's control.[96] As another media report, two years later, observed: "[s]heriffs are required to conduct investigations when inmates die. [However,] they're often incomplete, with critical findings hidden from view. Not only do these reports rarely make their way to families or the public, but they generally are not acted upon by a higher authority in government."[97]

Flawed review processes are by no means a Massachusetts-specific problem. In part, the ubiquity of the problem lies in the potential for reviews to provide the basis for litigation and civil liability.[98] As the National Commission on Correctional Health Care (NCCHC) and the American Foundation for Suicide Prevention (AFSP) have similarly concluded, "[f]ear of litigation might make full transparency seem like a liability and legal risk rather than a quality improvement opportunity."[99] While there is no question that a review process may "increase litigation exposure by aggregating details about the incident" into discoverable documents,[100] a robust review is essential to managing litigation risks long term.[101] Only through a careful review process can the bounds of reasonable foreseeability be determined and the contours of reasonable care defined. However, incentivizing institutions to undertake unflinching reviews of their own demonstrably failed practices remains one of the great obstacles to reform.[102]

Risk-reduction Strategies Exist

The failure to conduct detailed post-suicide reviews might matter less, at least from a prisoner safety perspective, were there no effective potential remedial strategies. In fact, as canvassed above, experts have identified a huge range of effective strategies for reducing inmate suicides. For example, in 2019, the NCCHC, in collaboration with the AFSP, published a comprehensive and highly regarded "Suicide Prevention Resource Guide."[103] Among other proposals, the guide suggests a structured suicide risk assessment system, informed by factors highly specific to justice-involved and incarcerated populations.[104] It also recommends modified physical environments[105] and suggests evidence-based principles for therapeutic intervention that focus on cognitive and behavioral skill deficits and learning new skills.[106] Specific strategies for suicide prevention include creating a healthy correctional community, promoting connectedness, lowering barriers to seeking mental health care, reducing access to means, reducing harmful effects of drugs and alcohol, promoting resilience, and promoting general health and physical functioning.[107] Finally, the guide recommends the creation of a national database that tracks prisoner suicide and includes demographic details; crime and custody information; method and means of suicide; substance use information; evidence of historical, clinical, and other general risk factors; protective measures attempted; and management/treatment at time of suicide.[108] That is to say, the Resource Guide strongly underscores the importance of post-suicide reviews to achieving meaningful reform.

The Legislature is the Key to Reform

Historically, the Massachusetts Legislature has demonstrated a strong reluctance to engage in much oversight with respect to mental health care at correctional facilities. Having said that, individual legislators have sometimes shown concern. In 2013, for example, Rep. Tom Sannicandro and Sen. James Eldridge formed the Criminal Justice Reform Caucus. It has 57 members[109] and supports a slate of progressive legislation, including around the issue of corrections.[110] The Joint Committee on the Judiciary, chaired by Rep.

94. Hayes, *supra* note 7. Hayes specifically highlighted the hanging risk presented from metal bunk beds. *Id.* at 28.

95. Christopher Burrell & Jenifer McKim, "Massachusetts Sees Highest Number of Inmate Suicides Since 2014," WGBH (Mar. 19, 2018), https://www.wgbh.org/news/2018/03/19/local-news/massachusetts-sees-highest-number-inmate-suicides-2014.

96. *Id.*

97. Christine Willmsen & Beth Healy, "Powerful Sheriffs Rarely Held to Account as Families Fight for the Truth," WBUR (Mar. 26, 2020), https://www.wbur.org/news/2020/03/26/jail-lawsuits-sheriffs-watch.

98. Tan de Bibiana et al., *supra* note 77, at 14.

99. NCCHC & AFSP, "Suicide Prevention Resource Guide 14" (2019), https://www.ncchc.org/wp-content/uploads/Suicide_Prevention_Resource_Guide.pdf.

100. Tan de Bibiana et al., *supra* note 77, at 22.

101. *Id.* at 24; "Legal Risks Abound in Peer Review; Good Process Required," Relias Media (Apr. 1, 2018), https://www.reliasmedia.com/articles/142383-legal-risks-abound-in-peer-review-good-process-required.

102. Tan de Bibiana et al., *supra* note 77, at 24.

103. NCCHC & AFSP, *supra* note 99.

104. *Id.* at 15.

105. *Id.* at 32-33. Among the recommendations, cells should be fully visible to staff, fixtures and other objects carefully selected to avoid their use as a means for hanging, excessive noise mitigated, light should be natural, and windows offering exterior views provided. *Id.* at 32.

106. *Id.* at 19.

107. *Id.* at 25.

108. *Id.* at 15.

109. "Caucus Members," Mass. Legislature Criminal Justice Reform Caucus, https://www.cjreformma.com/members (last visited Feb. 23, 2024).

110. *See* 192nd General Court Priority Bills and Subcommittees, Mass. Legislature Criminal Justice Reform Caucus, https://www.cjreformma.com/bills (last visited Feb. 23, 2024).

Michael Day and Sen. Eldridge, held two days of oversight hearings in December 2022 on the implementation of the Criminal Justice Reform Act (CJRA) of 2018 and on prisoner and correctional officer welfare.[111] Suicide prevention was discussed each day. Unfortunately, both Executive Office of Public Safety and Security and DOC officials declined the committee's invitation to testify.[112]

Given the Legislature's historically limited engagement with these issues, it is unsurprising that statutory language regarding suicide prevention in jails and prisons remains sparse in the General Laws. The DOC's enabling statute does not specifically address suicide or even mental health care, leaving it to the agency to promulgate appropriate regulations in these areas.[113] Several bills that would have improved mental health and substance use services for prisoners have not passed. Among these is a bill that would have transferred supervision of mental health care in prisons and jails to the DMH, including for the review and approval of any contract between the DOC and a provider of mental health services.[114]

However, there have been some promising legislative bright spots for reform advocates. For example, through the CJRA, legislators sought to reduce RH use in carceral facilities. In the same act, the Legislature also mandated the DOC and the counties to report data, including certain suicide data, to a newly formed Restrictive Housing Oversight Committee.[115]

In the same year, the Legislature improved access to medication-assisted treatment (MAT) for substance use in jails and prisons.[116] Under this 2018 law, the DOC must meet a range of requirements regarding both the availability of FDA-approved medications for treating opioid use disorder (OUD) and access to qualified substance use disorder specialists and behavioral health counselors for prisoners with OUD.[117] The law also established a pilot program for delivering MAT in five county correctional facilities,[118] expanding in 2019 to seven counties.[119] However, the law did not require full availability at all DOC facilities — a shortfall the MAT Commission targeted for improvement the following year.[120]

In addition, during its 2021-2022 session, the Legislature passed a number of measures aimed at improving mental health care services for all residents of the commonwealth, including — perhaps most crucially — the Mental Health ABC Act, an omnibus law addressing a range of barriers to care.[121] To complement these legislative efforts, Gov. Charlie Baker simultaneously rolled out the Executive Office of Health and Human Services (EOHHS) Roadmap for Behavioral Health Reform, a multi-year reimagining and expansion of the delivery of community mental health and substance use services through a behavioral health helpline and expanded access to treatment, including at community behavioral health centers and primary care settings.[122] These global efforts should benefit people who become incarcerated, hopefully reducing the rate of jail and prison suicides over time.

These reforms point the way to further progress in the future. To conform to best practices, the Legislature would do well to consider the simple step of mandating comprehensive suicide prevention plans (SPPs) for all prison, HOC and jail facilities in Massachusetts. The template for such a robust plan already exists in the form of the aforementioned NCCHC Resource Guide, viz:

- admission screening and assessment;
- medication administration for those already prescribed and desiring continuance;
- access to individualized therapeutic models, including psychological interventions;
- treatment for substance use conditions and traumatic brain injury, which often go unaddressed;
- staff training on suicide prevention and mental health,

111. Hearing, Mass. Legis. Joint Committee on the Judiciary (Dec. 20, 2022), https://malegislature.gov/Events/Hearings/Detail/4427; Hearing, Mass. Legis. Joint Committee on the Judiciary (Dec. 21, 2022), https://malegislature.gov/Events/Hearings/Detail/4428.

112. Hearing, Mass. Legis. Joint Committee on the Judiciary (Dec. 20, 2022), *supra* note 111, at 28:37.

113. The Legislature's inertia cannot be explained by sufficiency of federal law. There are no federal statutes or regulations that either mandate suicide prevention plans in state jails or prisons or establish an "industry standard" for *federal* correctional settings that prison or jail officials might emulate. Jessa Irene DeGroote, "Weighing the Eighth Amendment: Finding the Balance Between Treating and Mistreating Suicidal Prisoners," 17 U. Pa. J. Const. L. 259, 261, 283 (2014).

114. The most recent filing of this bill is H.1978, "An Act to Improve Mental Health Services in Places of Incarceration," Mass. Legis., 193rd Sess. (2023-2024). The Joint Committee on Mental Health, Substance Use and Recovery sent the bill to study in February 2024, effectively ending its prospects of passage in the 2023-2024 legislative session.

115. Section 39D of Chapter 69 of the Acts of 2018. Pursuant to the CJRA, the DOC commissioner is required to report quarterly, *as to each RH unit within each state and county correctional facility,* the number of prisoners who had committed suicide or committed non-lethal acts of self-harm. *Id.; see also* 103 CMR 170.12(b).

116. Chapter 208 of the Acts of 2018, "An Act for Prevention and Access to Appropriate Care and Treatment of Addiction."

117. *Id*. at §§ 75-78, 97, 111.

118. *Id*. at § 98.

119. Shira Schoenberg, "Despite Fears of Diversion, Massachusetts Jails Prepare to Offer Medication Assisted Treatment for Drug Addiction," MassLive (Aug. 7, 2019), https://www.masslive.com/news/2019/08/despite-fears-of-diversion-massachusetts-jails-prepare-to-offer-medication-assisted-treatment-for-drug-addiction.html.

120. Medication Assisted Treatment Commission, Report (Oct. 1, 2019), https://www.mass.gov/doc/medication-assisted-treatment-commission-report-10119/download.

121. Chapter 177 of the Acts of 2022, "An Act Addressing Barriers to Care for Mental Health;" *see also* MAMH, "Fact Sheet: An Act Addressing Barriers to Care for Mental Health," https://www.mamh.org/assets/files/MH-Omnibus-Fact-Sheet-Chp-177-of-the-Acts-of-2022_10.26.22.pdf.

122. "Roadmap for Behavioral Health Reform," MassHealth, https://www.mass.gov/service-details/roadmap-for-behavioral-health-reform (last visited Feb. 23, 2024).

including on the topics listed in current DOC policy — i.e., identification of warning signs and symptoms, understanding of role of demographics and culture, how to interact with prisoners, need for communication between correctional and health care personnel, referral processes, and monitoring and intervention protocols;

- safety enhancements within cells and improvements to physical environments generally;
- well-defined limitations on the use of isolation and increased social support;
- guidelines for observation and monitoring during the initial hours in custody;
- improved facilities for observation during RH, isolation, or segregated confinement;
- implementation of MHW/therapeutic supervision practices;
- formalized review procedures after each suicide or suicide attempt, including mandated external reviews;
- required inclusion of mental health clinicians in administrative leadership roles;
- creation of an appropriately accessible database containing information on suicides, suicide attempts, and other instances of self-harm; and
- mechanisms for external intervention as needed.

Language that could have advanced certain of these requirements was included in a 2021-2022 legislative session bill sponsored by Sen. Eldridge designed to address the problems facing prisoners on MHW.[123] The relevant provisions mandated that the DMH promulgate regulations requiring every prison, HOC and jail to "have a written suicide prevention and suicide response policy" and conduct "independent reviews of completed suicides, attempted suicides and incidents of self-harm."[124] While the bill's provisions regarding MHW became law through incorporation into the 2022 omnibus mental health act, the suicide prevention language from Sen. Eldridge's bill was not incorporated in that law or any 2023-2024 session bill.

Finally, in May 2023, Sen. Eldridge sponsored an amendment to the FY 2024 state budget that would have provided $325,000 to the EOHHS for an independent expert review of suicide risk and prevention strategies in Massachusetts HOCs, jails and prisons.[125] Unfortunately, the amendment was not adopted as part of the FY 2024 budget.

Conclusion

In view of the increasing proportion of prisoners with mental health conditions and/or substance use issues, and the concomitant rising suicide rate in jails and prisons, improving access to behavioral health services for prisoners should be a high priority for the Legislature, the DOC, and county sheriffs. The question is how best to tackle the problem. While both DOC officials and individual sheriffs have shown a willingness at times to adopt salutary change, the overall pace of improvement lags behind the increasing scale of the problem.

