The Reformer

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Submissions are welcome and encouraged. Please send an electronic version of your submission to holly@mslaw.edu or rudnick@mslaw.edu.

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Dear MSLaw Students, Faculty, Administration, and Alumni,

Your Student Bar Association welcomes you to what we hope will be another productive academic year. The SBA will be led by a proactive Board of Governors: Vice President Amy Babcock, Secretary Jake Hamm, Treasurer Sandra Caldas, all of our Class Representatives, and me as President. We are proud and eager to serve as your student government board for the 2013-2014 school year.

To the incoming class of 2016, we’d like to say congratulations! You are undertaking a big step that we remember all too well, a blend of excitement, nervousness, and confusion. For this reason, please feel free to bring us any questions or concerns you may have. We consider ourselves a community, and sometimes asking for help or advice is the best solution.

For those who are not aware, the Student Bar Association (“SBA”) is a student group that was formed to represent the student body. We listen to all student requests, and if it is something we cannot handle directly, we will work alongside the other student groups to try to find an answer or address your concern. We also encourage you to participate in our bi-weekly meetings, and if you are interested, we’d love to have you join.

Our goals this year are large. In addition to maintaining the SBA traditions, such as participating in the annual student/faculty softball game, and alumni golf yournament, hosting midterm reviews, and organizing the Back-To-School BBQ, the St. Ann’s Christmas Charity Drive, and the Annual Law Day Dinner Gala, we have aspirations for improvement. Already, we have rewritten the SBA Constitution to better facilitate productivity. In fact, we will be conducting a vote in the beginning of the school year to have it ratified; we encourage you to review it and cast your ballot. Additionally, each SBA member has personally taken on a task or student request to try to complete by the start of the school year. We also would like to establish an open door policy (the SBA office is located in the library) as best we can so students may contact us at any time.

We encourage you to drop by or contact us either by email (mslsba@gmail.com) or a written note in the SBA mailbox located in the cafeteria. We also have a Facebook group, which we update with upcoming events and activities. We look forward to hearing from you. Best of luck this year!

Very Truly Yours,
Andrew W. Boulanger
President 2013-2014

"I showed people that it's not about guessing what people can do. It's about saying, 'Here, show me what you can do.'" – David Ortiz.
Dear Members of the MSLaw Community,

The current Executive Board of MSLaw’s Diversity Alliance (DA) consists of President Leslie Arsenault, Vice President Britain Thames, Treasurer Sandra Alicea, and Secretary Poonam Choythani.

This past year was a banner one for gay rights, and MSLaw’s Diversity Alliance members actively supported the LGBT community both nationally and locally.

The Diversity Alliance had a successful bake sale that raised funds for Maine’s Marriage Equality campaign and an AIDS organization. We also established a mentor relationship with a group of LGBT youth in Andover known as “McVagly.” We offered these young adults some advice on topics such as establishing credit and avoiding legal trouble; we also chaperoned their Valentine’s Dance.

Additionally, with the help of Professors Rudnick, Kaldis, and Kilpatrick, the DA brought Attorney General Bureau Chief Maura Healey to MSLaw to speak about The Defense of Marriage Act (DOMA). As lead counsel who successfully argued against DOMA in the First Circuit last year, Ms. Healey helped lead the way for DOMA’s demise. It was an honor for us to host her, and this inspired my wife and me to join her at the U.S. Supreme Court in March to witness the oral arguments in the DOMA and Proposition 8 cases, where I also met Gloria Allred (pictured with me above). It was amazing to be in that historic courtroom with those powerful justices who ultimately decided (by a narrow 5-4 vote) that it was unconstitutional to deny legally married same-sex couples the same federal benefits that are granted to straight married couples.

I cannot describe the emotions I felt upon hearing that my marriage and the marriages of hundreds of thousands of other same-sex couples would finally be validated by our federal government. This was historic, but unfortunately, the quest for LGBT equality is far from over, so consider joining MSLaw’s Diversity Alliance and you too, could be part of history!