Some progress could doubtless be achieved through implementation of piecemeal improvements like those contained in the NCCHC Resource Guide. Indeed, many institutions, state and county, have recently done just that. However, a more holistic approach might well be more effective — one that involves, for example, reconsideration of DOC and county reliance on for-profit vendors for mental health care services and consistent standards for such services among DOC and county facilities. As to the latter point, the Legislature should consider removing authority for behavioral health care in carceral facilities from the DOC and sheriffs altogether and shifting responsibility for the delivery of *mental health* treatment to the DMH and for the delivery of *substance use* treatment to

123. S.192, "An Act to Ensure the Constitutional Rights and Human Dignity of Prisoners on Mental Health Watch," Mass. Legis., 192nd Sess. (2021-2022).

124. *Id.*

125. Mass. Legislature FY 2024 Senate Ways and Means Budget, Amendment 528; MAMH, FY24 Budget Fact Sheet: $325K to Conduct an Independent Expert Review of Suicide Risk and Prevention Strategies in Jails and Prisons, https://www.mamh.org/assets/files/Fact-Sheet-on-Suicide-prevention-study-5-3-23.pdf.

the Department of Public Health (DPH). Relying on the respective expertise of the DMH and the DPH would go far toward ensuring that best practices of behavioral health care are followed uniformly across state and local facilities.

The consolidation of decision-making authority in agencies with responsibility for the provision of therapeutic care to people with mental health needs presents many virtues, but also poses inevitable risks. With fewer people involved in determining what precisely constitutes best practices, the interposition of external oversight almost certainly would be beneficial. Some experts have encouraged legislation establishing an independent ombudsperson's office to provide objective assessments of mental health policy throughout the corrections system.[126] Sen. Eldridge filed a bill to create a civilian body for this purpose in the 2021-2022 legislative session,[127] and a number of legislators have called publicly for exactly this form of oversight.[128] Other states have adopted this approach with some success.[129]

The general concept of transferring responsibility for mental health care in jails and prisons to the entity best positioned to discharge that responsibility has already found some purchase in both the Legislature and Governor's Office. Bills to transfer BSH operations and control from the DOC to the DMH were filed in the 2023-2024 session.[130] Additionally, in July 2022, as part of the general governmental bond bill, the Legislature ordered a pre-design study, overseen by the Division of Capital Asset Management and Maintenance, for a forensic psychiatric hospital under the DMH's direction (to replace the current BSH facility).[131] Gov. Maura Healey subsequently included funding for this study in her June 2023 capital investment plan.[132]

The Legislature also could improve access to mental health services by monitoring implementation of the 2022 omnibus mental health act; requiring diversion of people in psychiatric crisis from emergency departments whenever possible; funding peer support services, including peer respites; and considering new legislation to ensure full and equitable access to mental health services. As important adjuncts to these efforts, the Legislature should consider proposals to aid individuals with substance use conditions, including by supporting and expanding existing substance use treatment programs; funding low-threshold housing and support services; establishing overdose prevention/supervised consumption sites; guaranteeing transportation to recovery high schools for young people; and ending the practice of civilly committing men to jail or prison settings for treatment under G.L. c. 123, § 35.

In the end, the forces responsible for suicides in prisons and jails are complex. Many of the current approaches for tackling this problem are manifestly inadequate — as the trend lines in the mortality statistics graphically demonstrate. However, there is a large and growing body of widely accepted research that charts a path toward improvement. Without question, advocates should continue to promote diversion from the criminal justice system and increased allocations for community mental health and substance use treatment services to help keep people out of jail and prison in the first place. Moreover, to protect those persons who are incarcerated, advocates also should pursue reforms to ensure high-quality, evidence-based, peer-supported, and accountable suicide prevention and behavioral health care in all of the commonwealth's correctional facilities. Such changes are possible and well worth our investment.

Certain issues set forth in this article are based upon research contained in an earlier publication, Jennifer Honig, "Jail Suicides in Massachusetts Point to National Crisis: Challenging Legislatures to Say Not One More," Prison Legal News (Apr. 1, 2021), https://www.prisonlegalnews.org/news/2021/apr/1/jail-suicides-massachusetts-point-national-crisis-challenging-legislatures-say-not-one-more/.

126. *See, e.g.,* Johnathan Silver, "Revised Screening, Vigilance Lead To Drop in Texas Jail Suicides," The Texas Tribune (Dec. 4, 2016), https://www.texastribune.org/2016/12/04/suicides-county-jails/ (quoting criminal legal policy expert Michele Deitch).

127. S.2948, "An Act Relative to Independent Civilian Oversight of Correctional Facilities," Mass. Legis., 192nd Sess. (2021-2022). The bill was not refiled in the 2023-2024 session.

128. Deborah Becker, "Calls Grow for Increased Oversight After Violent Incidents at Max Security Prison," WBUR (Aug. 30, 2021), https://www.wbur.org/news/2021/08/30/legislative-oversight-prisons-souza.

129. Voters in one Washington state county passed amendments that shift power in this way. One requires an inquest following any deaths in a county detention facility; another gives the power to subpoena witnesses, documents, and other evidence needed for investigations to a civilian oversight office that had already been established. Other amendments returned the office of sheriff to an appointed position and restored power to the public to define a sheriff's duties. Email from Bristol County for Correctional Justice to Jennifer Honig (Nov. 16, 2020) (on file with author). These changes are even more extraordinary given that the Washington state's county offices historically fulfilled a dual function, serving both as local governments in unincorporated areas and as agents of the state to carry out its programs. Hugh Spitzer, "'Home Rule' vs. 'Dillon's Rule' for Washington Cities," 38 Seattle U. L. Rev. 809, 812, n.11 (2015).

130. H.2985, "An Act Transferring Bridgewater State Hospital from the Department of Corrections to the Department of Mental Health," Mass. Legis., 193rd Sess. (2023-2024), and S.1239, "An Act to Transfer Bridgewater State Hospital from the Department of Corrections to the Department of Mental Health," Mass. Legis., 193rd Sess. (2023-2024).

131. Chapter 140 of the Acts of 2022, "An Act Financing the General Governmental Infrastructure of the Commonwealth" (enacted July 26, 2022).

132. Commonwealth of Massachusetts, Five-Year Capital Investment Plan: Fiscal Years 2024-2028 (June 22, 2023), https://budget.digital.mass.gov/capital/fy24/static/1475dce8ff3a8e8167606105e8acb94f/fy24capitalplanma.pdf, at 26.

Case Comment

Commonwealth v. Karen K., 491 Mass. 165 (2023)

Reasonable doubt is often considered to be the most important legal standard in our criminal justice system.[1] Though notoriously difficult to define, the standard is well known by both lawyers and lay people.[2] The prominence of the standard is reflected in popular culture, as it has served as the title for a classic hip-hop album by Jay-Z as well as movies starring both Samuel L. Jackson and Michael Douglas.[3]

In comparison to reasonable doubt, reasonable suspicion is considerably less famous. Yet for the average person, reasonable suspicion is a far more impactful standard. On any given day in Massachusetts, the police conduct scores of investigatory stops of pedestrians and drivers. These stops are only constitutionally valid if they are supported by a reasonable suspicion that the stopped individual is engaged in criminal activity.[4] How the police conduct the stop is also regulated by reasonable suspicion. If the police want to perform a pat-frisk, they must have reasonable suspicion that the detained individual is armed and dangerous.[5] If the police want to prolong the length of a traffic stop, they must have reasonable suspicion that criminal activity is afoot.[6] And if the police want to order the occupants to exit the vehicle, they must have either a reasonable suspicion of criminal activity or a reasonable suspicion of a safety threat.[7] While reasonable doubt may be more widely known, reasonable suspicion is arguably of greater practical importance because it is the standard that governs how the police interact with the citizenry on an everyday basis in Massachusetts.

The importance of reasonable suspicion is reflected by the Supreme Judicial Court's (SJC) treatment of the standard over the past decade. In the context of criminal law, no single issue has generated more recent attention from the commonwealth's highest court, and not a year has gone by without the SJC issuing an impactful decision on reasonable suspicion.[8] Part of the SJC's focus on reasonable suspicion undoubtedly stems from the prominence of the

1. *See* In re Winship, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure."); Commonwealth v. Russell, 470 Mass. 464, 474 (2015) (quotations omitted) ("The reasonable doubt standard provides concrete substance for the presumption of innocence — that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.").

2. *See* Commonwealth v. Webster, 59 Mass. 295, 320 (1850) (recognizing the difficulty of defining reasonable doubt), *abrogated by* Commonwealth v. Russell, 470 Mass. 464 (2015).

3. *See* Jay-Z, *Reasonable Doubt* (Roc-A-Fella Records 1996); *Reasonable Doubt* (Entertainment One Films 2014) (starring Samuel L. Jackson); *Beyond a Reasonable Doubt* (After Dark Films 2009) (starring Michael Douglas).

4. *See* Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007) ("[A]n investigatory stop is constitutionally justified if it is conducted on reasonable suspicion that the person seized has committed, is committing, or is about to commit a crime.").

5. *See* Commonwealth v. Narcisse, 457 Mass. 1, 9 (2010) (holding that a pat-frisk must be supported by reasonable suspicion that defendant is armed and dangerous).

6. *See* Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005) ("In order to expand a threshold inquiry of a motorist and prolong his detention, an officer must reasonably believe that there is further criminal activity afoot . . . ."), *cert. denied,* 546 U.S. 1187 (2006).

7. *See* Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020) (clarifying the reasonable suspicion standard for exit orders under Article 14). Police may also conduct an exit order if they "are conducting a search of the vehicle on other grounds." *Id.* Exit orders require no such justification under the Fourth Amendment. *See* Pennsylvania v. Mimms, 434 U.S. 106, 108-11 (1977) (concluding that exit orders require no additional constitutional justification once a vehicle is lawfully stopped).

8. *See, e.g.,* Commonwealth v. Privette, 491 Mass. 501, 507-19 (2023) (considering the application of the horizontal knowledge doctrine to the reasonable suspicion analysis); Commonwealth v. Garner, 490 Mass. 90, 92-97 (2022) (rejecting the commonwealth's efforts to portray the defendant's behavior as suspicious); Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 747-49 (2021) (reasoning that the uncharacteristic behavior of the defendant's companion supported reasonable suspicion that the defendant was armed and dangerous), *cert. denied,* 143 S.Ct. 135 (2022); Commonwealth v. Henley, 488 Mass. 95, 102-05 (2021) (analyzing reasonable suspicion based on a physical description of the suspect and geographical proximity to shooting); Commonwealth v. Evelyn, 485 Mass. 691, 708-09 (2020) (minimizing the importance of nervous or evasive behavior to a reasonable suspicion analysis when the defendant is a Black male in Boston); *Torres-Pagan*, 484 Mass. at 38-39 (clarifying that a pat-frisk requires reasonable suspicion that a suspect is armed and dangerous, not simply reasonable suspicion of a threat to officer's safety); Commonwealth v. Barreto, 483 Mass. 716, 720-22 (2019) (concluding that the defendant's interaction with an unidentified person did not support reasonable suspicion of drug transaction); Commonwealth v. Villagran, 477 Mass. 711, 717-18 (2017) (holding that reasonable suspicion for a pat-frisk was absent where defendant was nervous and smelled of marijuana); Commonwealth v. Cordero, 477 Mass. 237, 243-47 (2017) (concluding that the defendant's nervousness, criminal record, and travel from Holyoke did not give rise to reasonable suspicion so as to prolong traffic stop); Commonwealth v. Meneus, 476 Mass. 231, 236 (2017) (holding that reasonable suspicion to support a pat-frisk was lacking where the description of the shooter was vague, the offense took place in a "high crime" area, and the defendant fled from the scene); Commonwealth v. Warren, 475 Mass. 530, 538-41 (2016) (recognizing that flight from police by Black males in Boston does little to bolster reasonable suspicion analysis because Black males have been disproportionally targeted for stops by the Boston police); Commonwealth v. Rodriguez, 472 Mass. 767, 778 (2015) (holding that odor of burnt marijuana does not give rise to reasonable suspicion of criminal activity).

standard. Another motivating factor is the divisiveness surrounding the proper application of the standard. The Appeals Court has issued nine split decisions in reasonable suspicion cases over the past decade.[9] The SJC has experienced similar discord.[10] For instance, the case of *Commonwealth v. Sweeting-Bailey* resulted in a plurality opinion, two separate concurring opinions and two separate dissenting opinions.[11] For courts that are generally in agreement on most other issues, reasonable suspicion is the rare outlier that tends to create sharp division amongst the justices.

The case of *Commonwealth v. Karen K.* is one of the SJC's latest decisions involving reasonable suspicion.[12] Following a familiar procedural path, it came to the SJC after the Appeals Court issued a split decision in the case.[13] The broad question in the case was whether the police had reasonable suspicion that the juvenile defendant was armed and dangerous so as to justify a pat-frisk of her person.[14] While the answer to this broad question depended on the weighing of certain factors in the reasonable suspicion calculus, two of those factors were of particular importance. The first factor was the juvenile's act of continually turning one side of her body away from a group of seven police officers.[15] At the suppression hearing, a police officer used the term "blading" to describe the juvenile's behavior and testified that this act was indicative of a person attempting to conceal a weapon.[16] The second factor was the juvenile's attempts to evade the group of police officers.[17] The juvenile is Black.[18] The SJC previously recognized that a Black male's efforts to evade the police in Boston should be given less weight in some circumstances due to the Boston police's history of racially profiling Black men.[19]

This comment will focus on how the SJC weighed these two factors and how the court's decision will impact the future application of the reasonable suspicion standard.

I. FACTUAL BACKGROUND

On the afternoon of Nov. 1, 2018, someone living in the vicinity of the Mildred C. Hailey Apartments called a sergeant with the Boston police and reported that "'multiple kids' were 'hanging around, displaying a firearm' outside the [apartment] complex."[20] The sergeant did not immediately send anyone to investigate the caller's report.[21] At least three hours after the call, two separate groups of police officers were dispatched to the apartment complex to investigate the tip.[22] The officers split up into two groups.[23] One group consisted of seven officers.[24] Another group consisted of four officers.[25] The two groups arrived at the complex at approximately 8 p.m.[26]

At around the same time, the juvenile was walking with a companion along Heath Street on a sidewalk adjacent to the housing complex.[27] The juvenile and her companion observed the group of seven police officers cross Heath Street headed toward the housing complex.[28] Upon observing the group of officers, the juvenile and her companion immediately turned away from the officers and into one of the courtyards of the housing complex.[29] Unbeknownst to the juvenile and her companion, the other group of four police officers was located in a parked vehicle on Heath Street and had observed the juvenile and her companion turn into the courtyard.[30] These officers kept the juvenile and her companion under observation as they moved into the housing complex.[31]

As she walked through the courtyard, the juvenile continually looked over her shoulder at the group of seven police officers that had entered the housing complex.[32] The juvenile also repeatedly adjusted the waistband of her pants.[33] The juvenile and her companion briefly turned in the direction of the group of seven police officers.[34] However, the juvenile subsequently reversed her direction and split from her companion.[35] The juvenile was now walking by herself and at a quicker pace than she had been before.[36]

9. *See* Commonwealth v. Karen K., 99 Mass. App. Ct. 216, 225 (2021) (Milkey, J., dissenting), *aff'd*, 491 Mass. 165 (2023); Commonwealth v. Sweeting-Bailey, 98 Mass. App. Ct. 862, 867 (2020) (Maldonado, J., dissenting), *aff'd,* 488 Mass. 741 (2021), *cert. denied,* 143 S.Ct. 135 (2022); Commonwealth v. Chin-Clarke, 97 Mass. App. Ct. 604, 611 (2020) (Meade, J., dissenting), *review denied*, 486 Mass. 1107 (2020); Commonwealth v. Darosa, 94 Mass. App. Ct. 635, 649 (2019) (McDonough, J., dissenting), *review denied,* 481 Mass. 1108 (2019); Commonwealth v. Barreto, 94 Mass. App. Ct. 337, 347 (2018) (Hanlon, J., dissenting), *aff'd,* 483 Mass. 716 (2019); Commonwealth v. Gonzalez, 93 Mass. App. Ct. 6, 13 (2018) (Rubin, J. dissenting), *review denied,* 480 Mass. 1102 (2018); Commonwealth v. Warren, 87 Mass. App. Ct. 476, 483 (2015) (Agnes, J., dissenting), *vacated*, 475 Mass. 530 (2016); Commonwealth v. Rosado, 84 Mass. App. Ct. 208, 216 (2013) (Sikora, J., dissenting), *review denied*, 466 Mass. 1110 (2013); Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 315 (2013) (Berry, J. dissenting).

10. *See Privette,* 491 Mass. at 521, 543 (Cypher, J., concurring in part and dissenting in part) (Wendlandt, J., concurring); *Sweeting-Bailey,* 488 Mass. at 756-57, 761, 771 (Lowy, J., concurring) (Wendlandt, J., concurring) (Budd, C.J., dissenting) (Gaziano, J., dissenting); *Villagran*, 477 Mass. at 727 (Lowy, J., dissenting); *Rodriguez*, 472 Mass. at 778 (Cordy, J., dissenting).

11. *See generally* Commonwealth v. Sweeting-Bailey, 488 Mass. 741 (2021), *cert. denied,* 143 S.Ct. 135 (2022).

12. Commonwealth v. Karen K., 491 Mass. 165 (2023).

13. *See Karen K.,* 491 Mass. at 166 (further appellate review granted after Appeals Court issued split decision); *Sweeting-Bailey*, 488 Mass. at 742 (same); *Barreto*, 483 Mass. at 717 (same); *Warren*, 475 Mass. at 531 (same).

14. *Karen K.,* 491 Mass. at 166.

15. *Id.* at 176-179.

16. *Id.* at 171-172.

17. *Id.* at 179-180.

18. *Id.* at 179.

19. Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016).

20. Commonwealth v. Karen K., 491 Mass. 165, 167 (2023).

21. *Id.* at 180.

22. *Id*. at 167.

23. *Id.*

24. *Id.*

25. *Id.*

26. Commonwealth v. Karen K., 491 Mass. 165, 167 (2023).

27. *Id.* at 167-168.

28. *Id.*

29. *Id.* at 168.

30. *Id.*

31. *Id.*

32. Commonwealth v. Karen K., 491 Mass. 165, 168 (2023).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Meanwhile, two of the four police officers who were observing the juvenile from Heath Street had exited their vehicle and begun to walk through the courtyard toward the juvenile.[37] Having reversed direction, the juvenile was "headed directly toward" these two officers.[38] Their paths crossed in the courtyard.[39] The juvenile tried to walk around the officers, but one of them blocked her path and grabbed her by the arms.[40] The officers sought to conduct a pat-frisk of the juvenile's person.[41] They summoned a female officer to complete this task.[42] During the frisk, the female officer found a loaded gun in the waistband of the juvenile's pants.[43]

The juvenile was charged with four offenses based on the discovery of the gun.[44] Prior to trial, the juvenile moved to suppress the gun.[45] She argued that the "police did not have reasonable suspicion to stop her."[46] She further argued that the police "did not have reasonable suspicion that she was armed and dangerous so as to permit the pat-frisk."[47] A Juvenile Court judge concluded after a hearing that both the stop of the juvenile and the subsequent pat-frisk were justified because the officers had reasonable suspicion that the juvenile was carrying a firearm in her waistband.[48] Critical to this determination was the judge's finding that the juvenile "'bladed' her body 'so as to conceal something on her person'" as she walked through the courtyard of the housing complex.[49] Having concluded that the police had reasonable suspicion, the judge denied the juvenile's motion to suppress.[50]

The juvenile entered a conditional guilty plea to the four charged offenses.[51] In doing so, she preserved her right to appeal the denial of her motion to suppress.[52] On appeal, the juvenile again argued that the police stopped her without reasonable suspicion and that the subsequent pat-frisk was not supported by reasonable suspicion that she was armed and dangerous.[53] A divided panel of five Appeals Court justices narrowly affirmed the denial of the motion to suppress.[54] Three of the justices agreed with the motion judge and concluded that the circumstances established reasonable suspicion to believe that the juvenile was in possession of a firearm.[55] The majority upheld the judge's finding that the juvenile "bladed" her body in an effort to conceal something on her person and heavily relied upon this finding to conclude that reasonable suspicion existed.[56] The majority noted that the juvenile's "blading" of her body was sufficient to establish reasonable suspicion even if the juvenile's efforts to evade the police were given less weight due to her race.[57] The dissent concluded that reasonable suspicion was lacking.[58] The dissent reasoned that the juvenile's "blading" of her body added little to the reasonable suspicion equation because this imprecise term could be used to describe the simple act of looking over one's shoulder.[59] The dissent similarly reasoned that the juvenile's efforts to evade the police carried little weight given her race and the large number of officers involved.[60] Following the Appeals Court's decision, the juvenile filed a successful application for further appellate review with the SJC.[61]

Before addressing the SJC's decision, it is first important to provide some background on the use of the term "blading" in reasonable suspicion cases. It is also important to explain how the defendant's race influences the weight to be given to evasive behavior in determining the existence of reasonable suspicion.

II. THE HISTORY OF "BLADING"

The term "blading" made its first appearance in a published case in *Commonwealth v. Garcia*.[62] The police officers involved in *Garcia* testified that the defendant was turning his body such that one side of his torso remained out of the view of the officers.[63] The officers referred to this behavior as "blading" and testified that, based on their training and experience, this act was consistent with a person trying to conceal a weapon on their person.[64] The Appeals Court adopted the officers' use of the term "blading" and ultimately concluded that the defendant's behavior created reasonable suspicion that the defendant was engaged in criminal activity.[65]

Over the next few years, "blading" began to appear with greater frequency in reasonable suspicion cases.[66] Testimony that the

37. *Id.*
38. Commonwealth v. Karen K., 491 Mass. 165, 168 (2023).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Commonwealth v. Karen K., 491 Mass. 165, 166 & n.1 (2023).
45. *Id.* at 166.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 169.
50. Commonwealth v. Karen K., 491 Mass. 165, 166 (2023).
51. *Id.*
52. *Id.*
53. Commonwealth v. Karen K., 99 Mass. App. Ct. 216, 220 (2021).
54. *Id.* at 217.
55. *Id.* at 217-225.
56. *Id.* at 222-223.
57. *Id.* at 222.
58. Commonwealth v. Karen K., 99 Mass. App. Ct. 216, 238 (Milkey, J., dissenting).
59. *Id.* at 232.
60. *Id.* at 230-231.
61. *See* Commonwealth v. Karen K., 488 Mass. 1103 (Sept. 13, 2021) (granting further appellate review).
62. Commonwealth v. Garcia, 88 Mass. App. Ct. 307 (2015), *review denied*, 473 Mass. 1105 (2015).
63. *Id.* at 311-312.
64. *Id.*
65. *Id.* at 312.
66. *See* Commonwealth v. Resende, 474 Mass. 455, 459 & n.8 (2016); Commonwealth v. Hem, No. 20-P-621, 2021 WL 684237, at *3 (Mass. App. Ct. Feb. 23, 2021), *review denied*, 487 Mass. 1104 (2021); Commonwealth v. Garner, No. 19-P-1069, 2020 WL 7689193, at *2 (Mass. App. Ct. Dec. 28, 2020), *rev'd,* 490 Mass. 90 (2022); Commonwealth v. Mason, No. 17-P-687, 2019 WL 25540, at *3 (Mass. App. Ct. Jan. 18, 2019), *review denied*, 481 Mass. 1108 (2019); Commonwealth v. Harrison, No. 15-P-1609, 2017 WL 838230, at *2 (Mass. App. Ct. Mar. 3, 2017).

defendant was "blading" his or her body provided strong support for reasonable suspicion. The SJC and the Appeals Court concluded that reasonable suspicion existed in every case in which the motion judge found that the defendant "bladed" his or her body.[67] However, as the term "blading" became more popular, it became less clear what the term actually meant. In some cases, officers described the defendant as having taken a "bladed stance" and asserted that this stance was indicative of a person preparing to attack.[68] This was inconsistent with prior police assertions that "blading" was indicative of a person attempting to conceal a weapon.