Although my fellow Board members and I have thoroughly enjoyed being on the Board of the DA, all four of us are planning on graduating this year. Therefore, we are encouraging new students to come out and join the DA at our first meeting of the fall 2013 semester. We will be posting the meeting information on our bulletin board on the second floor of MSLaw, so watch for that, or you can sign up by sending an email to: LGBT@mslaw.edu. We will then notify you about the upcoming meeting and any other DA news.

We hope to hear from you all soon.

On behalf of your Proud DA Board,

Leslie Arsenault
Greetings Members of the MSLaw Community:

MSLaw’s chapter of the National Black Law Student Association (NBLSA) continues to strive to encourage diversity in legal education and the legal profession. BLSA is an excellent way to get involved at MSLaw and to meet your fellow classmates and other law students around the country who share our goals and interests. MSL-BLSA provides the opportunity to network with other law students nationwide and even attorneys who were members of other BLSA chapters during their law school careers.

Last year, BLSA was as active as ever. In September, three BLSA officers (President Patrick Brown, Vice President Kellie Tiller, and Secretary/Treasurer Katisha Brown) attended the Congressional Black Caucus (CBC) in Washington, D.C. The three-day event was attended by law students and pre-law students from across the county. The CBC hosted more than 12,000 public officials, industry leaders, community activists, emerging advocates, and interested citizens in the nation's capital to engage in policy discussions. During the conference, NBLSA hosted programming which called upon both local leaders and students to become servants of the community, advocates, and empowered leaders.

In February, BLSA celebrated Black History Month by inviting James Shepherd, one of the remaining members of the Tuskegee Airmen, the famed group of African-American pilots and support teams who saw battle during WW II, to speak to the MSLaw community. Mr. Shepherd entertained the audience with his stories of being in the segregated armed forces and fighting for his country. BLSA also teamed up with the veterans’ association to help fundraise for the new flagpole that proudly stands in the front of the school. BLSA also collaborated with the Diversity Alliance to fundraise for it.

Our goals for the upcoming year are to be involved more with the community. BLSA plans to get involved with Habitat for Humanity and to continue participating in clothing and food drives to help dozens of families in Lawrence. BLSA will also continue to work with the Barristers Club, serving dinner to the residents of the Lawrence YMCA the first Wednesday of every month.

The new board members for the 2013-2014 school year are:

President: Caryl Garcia
Vice President: Jason Herron
Secretary: Poonam Choythani
Treasurer: Calvin Carrasco
Historian: Armando Agnitti
Public Relations: Patrick Brown

Anyone who has any ideas or who wants to participate in our events or join BLSA, feel free to contact me at BLSAPres@mslaw.edu or our faculty advisors Professor Rudnick at rudnick@mslaw.edu and Professor Puller at puller@mslaw.edu. We all look forward to another productive year.

God Bless
Caryl Garcia
President
Dear Members of the MSLaw Community,

I am happy to inform you that this past April, I joined MSLaw as the new Director of Career Services & Alumni Relations. I look forward to meeting more of you this year, and I hope together we can work to grow and strengthen our MSLaw community. Please feel free to contact me with any updates or suggestions you may have.

This fall MSLaw is proud to announce the implementation of the new Alumni Mentor Program. The Alumni Mentor Program pairs students and recent graduates with more experienced alumni who provide support, personal encouragement, and professional guidance. This program is a partnership of the Career Services Office and the Academic Support Program. Most of you have probably received an e-mail announcing this upcoming program, and we are pleased with the number of alumni who have responded to say they would love to participate by mentoring a recent graduate or current student. We are still looking for more alumni-mentors, so if you are interested in this program or if you did not receive our email please contact me at 978-681-0800 or vdickinson@mslaw.edu.

As part of our initiative to establish a more organized network of MSLaw Alumni, we have been working to gather recent contact and employment information from all our graduates. To accomplish this, we have created an Alumni Relations Survey. If you haven’t already, you should soon be receiving this survey by mail and/or e-mail. We would greatly appreciate it if you could take a few moments to fill out this survey. To those of you who have already participated in the survey, we thank you for your time. The information we are gathering will help us to continually improve the services we offer to our current students and graduates.

This summer we have updated our online Alumni Directory. If you are interested in being listed in our growing directory visit our website to fill out an “Authorization Form” and mail, fax, or scan and e-mail it to the Alumni Relations Office. The online directory is a great way to keep in contact with other alumni or to make and receive referrals.