III. RACE AND EVASIVE BEHAVIOR

Courts have historically given substantial weight to an individual's flight from the police when assessing reasonable suspicion.[69] The SJC carved out an exception to this rule in *Commonwealth v. Warren*.[70] The defendant in *Warren* was a Black male.[71] He twice ran away from Boston police officers who tried to stop him while investigating a reported burglary.[72] The police eventually recovered a gun along the route that the defendant fled and charged him with unlawful possession of a firearm.[73] On appeal, the SJC considered whether the police had reasonable suspicion to justify their second attempt to stop the defendant.[74] A critical part of the court's analysis involved the weight to be given to the defendant's flight from the police.[75] The SJC recognized that the Boston police had a history of disproportionately stopping Black men.[76] Given this history, the court reasoned that a Black male in Boston may flee from the police "to avoid the recurring indignity of being racially profiled."[77] This reason for flight is "totally unrelated to consciousness of guilt."[78] The SJC therefore ruled that, in certain cases, flight should be given less weight when the defendant is a Black male and the stop occurs in Boston.[79]

The SJC expanded this reasoning to cover nervous and evasive behavior in *Commonwealth v. Evelyn*.[80] As in *Warren*, the defendant in *Evelyn* was a Black male who was stopped by the Boston police.[81] The defendant was walking on a sidewalk when police officers investigating a shooting drove up alongside him and attempted to talk to him.[82] The defendant started to walk faster and did not turn his head to make eye contact with the officers.[83] The officers repeatedly attempted to converse with the defendant, but he rebuffed these efforts.[84] After driving alongside the defendant for approximately 100 yards, one of the officers exited the cruiser.[85] The SJC concluded that the defendant was seized once the officer exited the cruiser and thus considered whether reasonable suspicion existed at that point.[86] In weighing the defendant's nervous and evasive behavior, the court reemphasized that Boston was plagued by "a long history of race-based policing" that would likely "remain imprinted on the group and individual consciousness of African-Americans for the foreseeable future."[87] Given this history, the court reasoned that it was appropriate to "significantly discount the weight of the defendant's nervous and evasive behavior."[88]

IV. THE COURT'S DECISION IN *KAREN K.*

The analysis of reasonable suspicion in *Karen K.* depended on the amount of weight the SJC would give to the juvenile's "blading" of her body and her efforts to evade the police.[89] The SJC ultimately concluded that the police had reasonable suspicion that the juvenile was in possession of a firearm.[90] In reaching this conclusion, the court first focused on the movements made by the juvenile as she walked through the housing complex.[91] The court gave significant weight to the defendant's act of adjusting her waistband while angling one side of her body away from the group of seven police officers.[92] The court reasoned that these actions were worthy of considerable weight because the officers had been trained to recognize this behavior as consistent with an individual attempting to conceal a weapon.[93]

Though the SJC gave great weight to the juvenile's behavior, it

67. *See* Commonwealth v. Resende, 474 Mass. 455, 459 & n.8 (2016); Commonwealth v. Hem, No. 20-P-621, 2021 WL 684237, at *3 (Mass. App. Ct. Feb. 23, 2021), *review denied,* 487 Mass. 1104 (2021); Commonwealth v. Garner, No. 19-P-1069, 2020 WL 7689193, at *2 (Mass. App. Ct. Dec. 28, 2020), *rev'd,* 490 Mass. 90 (2022); Commonwealth v. Mason, No. 17-P-687, 2019 WL 25540, at *3 (Mass. App. Ct. Jan. 18, 2019), *review denied*, 481 Mass. 1108 (2019); Commonwealth v. Harrison, No. 15-P-1609, 2017 WL 838230, at *2 (Mass. App. Ct. Mar. 3, 2017). In Commonwealth v. Garner, the motion judge did not credit police testimony that the defendant was "blading" his body. 490 Mass. 90, 95 (2022). The SJC therefore concluded that reasonable suspicion was lacking. *Id.* at 97.

68. *See* Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 748 (2021), *cert. denied*, 143 S.Ct. 135 (2022); Commonwealth v. Agogo, 481 Mass. 633, 635 & n.3 (2019); Commonwealth v. Recinos-Guerra, No. 17-P-884, 2018 WL 3614307, at *1 (Mass. App. Ct. Jul. 30, 2018), *review denied,* 480 Mass. 1108 (2018).

69. *See* Commonwealth v. Sykes, 449 Mass. 308, 315 (2007); Commonwealth v. Grandison, 433 Mass. 135, 139-40 (2001). *See also* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Our cases have . . . recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

70. Commonwealth v. Warren, 475 Mass. 530 (2016).

71. *Id.* at 531-32.

72. *Id.* at 532-533.

73. *Id.* at 530, 533.

74. *Id.* at 533-534.

75. *Id.* at 538.

76. Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016).

77. *Id.* at 540.

78. *Id.*

79. *Id.*

80 . Commonwealth v. Evelyn, 485 Mass. 691 (2020).

81. *Id.* at 695.

82. *Id.* at 694-695.

83. *Id.* at 695.

84. *Id.*

85. *Id.*

86. Commonwealth v. Evelyn, 485 Mass. 691, 703-04 (2020).

87. *Id.* at 708.

88. *Id.* at 709.

89. Commonwealth v. Karen K., 491 Mass. 165, 176-80 (2023).

90. *Id.* at 166.

91. *Id.* at 175-176.

92. *Id.* at 176-179.

93. *Id.*

made a point to discourage any future general reliance on the term "blading."[94] The court recognized that the term had "become . . . unwieldy, lacking precision or a single definition, and tinged with loaded connotations."[95] The court acknowledged that it had accepted police testimony asserting that "blading" was indicative of an attempt to conceal a weapon as well as police testimony asserting that a "bladed stance" was indicative of an imminent physical attack.[96] Due to the confusion regarding the term, the court advised the lower courts to "instruct witnesses simply to describe the behavior they observed in as much detail as possible, rather than merely labeling that behavior 'blading.'"[97]

The SJC next considered the juvenile's efforts to evade the police.[98] As noted above, the juvenile twice changed her direction of travel so as to avoid a group of seven police officers that had entered the housing complex.[99] She also attempted to walk around an officer who "stood in the path in an effort to stop her."[100] The court concluded that the juvenile's conduct provided appreciable support for reasonable suspicion despite the fact that she is Black.[101] The court recognized that it had previously downplayed the significance of evasive behavior in similar circumstances due to the Boston police's history of racial profiling.[102] However, the court emphasized that it had not eliminated evasive behavior as a factor in the analysis of reasonable suspicion.[103] The court ascribed greater weight to the juvenile's evasive efforts for a couple of reasons.[104] First, with respect to the juvenile's efforts to evade the group of seven police officers, the court noted that this group of officers was not "attempting to approach or apprehend" the juvenile.[105] Second, the court noted that the juvenile attempted to "quickly walk around" the officer who "stood in [her] path in an effort to stop her."[106] Though the court did not describe how much weight it was giving to the juvenile's evasive behavior, it clearly did not significantly discount this factor like it had in *Warren* and *Evelyn*.[107]

V. THE IMPACT OF THE DECISION

The court's decision in *Karen K.* provides some welcome guidance on the use of the term "blading." The court has made it clear that the term should not be used by police witnesses going forward.[108] Instead, officers should simply describe what the defendant did using plain language.[109] If a defendant continually looks over his shoulder while walking away from the police, then the testifying officer should say just that. Motion judges should encourage the use of plain language by instructing witnesses "simply to describe the behavior they observed in as much detail as possible."[110] If the witness fails to provide specific testimony, and instead relies on the term "blading" to describe the defendant's actions, then his or her testimony should be given minimal weight in determining the existence of reasonable suspicion.

Though the SJC focused its analysis on the term "blading," the positive impact of the court's decision is likely to extend beyond the use of this one term. The rationale employed by the court in rejecting "blading" is equally applicable to other imprecise terms. Take, for instance, a police officer's assertion that the defendant was in "fight or flight" mode.[111] This term implies that the defendant is a dangerous individual but fails to provide any specifics regarding the defendant's conduct. Like "blading," it is a vague term that serves to cast innocuous conduct in a far more sinister light. Applying the rationale from *Karen K.*, this term should be avoided. Instead of stating that the defendant was in "fight or flight" mode, the testifying officer should simply describe the defendant's behavior.

The court's decision in *Karen K.* emphasizes the need for police witnesses to speak plainly when describing a defendant's actions at a suppression hearing. No longer will the outcome of a case depend on a judge's interpretation of a nebulous term like "blading." Instead of having to decipher the meaning of imprecise terms, judges will have the benefit of testimony that plainly describes what the defendant

94. *Id.* at 173.

95. Commonwealth v. Karen K., 491 Mass. 165, 173 (2023).

96. *Id.*

97. *Id.*

98. *Id.* at 179-80.

99. *Id.* at 168.

100. *Id.* at 180.

101. Commonwealth v. Karen K., 491 Mass. 165, 179-80 (2023).

102. *Id.*

103. *Id.* at 180.

104. *Id.*

105. *Id.*

106. *Id.*

107. Commonwealth v. Karen K., 491 Mass. 165, 180 (2023). Chief Justice Kimberly S. Budd authored a concurring opinion in which she described the determination of reasonable suspicion to be "a very close case." *Id.* at 183 (Budd, C.J., concurring). Though she concluded that the circumstances established reasonable suspicion, she emphasized that "nervousness around law enforcement officers is not uncommon for law-abiding persons" and that "Black youth especially may have valid reasons unrelated to consciousness of guilt to avoid contact with the police." *Id.*

108. Commonwealth v. Karen K., 491 Mass. 165, 173 (2023).

109. *Id.*

110. *Id.* Though judges should instruct witnesses to speak plainly, they must be careful not to provide undue assistance to the commonwealth. It is the commonwealth's burden to establish the existence of reasonable suspicion. *See* Commonwealth v. Hernandez, 448 Mass. 711, 714 (2007) (establishing burden of proof where a motion to suppress has been filed). If a police witness is relying on the term "blading" to describe the defendant's actions, it is not the motion judge's job to correct this error.

111. *See, e.g.,* United States v. Dapolito, 713 F.3d 141, 146 (1st Cir. 2013); United States v. Patton, 705 F.3d 734, 736 (7th Cir. 2013); State v. Price-Williams, 973 N.W.2d 556, 560 (Iowa 2022); Commonwealth v. Garner, 490 Mass. 90, 95 (Mass. 2022); State v. Vandenberg, 81 P.3d 19, 27 (N.M. 2003); State v. Schwarz, 988 P.2d 689, 691 (Idaho 1999).

did prior to the stop. This emphasis on plain language will lead to greater consistency and more accurate fact-finding in reasonable suspicion cases.

The SJC made the right move in saying good riddance to the term "blading." Unfortunately, the same cannot be said about the court's consideration of the interplay between race and evasive behavior. Rather than providing clarity, the court muddied the waters. The court's decision creates confusion as to how to weigh a Black person's efforts to evade the police in Boston. In *Warren* and *Evelyn*, the court reasoned that a Black person's efforts to evade the police in Boston should be given little weight.[112] Yet the court's decision in *Karen K.* suggests that a Black person's evasive efforts can still be a substantial factor in the reasonable suspicion analysis.[113] This inconsistent treatment of evasive behavior leaves judges and lawyers adrift to determine the factor's appropriate weight. When should evasive behavior be significantly discounted as a factor like it was in *Warren* and *Evelyn*? And when should it be afforded substantial weight as it was in *Karen K.*? It is impossible to confidently make this determination given the current state of the law.

This confusion would not exist if the SJC had provided a better explanation as to why it was affording greater weight to the juvenile's evasive efforts in *Karen K.* As noted above, the SJC reasoned that the juvenile's attempts to evade the group of seven police officers were noteworthy because these officers were not approaching or seeking to apprehend the juvenile.[114] In contrast, the defendants in *Warren* and *Evelyn* fled from officers who were attempting to initiate conversation.[115] This distinction might have made sense if the juvenile had attempted to evade a couple of police officers on routine patrol who had shown no interest in her. However, the police presence in *Karen K.* was far more intimidating. The juvenile turned away from a group of seven police officers that was walking purposefully into a housing complex at 8 p.m.[116] There are many innocent reasons why a young Black person in Boston would not want to cross paths with this phalanx of police officers. Of course, they might want to avoid the risk of being racially profiled. Yet they might also assume that the officers were responding to a dangerous situation and thus walk in a different direction for fear of getting involved. Most people walk away from, not toward, potentially dangerous situations. Given the number of officers and the purposeful way that they entered the housing complex, it is entirely understandable why an innocent person in the juvenile's shoes would think twice about their direction of travel. The fact that the group of seven police officers had not approached the juvenile is simply not a logical justification for treating her evasive efforts as more suspicious.

Even if this distinction were logical, the SJC almost immediately abandoned it when considering the juvenile's attempt to walk around the officer who stood in her path and ultimately stopped her. The SJC thought it significant that the juvenile attempted to walk around this officer even though he was clearly attempting to stop the juvenile. If the weighing of evasive behavior depends on whether the police were approaching the defendant or not, then the juvenile's attempt to evade this officer should have been given minimal weight. The SJC did not do so. It instead concluded that the juvenile's attempt to walk around the officer blocking her path was a significant factor in the analysis of reasonable suspicion.

The inconsistent weighing of evasive behavior in *Karen K.* is problematic. Fortunately, the SJC's appetite for reasonable suspicion cases is not likely to soon decrease, and therefore, an opportunity to clarify the proper weighing of evasive behavior should present itself in the near future. It should not be long before the SJC is again facing the question of how much weight should be given to a Black person's efforts to evade the Boston police when assessing the existence of reasonable suspicion. Faced with this question, it is likely that the SJC will reemphasize its holdings in *Warren* and *Evelyn*. These decisions broke new ground by recognizing that the history of racist policing in Boston must be factored into the reasonable suspicion analysis. It is unlikely that the court intended to roll back the impact of these decisions through its decision in *Karen K.* The court would have been far more explicit in its rationale had it intended such a result.[118] Instead, *Karen K.* is destined to be limited to its own facts. The trend toward recognizing the history of racist policing and factoring it into the reasonable suspicion analysis is likely to continue. Yet as this trend continues, it is important that the SJC provide precise guidance as to when a history of racist policing is relevant to the weighing of evasive behavior in a reasonable suspicion analysis. Consistent application of the principles established in *Warren* and *Evelyn* is critical if there is to be uniformity in how reasonable suspicion cases are resolved in the commonwealth.

— Edward Crane

112. Commonwealth v. Evelyn, 485 Mass. 691, 700-03 (2020); Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016).

113. Commonwealth v. Karen K., 491 Mass. 165, 179-80 (2023).

114. *Id.* at 180.

115. *Evelyn*, 485 Mass. at 703-04; *Warren*, 475 Mass. at 532-33.

116. *Karen K.*, 491 Mass. at 167-68.

117. *Id.* at 180.

118. Chief Justice Budd's concurrence provides a strong indicator that the SJC will continue to go forward, not backward, in recognizing the impact of race in its reasonable suspicion decisions. *See Karen K.,* 491 Mass. at 182-185 (Budd, C.J., concurring). She emphasized that Black youth in particular "may have valid reasons" to avoid contact with the police that are unrelated to consciousness of guilt. *Id.* at 183.

Book Review

Business and Commercial Litigation in Federal Courts (Robert L. Haig, ed., ThomsonReuters Fifth Edition 2021)

Business and Commercial Litigation in Federal Courts, a periodically updated treatise now in its fifth edition, covers not only the procedural topics one would expect, but also the substantive law in many of the fields most commonly encountered by business and commercial litigators. Editor-in-Chief Robert L. Haig and many contributing authors turned out the first to fourth editions of this treatise in 1998, 2005, 2011 and 2016 to great praise. Its fourth edition, reviewed in the Mass. Law Review, 99(3) Mass. L. Rev. 240 (2018), had 153 chapters in 14 volumes totaling 17,142 pages by 251 authors, including 22 judges. The current fifth edition (2021) has 180 chapters in 16 main volumes, plus a Table of Cases as Volume 17 and an Appendix as Volume 18; it contains 19,866 pages by 373 authors, including 32 judges. The chapters from earlier editions have been extensively revised, and 26 new chapters have been introduced (Foreword, p. iv). The quality and expanded content of this fifth edition, no less so than prior editions, fully deserves the encomium "monumental" and then some, having managed to keep, build on and expand the strong foundation of earlier editions.[1]

We have carefully sampled the work, with special attention to particular factors and selected chapters. The lists and biographies of the contributing authors show qualifications that are uniformly impressive. Many are involved in the American Bar Association, state bar associations and the American Law Institute; are actively involved with pro bono activities, teaching activities and civic activities; and have established public records of successful handling of cases at every level of our legal system. The quality of the writing, the careful attention to precedent and sources, the refreshing understanding that context and overview must precede diving into detail, and a disciplined editorial hand all contribute to the value of the treatise. The treatise, in all its now five editions, is the result of a joint venture of the ABA Litigation Section and ThomsonReuters, with all royalties going to the ABA Litigation Section.

Each chapter of the treatise contains a helpful table of contents, numerous subheadings, generous references for further reading on the topic, and practice aids consisting of checklists and forms. The checklists are particularly helpful because few practitioners keep in their heads every rule or element on an issue. Annual pocket part supplements covering new developments are issued.

The treatise is a step-by-step practice guide that covers every aspect of a business or commercial case, from the investigation and assessment that take place at the inception, through pleadings, discovery, motions, trial, appeal, and enforcement of judgments. It includes in-depth features on subject-matter jurisdiction (in 63 subsections of chapter 1, each a significant resource on its own); personal jurisdiction and service (ch. 2); venue, forum selection and transfer (ch. 3); case investigation and tools (ch. 4); internal and Congressional investigations (ch. 5-6); case evaluation (ch. 7); the complaint (ch. 8); responses to complaints (ch. 9); and third-party practice (ch. 10). In volumes 5-7, jury and bench trials are exhaustively covered, including use of technology in court; evidence; persuasion; ethics; judgments; post-judgment practice; appeals; and collection and enforcement of judgments.

Chapters 11 through 17 focus on forum. The choice of a state or federal forum has a major impact on many aspects of litigation, including cost, and the treatise analyzes in great depth the strategic factors to be considered in making the choice (ch. 11) or resisting

1. The list price for the entire treatise in printed book form is $2,088 (though discounts are available, e.g. 25% for American Bar Association Litigation Section Members). Monthly payment arrangements are available (including updates). And electronic access through Westlaw is available by various configurations and packages. It is estimated that authors and their firms have invested more than $100 million of billable time in producing the treatise over the years (Foreword, p. iii). All royalties from the treatise and pocket parts go to the ABA Litigation Section, and the amounts have been substantial.

choice of a state court by removal to federal court (ch. 17). Widespread concerns that business litigation has become too complicated, complex and expensive are addressed in one of the chapters, titled "Civil Justice Reform" (ch. 16). The chapter also discusses efforts in progress to restore an ability to handle in federal courts routine business disputes in diversity-jurisdiction or federal-question cases that may be primarily state law in nature. The pros and cons of reform proposals are thoroughly discussed.

The treatise does not neglect alternative methods of dispute resolution, such as negotiations (ch. 59) and settlements (ch. 42), and chapters have been included on mediation (ch. 60), arbitration under federal statutes (ch. 61), and international arbitration (ch. 62). Litigation management strategies in use today by law firms and corporations are also addressed. New chapters address other issues in the business side of law practice, including marketing to potential business clients (ch. 82), and teaching litigation skills to younger lawyers (ch. 83).

The treatise also covers regulatory litigation (ch. 91) and practice before administrative agencies and tribunals (ch. 161) whose rulings are ultimately reviewable in federal courts (albeit with *Chevron* defenses more often than not). This includes such areas as labor-employment (OSHA, EEOC), IRS, FOIA, DOJ, EPA, DOD (and other procurement agencies), ICE, FTC and FCC practice. An attorney consulting this treatise will be able to toss off acronyms as though he or she had practiced in a field for years, though care must be taken to make sure the full names and meanings are disclosed first to generalist judges.[2]

In chapters 87-130, the main focus shifts to substantive law, all heavily cross-referenced to the earlier procedural chapters. The substantive law chapter topics include antitrust (ch. 87); banking (ch. 109); bankruptcy's impact on commercial litigation (ch. 65); collections (ch. 112); commodities and futures (ch. 95); communications (ch. 115); construction (ch. 169); consumer protection (ch. 113); copyright (ch. 118) (and so on through the alphabet). There is extensive coverage of state-law issues that may be litigated in federal courts, including insurance (ch. 107) and reinsurance (ch. 108); director and officer liability (ch. 96); merger and acquisitions transactions (ch. 99); medical malpractice (ch. 103); contracts (ch. 106); agency (ch. 132); and joint ventures (ch. 134). The wide range of subjects governed by the Uniform Commercial Code is also covered, including sale of goods (ch. 139); warranties (ch. 137); negotiable instruments (ch.140); unfair competition torts (ch. 141); commercial real estate (ch. 137); franchising (ch.150); construction and project finance (ch. 170). Newly introduced in the fifth edition are chapters on substantive areas that have increased in importance in recent years, including animal law (ch. 175); art law (ch. 174); artificial intelligence (ch. 80); climate change (ch. 179); corporate sustainability (ch. 98); political law (ch. 164); and more.

It is hard to think of any significant omission from the treatise's coverage.

In addition to civil litigation or administrative enforcement, attorneys who litigate business and commercial law cases must be aware of criminalization trends that have introduced volatile issues involving the use or nonuse of criminal prosecution in such disputes. Notwithstanding the too-big-to-fail/too-big-to-jail trope, potential criminal or punitive consequences lurk behind almost every business dispute of any significance. Like it or not, business and commercial lawyers and law firms and in-house legal departments must become well versed in both criminal law and civil law to deal directly with disputes that implicate both areas (or at least be knowledgeable enough to spot issues and engage the timely assistance of specialized teams and resources). The treatise gives special attention to these matters in Volume 14, including fraud (ch. 151); white-collar crime (ch. 153), which is one of the longest chapters of this multi-volume treatise; the interplay between commercial litigation and criminal proceedings (ch. 154); money laundering (ch. 155); the Foreign Corrupt Practices Act (ch. 156); export controls (ch. 157); and the False Claims Act (ch. 160), among others.

The treatise also places great emphasis on strategic considerations specific to commercial cases. Details are always related to the

2. Interview with Seventh Circuit Judge Frank H. Easterbrook, 15 Scribes J. Legal Writing 1 (2013).

broader picture, with various options and their consequences clearly set forth. Many chapters reflect the authors' involvement in high-stakes cases and no-stone-unturned efforts, which results in an admirably comprehensive scope and precision. The old adage, "Don't make a federal case out of it," has effectively been replaced by a reality that almost all commercial litigation today gets very complicated very fast. Nevertheless, modest-stakes cases demand consideration of proportionality, without limitation of quality counseling and advocacy. Knowing the full range of available tactics and options makes it easier to scale down for such cases without sacrificing essentials. The quality of analysis and litigation skills needed for such cases will be assisted by consulting this treatise. After all, good lawyering counts in every case, large or small.

Chapters 69 ("Appeals to the Courts of Appeal") and 70 ("Appeals to the Supreme Court") deal with the appellate process in federal courts. The treatise clearly describes complicated procedural issues and highlights traps for the unwary. The skills required for appellate litigation differ from those at trial in several respects, and these chapters do an outstanding job of alerting the reader to the essential perspective needed to handle an appeal successfully.

Chapter 69 encompasses all of the technical requirements for briefing and arguing a federal appeal and contains advice from a sitting Second Circuit judge about what really counts and how cases are really decided. This sort of insider advice can be quite helpful, and is reminiscent of Chief Judge Frank Coffin's books,[3] which those of us in the First Circuit have long known, of course, are indispensable reading if one wants to understand how federal appeals are processed, not to mention the insightful observations of Chief Judge Calvert Magruder[4] (echoed on the state side by Justice Benjamin Kaplan).[5] And, because the essentials of success on appeal are not that different between the state and federal courts in Massachusetts, much of Chapter 69's guidance is applicable to state practice.[6] Chapter 69's succinct coverage of the appellate process and the quality of the advice given about how to handle an appeal are impressive and well worth consulting, the earlier the better, whenever the prospect of appeal exists in a case.

Chapter 70 highlights the essentials of Supreme Court practice, covering the basics, and informing counsel of the extensive resources available to understand the unique issues that may arise in handling a Supreme Court case.

Chapter 83, titled "Teaching Litigation Skills," exhorts every lawyer to teach and transmit litigation skills to the generation of lawyers who will follow us. This review is not the place to debate alleged failings in legal education or the merits of curricular changes designed to emphasize "experiential learning." Suffice it to say, no one is a complete lawyer after a mere three years of study; mentorship in practice has always been, and will doubtless remain, an essential part of becoming an accomplished lawyer. This chapter gives sound advice about how this teaching role can be subsumed into the process of effectively representing the client's interests in any given case, and can, in fact, improve the representation. The chapter emphasizes the need for partners and senior attorneys to teach the ephemeral skills of persuasion, written advocacy, oral advocacy, credibility and, above all, professional integrity.

In a multi-volume treatise with innumerable procedural and substantive details on business and commercial litigation in federal courts, it is refreshing to see that the fundamentals of the lawyer's role have not been overlooked. As Justice Oliver Wendell Holmes Jr. remarked, it is the lawyers who provide the "implements of decision" to the judges,[7] and Justice Robert H. Jackson memorably described how important the bar is to the development of our law.[8] The entire treatise exhibits an understanding of counsel's essential role in our legal system — from private resolution of disputes, to trial litigation, to the highest appellate courts in the land — and offers the knowledge needed to fulfill every aspect of that role with distinction.

Your reviewers commend this current edition of the treatise unreservedly to any lawyer, novice or experienced, who wants to excel at business and commercial litigation in federal courts or elsewhere.

— Jerry Cohen and Thomas J. Carey Jr.[9]

3. *See generally* Frank Coffin, *On Appeal: Courts, Lawyering and Judging at the Appellate Court* (W.W. Norton + Co. 1994); Frank Coffin, *The Ways of a Judge: Reflections From the Federal Appellate Bench* (W.W. Norton + Co. 1980).