As always we would love to hear from you. MSLaw’s greatest asset is its diverse network of hardworking and successful alumni. Please contact us by e-mail, phone, or in person to let us know what you are up to and how we can help you. I look forward to hearing from you soon.

Sincerely,

Victoria Dickinson
Career Services & Alumni Relations Office
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Although “whistleblowing” conjures up images of both Edward Snowden hiding from federal authorities after revealing top secret information concerning governmental mass surveillance and employees uncovering deception and fraud by government contractors, the practice of one MSLaw alum focuses solely on the latter. Tony Munter (’94) currently practices law with Price Benowitz LLP in Washington, D.C. Having spent approximately eight years handling False Claims Act cases at another Washington, D.C. firm, Tony has just joined the established multi-jurisdictional criminal defense practice heading up its fledgling False Claims Act (FCA) section. For the uninformed, the FCA was passed during the Abraham Lincoln administration, to permit private parties to bring suit against private individuals who had defrauded the government by providing substandard or inadequate resources to the Union during the Civil War. “You may see the Latin term qui tam thrown around for this which means ‘who as well’—it’s short for a longer Latin phrase that means ‘who sues in this matter for the king as [well as] for himself,’” explained Tony. The concept comes from the middle ages when one could assist a prosecution in England and get a share of a penalty the King might impose.

Today’s cases are more sophisticated and arguably have more at stake monetarily and ethically. Representing claimants (called “Relators”) in these cases allows Tony to “sleep well at night. If the government has been defrauded, that means that a company has reaped rewards at taxpayers’ expense. It also means that companies that want to compete on merit lost out in the world of government contracting. So, I’m happy to pursue these kinds of cases,” he stated.

Tony emphasizes, however, that the cases are difficult to handle and costly to pursue for many reasons. “My clients can be distraught and that is hard. After all, most of them only learn about their rights after they went to the boss to complain about fraud and got fired for their trouble. An experience like that is very hard on our clients,” he lamented. Additionally, the process is complicated and can be very long. “The statute creates a two-step process,” added Tony. “First, the case is filed ‘under seal,’ and the government gets time to investigate the matter. They can extend the time of their investigation for good cause shown. It may be a year or even longer before the individual who files the case knows anything about whether the government is interested in joining or taking over the action. If the government declines to intervene, the individual has the right to pursue the matter in court even without the government. If that is the case, you and the client need to decide if the case is worth pursuing. Someone needs to pay the costs of litigation, which can be considerable. Usually, the client does not have the means, so the attorney has to front them him or herself, or affiliate with a firm that has the resources to do it. Figuring all that out can take time. If the government decides to intervene, you usually get a settlement. If the parties cannot settle, the government takes over the costs of going to trial.”

Winning the cases can be very remunerative. “These laws give an individual the right to sue on behalf of the government for a ‘false claim.’ So, the government’s money must be at stake in some way,” Tony noted. “Then, if there is a successful recovery, the individual gets a share, anything from 15-30% of the total judgment under the federal law. And, the contractors are liable for treble damages if they lose at trial, so there is an incentive for the
company that committed the fraud to settle. And there may also be relief for wrongful termination if the dismissal related to the employee’s blowing the whistle.”

While this article was being written, Tony received word that a case he had filed eight years ago had withstood a motion for summary judgment brought by the defendant. “Sometimes it can seem like a lifetime between the time the client walks in the door and the time anything meaningful happens,” he said. “The client doesn’t always understand why it’s taking so long, so you have to be understanding about their impatience.”

Before Tony started doing FCA cases, he had a very diverse legal career. He worked as a US immigration attorney in Israel for Kan-Tor-Schwartz, which handled cases for Israelis who wanted to come to the U.S. to do business. He has also handled automobile accident appeals for the Division of Insurance Board of Appeals in Boston and around Massachusetts. He is somewhat surprised at the fact that he is practicing law every day. When he came to law school, he never really envisioned himself being a lawyer. Tony was merely interested in the law as a subject and thought he could develop some skills that might help him in the “real world.” Tony is happy with his decision. “MSLaw was great,” he commented. “I was able to work and attend law school at the same time. The professors were very challenging, and the environment made it possible for working people to earn a law degree.”