4. *See* Calvert Magruder, "The Trials and Tribulations of an Intermediate Appellate Court," 44 Cornell L. Rev. 1 (1958).

5. *See* Benjamin Kaplan, "Do Intermediate Appellate Courts Have a Law-making Function?," 70 Mass. L. Rev. 10 (1985).

6. *See* Christopher J. Armstrong & Thomas J. Carey, Mass. App. Prac. (LexisNexis 2022 ed.).

7. John W. Davis, "The Argument of an Appeal," 26 A.B.A.J. 895, 896 (1940), *reprinted in* 3 J. App. Prac. & Process 743 (2001).

8. Robert H. Jackson, "Advocacy Before the United States Supreme Court: Suggestions for Effective Case Presentations," 37 Cornell L. Rev. 1 (2003), *reprinted in* 5 J. App. Prac. & Process 219; Robert H. Jackson, "Tribute to Country Lawyers," 7 Texas B.J. 146 (1944) (available at https://www.robertharjackson.org/speech-and-writing/tribute-to-country-lawyers/).

9. Attorney Cohen practices at Burns and Levinson in Boston, teaches at Roger Williams Law School and UMass Dartmouth School of Law, and serves on the Editorial Board of the *Massachusetts Law Review*. Attorney Carey is an appellate practitioner, teaches at Boston College Law School, and serves on the Editorial Board of the *Massachusetts Law Review.*

Book Review

Personalized Law: Different Rules for Different People

By Omri Ben-Shahar and Ariel Porat, Oxford University Press 2021, 244 pages

In the summer of 1835, Mr. Menlove built a haystack on the edge of his property in Shropshire, England, in close proximity to two cottages owned by his neighbor, Mr. Vaughan. Despite warnings over the course of five weeks that the haystack was a severe fire hazard, Menlove refused to remove it and reportedly stated that "he would chance it."[1] At length, the haystack spontaneously caught fire. The conflagration spread to the neighboring cottages and destroyed them. In defending against an action for negligence by his injured neighbor, Menlove argued that he was not responsible because he had acted in good faith to the best of his judgment and should not be responsible for the "misfortune of not possessing the highest order of intelligence."[2] In rejecting this individualized approach, the Court of Common Pleas in a case of first impression held the standard of care to be the conduct of a man of ordinary prudence. Chief Justice Tindal declared that, if liability were based on personal judgment, it "would be as variable as the length of the foot of each individual."[3] In *Personalized Law: Different Rules for Different People,* Omar Ben-Shahar and Ariel Porat foresee a day when the prudent man rule will be obsolete and negligence cases decided through a personalized standard of care that accounts for the strengths and weaknesses of each individual person.

Inspired by advances in personalized medicine, nutrition and education,[4] Ben-Shahar, a professor at the University of Chicago Law School, and Porat, a professor of law and president of Tel Aviv University, believe the time may soon be here for law to begin to take a similar individualized approach. In a succinct, well-written (though poorly copy-edited) account, they consider how such a legal regime might look, lay out arguments for and against personalized law, describe practical problems of implementation, and propose solutions. In essence, the book is a thought experiment presenting what the authors characterize as a model by which they seek to demonstrate that personalized law "is a worthy conversation."[5]

The book begins with a question: assuming personalized law becomes technically feasible, would it bring a utopia similar to personalized medicine, "[or] would it produce alienation, demoralization, and discrimination?"[6] Ben-Shahar and Porat methodically explore the answer. After a brief introduction, the book is divided into four parts. Part I considers what personalized law is, compares it to existing legal regimes, and discusses benefits and costs. Part II gives examples of personalized law from a variety of legal arenas. It then describes possible regulatory techniques for implementing a scheme of personalized rules and considers personalizing by age. Part III examines questions of justice and equal protection. Finally, Part IV addresses implementation, including coordination, potential manipulation of rules, and issues surrounding the need for large amounts of personal data.

The authors define personalized law as laws, rules and regulations that vary person by person, what they call a "reasonable you" standard, in stark contrast to a uniform "reasonable person" paradigm.[7] A type of "precision law," it is a framework where everyone has his or her own "personal legal system, where commands vary along a continuum, and even change instantaneously."[8] Under a personalized approach, law focuses on individuals instead of the entire population. Policies or goals underlying a particular law first must be identified to come up with a desired legal outcome. Personalization then uses multiple human characteristics and attributes relevant to a legal outcome to tailor rules or standards applicable to each individual based on that person's mix of such factors. Depending on the rule, relevant factors can include, among others, mental skills, expertise, health, age, physical condition, preferences, idiosyncrasies and the person's environment.[9] Tailoring is done by "machine-sorted information": algorithms that will work through the various factors to come up with each individual's rules.[10]

To illustrate how personalized law might work, Ben-Shahar and Porat examine several legal disciplines: tort law, consumer protection and criminal law. Consumer disclosures seem to be a target of both authors, who have published other works on the topic.[11] They are particularly troubled by over-disclosure, which they believe often results in people entirely ignoring disclosures.[12] In their view, robust consumer disclosures provide much more information than

1. 132 Eng. Rep. 490, 491 (1837).
2. *Id*. at 492.
3. *Id*. at 493.
4. *See* Omri Ben-Shahar & Ariel Porat, *Personalized Law: Different Laws for Different People* 45-49 (2021).
5. *Id.* at 223. Although the authors vigorously advocate for and highlight the advantages of personalized law, they step back in their conclusion and protest that they are not calling for immediate adoption of personalization. *Id.*
6. *Id.* at xi.
7. *Id.* at 1.
8. *Id.* at 201.
9. *Id.* at 24.
10. Ben-Shahar & Porat, *supra* note 4, at 19.
11. *See* O. Ben-Shahar & C. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (2014); A. Porat & L. Strahilevitz, "Personalizing Default Rules and Disclosure with Big Data," 112 Mich. L. Rev. 1417 (2014).
12. Ben-Shahar & Porat, *supra* note 4, at 92-96.

is needed by (or sensible for) the average consumer. As a result, most people skip over disclosures rather than wade through them looking for relevant provisions.[13] Similar arguments apply to other consumer protections, such as warranties and return rights.[14] In contrast to uniform rules, personalized law can be tailored to protect consumers most in need. Sophisticated consumers or people who abuse the system would get less protection than someone who has difficulty understanding risks. In other words, each individual gets the disclosures and other consumer rights best suited to his or her individual circumstances, by taking into account factors such as the person's skills, experience, intelligence and financial situation.[15] The underlying goal of protecting vulnerable consumers would remain the same, but the distribution of consumer rights across the population would change.[16]

The authors even consider personalizing constitutional rights. A uniform bill of rights gives everyone an equal amount of each right.[17] Personalized law instead would provide varying rights depending on individual preferences. Voting rights could be personalized because some people value voting less than others and, indeed, do not vote at all.[18] Under Ben-Shahar's and Porat's proposal, each person's total allocation of rights would be equal. Someone could have more gun rights (fewer restrictions and safeguards) in return for fewer voting rights or less freedom of speech. However, the book does not explain how those rights could be quantified and apportioned. It seems an unworkable situation and incompatible with democratic values. Ultimately, the authors admit that constitutional rights differ from other legal rules in that they have value to society separate from and exceeding their private value. After all, certain rights are inalienable and cannot be relinquished.[19] Voting and political debate benefit the public when all take part. These core rights serve society as a whole quite apart from the sum of benefits accruing to each person.[20]

Default rules present perhaps the most obvious application of personalization. These rules consist of any nonmandatory legal requirement that can be changed by the person it affects. Many default rules apply only to one person, for example, laws governing intestacy, organ donations and retirement savings. They can also apply to matters with multiple parties, such as provisions of the Uniform Commercial Code. Default rules generally are uniform and do not reflect individual preferences.[21] With personalized default rules, no action would be needed to implement people's wishes. Individuals could save on transaction costs incurred to override the default (e.g., for preparing a will) and not have to worry about taking steps to opt out of the uniform regime (they could still opt out of their default rule).[22] Although straightforward for single-person rules, personalized defaults for multi-party matters would be trickier. In those situations, the authors suggest that personalization of defaults could be done for specific areas, such as consumer law and insurance, so as to favor the weaker party.[23]

Throughout the book, Ben-Shahar and Porat contrast their proposal with uniform law. They examine how different personalized rules benefit and disadvantage individuals and society as compared to a uniform regime. They consider cross subsidies of different groups under both scenarios and evaluate the trade-offs. They compare the two in terms of fairness, biases, efficiency, and ease of administration. Almost invariably, they conclude that overall personalization is superior, and perceived problems with it actually do not exist or else can be solved.

Unlike a uniform approach, precision is a defining feature of personalized law. Because personalized law incorporates more factors than uniform law, it can more fully promote the policy goals underlying any particular law. Although uniform rules need less information, and therefore are both easier to administer and less costly than personalization,[24] they result in a misalignment of rights.[25] Because uniform standards are built to reflect an average, some people receive a legal right that is not the best for them. As the authors point out, precision is not a completely novel concept. Damage awards for personal injuries and the exercise of judicial discretion in sentencing decisions both involve personalization.[26] Various rights and responsibilities are subject to age-related cutoffs. Children have lower standards of care than adults (but also are forbidden to engage in

13. *Id.* at 93.
14. *Id.* at 71-72.
15. *Id.* at 123-24.
16. *Id.* at 35. On the related topic of medical and drug disclosures, the authors contrast personalized medicine, which uses individual characteristics to diagnose disease and determine treatments, with medical warnings. In the latter case, uniform comprehensive disclosures are used rather than fitting the disclosure to what is relevant to the individual patient. *Id*. at 39-40.
17. *See generally, id.* at 102-04.
18. Ben-Shahar & Porat, *supra* note 4, at 102.
19. *Id.* at 103.
20. *Id.*
21. *Id.* at 87.
22. *Id*. at 88.
23. *Id*. at 239-40.
24. Ben-Shahar & Porat, *supra* note 4, at 19.
25. *Id.* at 51.
26. *Id.* at 22-23.

some activities). Doctors have higher standards of care than non-professionals, and specialists face the highest standard. But these are general differentiations; within each category it is the average that is considered.[27] Moreover, uniform rules often lead to individuals imposing their own personal standards. Thus, tort regimes may result in different people acting differently depending on how risk-averse they are.[28]

Tort law illustrates how the approaches differ. Under uniform law, an assessment of negligence considers what a reasonably prudent person would do in a specific situation. This approach ignores the many differences of temperament, intellect, education, and other characteristics that make up different people.[29] A uniform standard of care is thought necessary due to the inability to measure an individual person's powers and limitations,[30] or perhaps it is considered fairer to victims to require a tortfeasor to meet an objective reasonableness standard. In contrast, a personalized standard of care takes into account subjective factors and also the physical characteristics of each individual. Eyesight, reflexes, medications, better training for professionals, experience, and risk-seeking proclivities all could affect the standard of care. In short, the standard can be adjusted based on any reliable information showing that a person is causing greater risks or is better positioned to prevent harms. Indeed, a person's standard of care could vary throughout the day as fatigue sets in.[31]

It is not entirely clear how the personalized tort regime would be implemented in the courtroom. The authors seem to suggest that preexisting algorithms could be used by the court to analyze personal information presented as evidence to establish the personalized standard of care.[32] They do not spell out how the jury would be instructed or actually apply the standard specified by the algorithm, although they insist that humans would make the determination as to the additional precautions that a riskier person must take.[33]

Developing a personalized legal system would be a tremendous task necessitating an immense amount of information. Such a system would require identifying all human characteristics relevant to a legal outcome, measuring those characteristics, and then building an algorithm to determine how to meld those characteristics to create a legal rule.[34] But first the goals or objectives of a law must be clearly identified in order to determine what characteristics are relevant.[35] To gather all this information, the authors look to big data[36] — extremely large, complex collections of information that cannot be handled by traditional data processing methods but may be analyzed by computers to reveal patterns, trends and associations.[37] They expect the main source of information will be records held by governments, and in many cases, private industry (although they admit that it is unlikely private businesses can be forced to share such information with the government).[38] Other sources could include information within medical databases. For personal default rules applicable to matters such as wills or contracts, they suggest that surveys and sampling be used to train an algorithm to predict preferences of individuals with similar characteristics. The accuracy of the algorithm could be tested by comparing it to actual preferences in a sample. The results could then be extrapolated to predict preferences of the entire population based on the assumption that preferences of people with certain characteristics as shown in the sample will match those of people with similar characteristics in the general population. This approach depends heavily on accurate survey responses.[39]

For some litigation matters, the authors anticipate self-reporting. For example, a tort victim would have an incentive to provide personal information (e.g., through testing) to maximize damages. However, a tortfeasor might resist providing information that could result in a higher standard of care. To counteract such resistance, courts could rely on presumptions if parties do not submit to physical and cognitive screening tests to provide personalized information.[40] In any event, the authors believe that, as society continues to collect more and more information about its citizens, computers and databases will have sufficient information to predict preferences and characteristics based on individual traits without requiring new tests.[41]

27. *Id.* at 22. The authors call this the "old precision law," by which they mean tailoring legal rules to reflect the context of a limited number of relevant circumstances. *Id.* at 20. "Contextualization is a regime of tailored commands, in which relevant distinctions are drawn to promote the goal of the law." *Id.* at 21. However, these factors rarely involve attributes specific to the individual person but instead are external circumstances. *Id.* at 22.