When asked if he would encourage others to pursue law as a profession, Tony answered, “Yes, on balance. I have to warn people that it seems harder today than ever [to find work]. There are more lawyers now so it’s very competitive, more so than when I graduated. Still, having a law degree is a powerful tool to be able to use. If you can combine your law degree with what you do already, if you can add an area of expertise to your legal ability, then I think MSLaw is a perfect place to go to school. There is a real-world atmosphere to the school that was very helpful to me. That combination of real-world experience and a legal degree can vastly improve your career.”

Tony lives with his wife, who is a journalist, and his 8-year-old daughter. He states that he is enjoying his life and his career.
Nonetheless, the jury was only out minutes and found both men not guilty.

Raffi’s next step was to join with two other lawyers to successfully pursue a civil rights claim against the police and recover a verdict of $4.5 million for them in federal court. Since then, he has won five more civil rights cases, recovering $10 million for his clients, and he has an undefeated record in criminal cases concluded after trial since 2008.

Raffi has known since he was a child that he wanted to be a lawyer. He says he was always making excuses for kids who got into trouble and consistently looks for the good side in someone, even one charged with having committed horrendous acts. A professor at his alma mater, St. John’s University, solidified his desire to become an attorney.

While working as a paralegal and law clerk during law school, he decided he wanted to work for himself. “I have always been someone who liked to work alone and steer clear of office politics,” he commented. Working for a firm does not afford him the flexibility that comes with working for himself. He readily admits that establishing a successful solo practice has not been easy. “It’s not easy building a practice and then successfully maintaining it and making it consistently grow,” he explained. “You have to be somewhat of an entrepreneur, a business man, and understand finance and economics—all wrapped into one—to make a business grow, and a law practice is not different. This requires extreme patience and discipline. The law degree is just one key of many needed to run a successful law practice. I knew building my career would be a 10-year sacrifice with the right planning and connections, and seeking this autonomy was important for the quality of my practice. I would say my career is much like an actor’s career: I work when I get a role I want to do and get involved in other things when I don’t, such as networking, marketing, speaking engagements, legal analysis for the news channels, etc.”

Raffi feels that the Socratic method employed by MSLaw professors is particularly conducive to teach logical thinking and leads to honing the kind of thought processes that make a good lawyer, much better, he says, than being “dictated to.” Attending MSLaw also prepared him to establish his own practice, and not to just assume that someone would hire him because he graduated. He has had interns in his office who are in the top 10 of their classes at USC, and they are worried about getting jobs after graduation. He candidly says: “MSLaw is a good option for anyone who believes they can be successful with hard work, honesty, patience, diligence, and ambition. If you’re looking to be a high paid slave at some law firm, I would think MSLaw wouldn’t be the right fit.”

When Raffi first opened his office in 2002, his goal “was to create enough financial freedom for me prior to turning 40 so that I would have a practice—where I chose my cases a la carte rather than being forced to take cases because I need to pay the rent,” he noted. To that end, he created a 10-year personal budget and a 10-year business budget. To no one’s surprise, he met and surpassed all of his goals in his first decade of practice. “Although I am focusing on the same career trajectory for the next 10 years, I want to use my prior criminal and civil rights experience to transition into other related areas of interest such as writing (legal and fiction), creating a new legal show for television, being a legal consultant for legal television shows and movies, being involved in a permanent legal analysis position at a major network while continuing my practice, and investing,” he added. “If any one of these comes to fruition in the next 10 years, that would greatly please me.” Rather than focus on one at a time, Raffi is tackling all of the above. “You get a better chance of hitting the bulls-eye with more darts,” he remarked.