28. Wills and contracts are other examples of potential self-personalization modifying uniform rules to satisfy individual concerns.

29. Ben-Shahar & Porat, *supra* note 4, at 24.

30. *Id.* at 61, citing Oliver Wendell Holmes Jr., *The Common Law* 108 (Little, Brown & Co., 1881).

31. *Id.* at 62.

32. *Id.* at 207.

33. *Id.* at 228.

34. *See generally id.* at 202-07.

35. Ben-Shahar & Porat, *supra* note 4, at 36.

36. *Id.* at 209.

37. *See, e.g.,* "What is BigData," Oracle, https://www.oracle.com/big-data/what-is-big-data/ (last visited Jan. 17, 2024).

38. Ben-Shahar & Porat, *supra* note 4, at 209-10, 211.

39. *Id.* at 212-13.

40. *Id.* at 207-08.

41. *Id.* at 208.

Selection of policy goals is not always straightforward. Indeed, different goals can result in conflicting personalized rules. For example, personalized tort law can incorporate either risk-based or skills-based standards of care. Each provides greater precision than uniform rules; however, they can work against each other. Thus, characteristics that affect level of risk may also correlate with characteristics that affect ability to take precautions (skills). Under a risk-based approach, drivers posing low risk would be allowed to take less care. However, such drivers might also have above-average skill in using accident-prevention measures so that, under a skills-based approach, they would be held to a higher standard of care. Similarly, risk-based personalization requires people creating greater risks to be more careful.[42] In contrast, under skill-based personalization, people who are less capable of taking precautions are allowed to take less care even though they create more harm.[43] This seems decidedly unfair to victims. Moreover, a skills-based approach could cause people not to improve their own precautionary skills if improvement will result in an elevated standard of care. Accordingly, behavior could be manipulated to get better personalized treatment.[44] To resolve the conundrum, the authors suggest an asymmetric negligence framework. Personalized standards of care would increase for those with high skills but not decrease for those with low skills. A defendant could not rely on low skill to support a lower-than-average standard of care. A victim, however, could point to a defendant's high skills to support a higher standard.[45]

Ben-Shahar and Porat are vague as to how the personalization process would be set up: presumably, a large regulatory structure would be required to determine what information is needed, develop algorithms, and create the multitude of individual legal rules. The authors acknowledge that the upfront cost of getting a personalized legal system underway would be a major challenge. To address this, they propose proceeding in steps starting with several levels of uniform standards rather than complete personalization, and they suggest big data can ameliorate the costs by rapidly analyzing vast amounts of information.[46] They would start with default rules that govern matters involving individual decisions, as they see these as the simplest and least controversial.[47]

Ben-Shahar and Porat emphasize that personalized law will make life difficult for legislators. Since algorithms would be used to establish each individual's "law," a law's objectives would need to be precisely stated in advance so they could be translated into computer code. In enacting statutes, legislators would have limited leeway to compromise with vague language. Because algorithms need clear direction in order to implement policy goals, legislators would need to state clearly a statute's purpose before enactment or, if it had several purposes, then to state each purpose's relative priority or weight. Judges, who currently might balance legislative priorities in a statute on a case-by-case basis, would have much less freedom to do so. Statutes could not be interpreted to address new problems or changing societal priorities. On the other hand, personalized law would increase transparency and clarity by forcing lawmakers to precisely articulate how they weigh competing objectives. Similar issues would affect the development of administrative regulations by agency bureaucrats.[48]

Besides the need for data, personalized law must confront a plethora of potential problems. For one, as a practical matter, how do people learn their commands, especially those that change over time? Ben-Shahar and Porat do not see this as an obstacle and suggest that people may find it easier to anticipate what is reasonable for them than to discern average societal traits.[49] As they concede in a footnote, however, people are not always aware of their own skill level, a prime example being new drivers.[50] With standards that change, machines would be needed to communicate the commands in real time. For example, personalized speed limit displays could be

42. *Id.* at 64-65.
43. *Id.* at 68.
44. Ben-Shahar & Porat, *supra* note 4, at 68-69.
45. *Id.* at 70.
46. *Id.* at 208.
47. *Id.* at 239.
48. *See id.* at 36-37, 233-34, 235-36.
49. *Id.* at 214.
50. Ben-Shahar & Porat, *supra* note 4, at 214, n. 34.

flashed on a car dashboard. This information also would need to be available simultaneously to traffic-enforcement personnel.[51]

Privacy is another concern. Large amounts of personal information must be evaluated and tracked to create individual legal rules, and the results will be widely available, at least in instances where an individual seeks to act on the rule. This may be of little concern to some people but anathema to others. Besides the concerns of individuals, society has its own interest in data protection. The authors reference the view of some scholars finding negative impacts on civic engagement when businesses make widespread use of personal data.[52] Big data also can cause harm in ways separate from privacy concerns. Social harms include the ability to affect outcomes of elections and discriminate by, for example, targeting personalized ads in a biased fashion based on the perceived group membership of the recipient.[53] As a result, Ben-Shahar and Porat posit that, in some areas, data collection should be limited and specific rules, such as free speech rights, excluded from personalization.[54]

Because digital data privacy preferences vary, the authors suggest that solutions should be personalized, by allowing people to opt out either completely or by specific areas. This raises another problem: manipulation, which can occur if people choose to be governed by personal commands only when they are benefited by them and otherwise fall back on a uniform standard.[55] Indeed, personalized law is rife with opportunities to manipulate. Many of the attributes used to create an individual's commands, including measures to evaluate skill and riskiness, individual preferences and needs, and cognitive and physical characteristics, such as impulsiveness, reflexes and risk aversion, are subject to manipulation. Thus, imposing a higher medical standard of care for higher-skilled physicians may be a disincentive for acquiring additional skills.[56] Similar problems can occur with consumer protections. A personalized system where less savvy or informed consumers, the uninsured and the poor get more protection could encourage less information, less insurance and less work.[57] In some situations, it may be beneficial to feign ignorance. Where people know they are being evaluated in a way that could affect their rights and duties, they might have an incentive to pretend to be less skilled or knowledgeable than they are.[58] Arbitrage is another form of manipulative risk. Instead of purchasing directly from a retailer, people with low consumer protections can seek to buy from consumers who receive better deals in terms of warranties, price or damages for breach.[59]

As with other problems noted throughout the book, the authors explore possible solutions to manipulation. The risk may be muted, they suggest, if legal standards are based on one's potential to acquire a skill.[60] In that case, failure to learn a new skill would not affect the standard of care, thereby removing the disincentive to self improvement. However, the authors admit that considerably more information would be needed to determine individual potential to learn a skill than to identify existing personal attributes.[61] As another disincentive, they speculate that the large number of characteristics used for a personalization algorithm could counteract any desire to manipulate. A personalized system combines many separate factors to affect many separate commands. Because each characteristic affects a variety of personalized legal rules, specific attributes may provide both benefits and detriments depending on the particular rule involved. Moreover, individuals may not be able to tell which characteristics are considered in setting a given command. Accordingly, they would not know what type of manipulation would be worthwhile.[62]

Ben-Shahar and Porat devote a chapter to considering ways a personalized regime could threaten social coordination. They recognize that society requires coordination for at least some activities, and that coordination often requires uniformity. Uniformity allows people to work together understanding that actions will be

51. *Id.* at 215.

52. *Id.* at 219. (citing Julie E. Cohen, "Examined Lives: Informational Privacy and the Subject as Object," 52 Stan. L. Rev. 1373, 1374-76, 1389-90 (2000); James P. Nehf, "Recognizing the Societal Value in Information Privacy," 78 Wash. L. Rev. 1, 69-71 (2003); Paul M. Schwartz, "Privacy and Democracy in Cyberspace," 52 Vand. L. Rev. 1609, 1653 (1999); Daniel J. Solove, "Conceptualizing Privacy," 90 Cal. L. Rev. 1087, 1089-90, 1152 (2002); George Ashenmacher, "Indignity: Redefining the Harm Caused by Data Breaches," 51 Wake Forest L. Rev. 1, 13-14, 20-23 (2016)).

53. *Id.* at 219-20.

54. *Id.* at 220.

55. *Id.* at 217-18.

56. Ben-Shahar & Porat, *supra* note 4, at 68, 191.

57. *Id.* at 76.

58. *Id.* at 190-91.

59. *Id.* at 193. Sellers can combat arbitrage by providing an ongoing service consisting of access to the product. For example, this is done when music publishers sell access to music instead of a physical product. Tracking people constantly also could prevent arbitrage. *Id.* at 199. But that would raise privacy concerns.

60. *Id.* at 195.

61. *Id.*

62. Ben-Shahar & Porat, *supra* note 4, at 197.

predictable and that everyone is following the same rules. After examination, however, they conclude that personalized law actually is not a threat; on the contrary, they believe it has the potential to improve coordination.[63]

The authors identify four types of coordination: (i) group activity that must be synchronized, such as class actions; (ii) individual activity, such as driving and rules governing commerce, where individual interactions need to be coordinated; (iii) coordination of information needed to predict prices, quality of products and how others will behave; and (iv) participation, by which they mean laws, such as licensing requirements, that affect participation in jobs and other activities.[64] Each type of coordination, they argue, can be enhanced, rather than destroyed, by personalized law. For example, although a master plan is required to synchronize group activity, uniformity is unnecessary. They analogize to a musical band where each performer has an individual role, all of which are combined to create the music.[65] Ben-Shahar and Porat would program the algorithm to include group coordination as a goal.[66]

To coordinate individual activity, such as rules of the road, the authors look to technology to provide information not available with uniform rules. Big data can allow individual variations but still synchronize activities. As an example, they consider how technology could support a personalized driving system, pointing to the success of air traffic control in safely coordinating air travel without all planes observing a uniform speed limit.[67] A personalized approach would incorporate multiple factors, such as drivers' skills, risk characteristics, speed, condition of the car, and the like, which an algorithm could use to determine safe traffic flow. Presumably, driving on the same side of the road would remain uniform.

Ben-Shahar and Porat rely on technology as well to replace coordination of information. Because technology has made information inexpensive, they believe things like uniform markets and uniform licensing standards are unnecessary to obtain information.[68] As for participation, they note that, by eliminating uniform standards, personalized law would reduce the cost of many activities and thereby increase participation.[69] They do not say whether personalized licensing standards should incorporate a minimum floor to address safety.

Much of the book is devoted to considerations of equality and distributive justice.[70] The authors ask whether equality can survive with personalized law and conclude that a personalized legal regime is consistent with "equality before the law."[71] Both uniform and personalized laws rely on personal attributes to create a legal command. However, while uniform law specifies only one or a limited number of factors, personalized law uses many factors, each of which is treated equally for each person, both in the weight assigned and the methodology to combine them.[72]

Personalization can also promote equity.[73] Unlike uniform law, personalized rules can more readily take account of differential barriers faced by people, including them as factors in constructing legal rules. By fairly measuring interpersonal differences, the authors argue that a personalized system can be more just than a uniform one.[74] They attack a false equality that ignores obstacles faced by different people.[75] Hence, consumer protection law tries to help consumers who are susceptible to making bad purchasing decisions, whether due to poverty, lack of education, desperate circumstances or otherwise. If all people get the same protection geared to the "average" consumer, those who need more help are denied an appropriate level of protection.[76]

Moreover, a uniform rule fails when a benefit theoretically available to all is actually used most by those who need it the least. Differential access to benefits guaranteed by uniform laws results in "equal treatment of unequals."[77] People who have more resources or are more sophisticated typically are better able to learn about and apply for a uniform benefit than less fortunate people. Accordingly, they are more likely to take advantage of the benefit. As a result, uniform laws that treat everyone the same can act to exclude people faced with barriers to access that are not faced by others.[78] Furthermore, people who use a benefit less effectively subsidize those who use it more.[79] Where wealthier or more sophisticated persons are more likely to use the benefit, it works contrary to the goals of distributive justice and equitable treatment.[80]

63. *Id.* at 168-69.