Raffi loves being a lawyer. When he is not busy with his practice and his family, he enjoys skiing, playing the guitar, and reading. He lives in Studio City with his “soul mate Luiza, who is a partner at Poole & Shafferly, a mid-size firm in Los Angeles,” he said. Luiza practices toxic tort litigation defense, specifically asbestos litigation. Daughter Scarlett is six years old (“going on 25!”) and a talented piano player and expert skier, who speaks Armenian and Mandarin. Rumor has it that her dad is grooming her to be the first American/Armenian Senator of the United States. Son Gavin is four years old, following in Scarlett’s footsteps “to be on the campaign trail with his big sister.”
Benjamin Simanski ('09) is living the dream. Immediately upon graduating, he passed the bar exam and opened a criminal defense practice with his father, spending many days in court. He married his law school sweetheart and bought a house. Oh, and did I mention that he is now blind?

“I live by the mantra ‘living the dream,’” Ben noted. “It is always my answer to questions about how I’m doing. I really am living the dream.”

About a year ago, Ben went to his optometrist for a routine check-up to obtain a new prescription for contact lenses. After examining him, his doctor asked him if anyone had ever mentioned anything to him about his eyes. When Ben said no and asked, “What would someone have said to me?” his doctor declined to comment further and instead referred Ben to Dr. Eliot Berson, a world-renowned ophthalmology specialist at the Massachusetts Eye and Ear Infirmary. After more than 10 hours of tests, Ben learned that he has juvenile macular degeneration (JMD), a fast-paced genetic disease of the eye which currently has no cure. Eight months later, on June 20, 2013, Ben was officially diagnosed as legally blind.

“I like to say that I hit the powerball of eye disorders,” Ben joked. “The chances of someone getting this are really low, because both parents have to carry the gene, and even then there is still a small chance of developing juvenile macular degeneration.”

As if remaining positive about all of the major changes that Ben’s life was about to undergo is not impressive enough, Ben ran the Boston Marathon this past April to raise money for JMD research. “In my determination to not let anything defeat me, I didn’t feel I could stop my life to sulk,” explained Ben. “So I told my co-worker I was going to do a marathon, and he said I was too big to run, which ticked me off. So I started running and running and hooked up with Mass Eye and Ear to raise money for Dr. Berson’s research lab. Everyone there was more than willing to allow for that.” So Ben started a donation page online and raised $12,987, surpassing his goal of $10,000. “I had awesome contributors: judges, lawyers, MSLaw alumni and professors, local community friends, and members of the governor’s council. A lot of people just started asking questions and we raised awareness for it.”

In appreciation for his efforts, Mass Eye and Ear held a pre-race brunch for Ben and his family, where he got to meet Katherine Switzer, the first woman to run in the Boston Marathon.

Ben finished the marathon in three hours and 25 minutes. “He trained when it was 18 degrees out,” said his wife Kat ('09). “He was never home. He was a running machine.”

And if one is still not convinced that Ben could possibly be “living the dream,” consider the fact that Ben had VIP passes for his family to sit in the bleachers across from where the bombs exploded, at the very time they went off. “Our passes weren’t good until 2pm, and I was tracking Ben’s progress on my phone,” explained Kat. “Since he would be finishing about 1:30pm, we just headed to the family corral, which is where we were when the explosions occurred.”

“We were surrounded by thousands and thousands of people,” Ben said. “We heard the explosions, but no one knew what they were. Then we started hearing sirens.”

Undeterred by his inability to see, Ben is committed to running the marathon again next year, this time perhaps with Kat. But training now presents new challenges. “I still run every day, but it is a little more difficult now because I have trouble seeing things like, oh, cars,” joked Ben. “I run with a little fear of God. I try to run routes that aren’t heavily traveled, and I have memorized the

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high traffic times.” Ben also bought a treadmill for training in the winter months. “I also try to do road races with other guys whom I can follow.” In a rare moment of slight complaint, Ben lamented, “It sucks, but it’s a stress reliever for me. It is my independence. I can’t drive, so if I want to get somewhere, I run.”

Other adjustments that Ben has had to make include memorizing the layouts of rooms so he can navigate them without bumping into furniture. He uses his phone to zoom in, and he can read if it is no more than 1/4” from his eye. He memorizes physical attributes about people and can recognize their gaits when they approach. “I try to get close enough to people to discern their gaits, which can be kind of awkward when it is someone who doesn’t like me,” he joked.