64. *Id.* at 167-68.

65. *Id.* at 173.

66. The authors note that algorithms allow autonomous cars to coordinate with traffic while navigating roadways. *Id.* at 176.

67. *Id.* at 175.

68. Ben-Shahar & Porat, *supra* note 4, at 178-79.

69. *Id.* at 181, 183.

70. The authors also discuss how their proposals affect and could advance corrective justice.

71. Ben-Shahar & Porat, *supra* note 4, at 121.

72. *Id.* at 122.

73. It is not always clear whether the authors are making a distinction between equality and equity. In places, they seem to use the terms interchangeably. Their main concern is with the fair allocation of opportunity and resources adjusted for individual needs. They believe personalization can offset unequal distribution that treats equals as unequals and see this as a way to reach a truly egalitarian society. *Id.* at 142. Ultimately, their focus is on distributive justice to achieve equality by accounting for different needs and handicaps.

74. *Id.* at 122.

75. *Id.* at 122, 140.

76. *Id.* at 123.

77. Ben-Shahar & Porat, *supra* note 4, at 141.

78. *Id.* at 140.

79. *Id.* at 141. The authors discuss flood insurance and disability accommodations as examples to make their point.

80. *Id.* at 140-41. For litigation, the authors suggest more lenient procedural rules for inexperienced or unskilled parties. Despite the negative impact on coordination, they see this as a matter of fairness, as they view uniform civil procedure rules as benefiting more sophisticated parties at the expense of individuals. Personalizing rules so that parties with fewer resources have more leeway could level the playing field. *Id.* at 176.

On the other hand, the authors note that some legal rules are meant to advance policies distinct from a fair distribution of benefits and burdens. In such a case, personalization could make matters of fairness worse.[81] Consider a law that seeks to reduce accidents. A personalized risk-based negligence scheme that requires persons who take more risks to meet higher levels of care may not be fair if riskiness is based on inherent characteristics. Where dangerousness reflects a person's innate clumsiness, physical or mental impairments, or meager resources, imposing an elevated standard of care would aggravate underlying inequality. Where such deficits correlate with poverty, the authors see an emphasis on risk as especially unjust.[82]

Having noted this dilemma, Ben-Shahar and Porat then show how personalized law can resolve it. They point to three factors. First, individuals who bear more burdens in one area may receive more benefits in another, such as a person with a higher standard of care also getting higher consumer protections, resulting in "equality of the aggregate."[83] Second, personalized law uses algorithms that emphasize certain factors over others. Accordingly, personalized law can adjust the emphasis given to different personal attributes and thereby incorporate considerations of equity in allocating burdens and benefits of a rule in a way that a uniform standard cannot.[84] Third, algorithms used to create personalized law could provide for a multiplicity of goals, including equalizing distribution of benefits and burdens.[85] Alternatively, they suggest that personalized law could forgo redistributive goals, leaving that to tax and fiscal policy. The authors argue that detailed data required to operate a personalized legal regime will show the varied way legal rules affect different people. In turn, this will better inform the use of fiscal policy to direct redistribution.[86]

The use of biased data in setting up algorithms presents another problem for advancing justice. Unjust treatment could result if algorithms employ data collected in a discriminatory way or that reflect historical biases. Characteristics arising out of historical conditions can result in "accurate data [that] 'accurately models inequality.'"[87] To address this concern, algorithms could be programmed to ignore or adjust for certain information and consider equality as one of their goals.[88]

Personalized law implicates equal protection principles if it treats people differently based on personal characteristics that include membership in a protected class. Ben-Shahar and Porat believe that equal protection concerns are not a barrier, pointing out that unlawful discrimination arises only when characteristics are used to differentiate groups.

They focus on the Supreme Court decision in *Craig v. Boren*,[89] which struck down Oklahoma's different drinking ages for men and women despite their statistical accuracy in identifying risk. Ben-Shahar and Porat see the court's aversion to sex-based generalizations as due to discomfort with treating people as groups rather than as individuals.[90] In contrast, personalized law uses group characteristics only as one of many factors in setting an individual's legal rule. It avoids classifying people on the basis solely of their inclusion in a suspect class.[91] Further, this rule can change on a continuing basis depending on changes in the individual's circumstances. Therefore, "even when membership in a group is factored into the treatment by personalized law, members of the group are not treated uniformly."[92] An individual's legal commands are not determined by membership in a particular class but rather reflect the entire mix of the person's characteristics.[93] Further, they contend that the use of a suspect classification would be narrowly tailored since it would be only one of a large number of factors used in creating the personalized law. As long as the suspect factor is not given an inordinate weight and is not by itself decisive, then the authors argue that its use is legal.[94]

As a fallback if constitutional requirements prohibit any use of suspect classes in establishing a rule, the authors note that an algorithm could be directed not to use that data.[95] Such an approach, however, would raise another concern. In the absence of suspect class as a criterion, algorithms likely would use other factors that correlated with the suspect one. These proxies could themselves result in disparate impacts. To address the problem, Ben-Shahar and Porat

81. Uniform law can have competing justice concerns, but it does not cause an unfair redistribution of benefits. *Id*. at 127.

82. *Id.* at 126. The authors argue that a just society should adjust for "random characteristics and experiences" that people have no ability to control. *Id*.

83. Ben-Shahar & Porat, *supra* note 4, at 127-28.

84. *Id.* at 129-31.

85. *Id.* at 131.

86. *Id.* at 131-32.

87. *See id.* at 136, quoting Solon Barocas & Andrew D. Selbst, "Big Data's Disparate Impact," 104 Cal. L. Rev. 671, 729 (2016).

88. *Id.* at 137.

89. 429 U.S. 190 (1976).

90. Ben-Shahar & Porat, *supra* note 4, at 147.

91. *See generally, id.* at 143-63; *see also, id.* at 134-35, citing City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 708–09 (1978) & Miller v. Johnson, 515 U.S. 900, 911 (1995).

92. Ben-Shahar & Porat, *supra* note 4, at 149.

93. *Id.* at 150-51, citing Grutter v. Bollinger, 539 U.S. 306, 337, 343-44 (2003) (approving use of race as part of "multi-factor, holistic, individualized review"). It is unclear whether the authors' reasoning is undermined or helped by more recent caselaw. *See* Students for Fair Admissions, Inc. v. Harvard, U.S. Sup. Ct. Nos. 20-1199 and 21-707, slip op. at 40 (June 29, 2023) (student must be treated based on experiences as an individual not on basis of race).

94. Ben-Shahar & Porat, *supra* note 4, at 153.

95. *Id.* at 149.

propose that the algorithm first be programmed with all relevant characteristics, including any suspect classifications. As a result, the algorithm will give all characteristics their appropriate weight and will not include indirect proxy effects. Once the algorithm is "trained," it will be run to produce the legal rule without the suspect class data included. An average factor would be used for the omitted characteristics. The other factors would not include proxy effects because they would have been given their "pure weights," thereby removing disparate impacts.[96]

Ben-Shahar and Porat acknowledge the disquiet caused by the idea that machines are making legal decisions. They maintain that humans would retain control of moral choices with algorithms merely implementing those choices. In designing the system, people would decide what values are important and choose among competing policy goals.[97] Despite these assurances, a concern lingers that computers would replace human agency.

Throughout the book, Ben-Shahar and Porat vigorously advocate for personalized law. They undertake an in-depth look at the benefits and drawbacks of personalization, anticipating and countering objections. Although recognizing myriad problems, they find solutions. Indeed, they see personalized law as an answer to many social ills. They believe it would advance human dignity by emphasizing the individual. But by the book's conclusion, the authors step back from their "ideal version."[98] They recognize that wholesale adoption of a personalized framework would cause major disruption. Such caution is appropriate. The transition obstacles alone seem overwhelming and much depends on an optimistic view of the ability to harness big data. Moreover, wholesale personalization would reorder individual rights and responsibilities and call into question the meaning of equality under the law. For the near term, they foresee a gradual move to personalization beginning with incremental adjustments to uniform default rules.[99]

Ben-Shahar and Porat have produced a thought-provoking introduction to a new legal paradigm. Much discussion and debate will be required before their ideas can come to fruition, but *Personalized Law* is a worthy start to the conversation.

— Victor Baltera

96. *Id.* at 161.
97. *Id.* at 231.
98. *Id.* at 209.
99. *Id.* at 239.

Massachusetts Law Review
Seeks Submissions

The Massachusetts Bar Association is seeking submissions for its quarterly publication, the *Massachusetts Law Review*, the longest continually run law review in the country. A scholarly journal of the MBA, the *Massachusetts Law Review* is circulated around the world and contains comprehensive analyses of Massachusetts law and commentary on groundbreaking cases and legislation.

To submit articles or proposals for articles, email CWoodcock@MassBar.org or call (617) 338-0675.

MASSBAR ASSOCIATION

THE PREEMINENT VOICE OF THE LEGAL PROFESSION™

www.MassBar.org

Decisis™

Speed. Reliability. Simplicity.

Meet Decisis — The comprehensive and reliable legal research database you've been looking for.

Decisis is included FREE with your MBA membership.

www.MassBar.org/Decisis

100 Years of Massachusetts Law Review — Available. Searchable. Online.

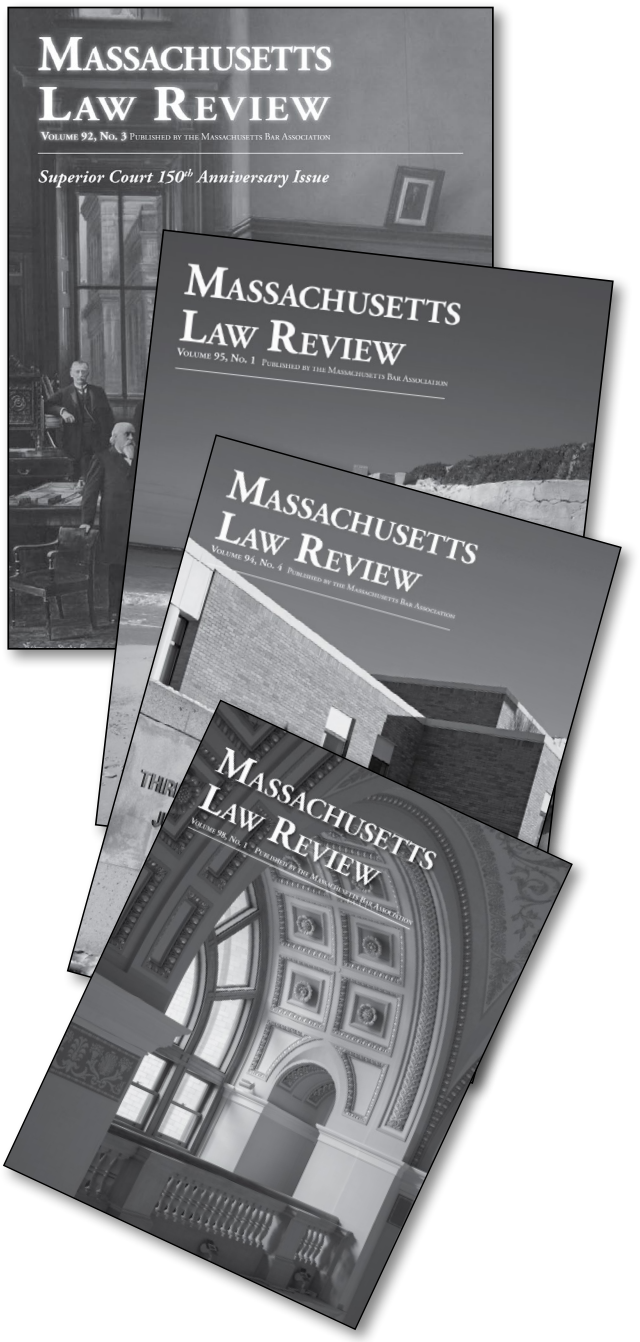
Massachusetts Bar Association members can now search every past issue of the *Massachusetts Law Review* online through a partnership with HeinOnline.

The *Massachusetts Law Review* is the longest continually published law review in the nation. Now, MBA members can view every issue, starting with the *Massachusetts Law Quarterly* (the original name of the *Massachusetts Law Review*) Vol. 1, No. 1, from November 1915, through the most recent *Massachusetts Law Review,* Vol. 104, No. 3. Using the HeinOnline search function, users can type in a search term (e.g., "eminent domain") to find all of the *Massachusetts Law Review* articles over the past 100 years, where that term has appeared.

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

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

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



MASSBAR ASSOCIATION
THE PREEMINENT VOICE OF THE LEGAL PROFESSION™

www.MassBar.org • 617.338.0500