Once he received his official diagnosis, Ben had to resign from the job that he loved so much, giving up his favorite aspect of practicing law: “Court! I love being in court, arguing and convincing prosecutors that they’re wrong. I love the theatre of it. It’s like a courtroom play,” he noted. During this time of transition for Ben, an opportunity arose that was too good to pass. Thanks in part to his good relationships in the community (“Everyone loves him,” said Kat), Ben was hired as the assistant clerk magistrate for superior court in Franklin County, a position he has embraced as if it were always his dream. “It is amazing,” he remarked. “It’s a hugely different perspective. Being on the other side, I see all these attorneys on both the civil and criminal sides using different tactics to gain the upper hand, and now I have to call them out on it. It’s intriguing, interesting, and highly rewarding.”

Ben was not the only one forced to make some changes. His inability to drive means that he will have to rely on Kat more for transportation. So after working for three years at personal injury law firm in Springfield, Kat decided to branch out on her own and open her own practice, which affords her the flexibility to accompany Ben on appointments and get him to and from work. As if that change wasn’t enough, Kat also changed her practice area completely. She now handles care and protection cases and other child welfare issues. “It’s really rewarding,” she stated. “It’s also nice because now I’m no longer the lowly associate, although for awhile I was Ben’s personal assistant,” she joked. She took over Ben’s former office space and now works near their house instead of an hour away. “I really like being my own boss,” she commented. “Running my own business is stressful, but I enjoy it a lot more than not being in control of my cases. I have a lot of child clients. I enjoy that they’re my boss, that I’m working for them. It’s a real pleasure when I can get them back home with family.”

Ben and Kat met in their first semester of law school and have been inseparable since. So it is no surprise that both have fond memories of MSLaw. When asked what they missed most about law school, Ben answered emphatically: “Everything! Law school is awesome, and you don’t realize it until you are out. I miss the hours spent practicing moot court, Taco Bell—I haven’t had fast food in years!”

“I miss the people and friends,” Kat added. “Everyone has their own schedules now, and it’s tough to keep in contact. I miss the camaraderie. If you have a question, you can just walk up to your professor’s door and ask.” And not to be outdone by her affable husband, Kat joked: “I miss the rule against perpetuities.”

To incoming 1Ls, they both agree that there is no place in law school for shortcuts. “Read the damn cases!” Ben exclaimed. “The whole case—read it. You can’t do it any other way. Read, read, and read some more. Take notes. And one more thing: you don’t know how to write, 1Ls! You don’t—it takes time.”

Kat agrees: “Don’t take criticism as an insult. My father told me when I entered that everyone going to law school has an ego, and leave your ego at the door.” She also advised that students get in the habit of outlining. “Outlining really does help. Do the practice exams, and get a good study group together—not a social group, but a study group. And make sure you can read your notes when Professor Devlin calls on you.”

Ben and Kat live in Turners Falls with their 60-pound hound mix Allie and their three-pound chihuahua/poodle mix Tort. They enjoy spending lots of time with the dogs, taking them on walks, to the dog park, and to the beach. They love to be outside, whether it is doing yard work or grilling. “Most of the time, though, we just work,” said Kat.
Rohit Bhasin ('06) married Priya Bhola on August 11, 2012, in Bloomington, Indiana, at the Bloomington Convention Center. Rohit currently works at MSLaw as the Assistant Director of Admissions, and Priya is in Pharmaceutical Quality Assurance . . . Glen Frederick ('11) and Rich Kelly ('11) have started a practice together in Andover but have not given up their day jobs. Glen is still working for Mercedes-Benz Financial Services, and Rich is a Vice President and Director of Puma, where he handles corporate real estate and construction management among other things. Right now their practice is general, but as they transition into being full-time lawyers, they hope to use their financial and real estate experience in their firm . . . After 10 years in City Hall as an Administrative Assistant in a variety of departments, Kim Scanlon ('06) has been appointed Assistant City Solicitor for the City of Medford . . . Al Reinhart ('07) is a registered patent attorney practicing intellectual property and technology law, specializing in electronics, electromechanical, and computer hardware and software technologies from his office in Boylston, MA . . . Campbell Cooke ('98) opened his own immigration firm in Tulsa, Oklahoma, in 2002, after spending a few years doing immigration law in a firm there. His clients come from all over the U.S. and abroad, and he is starting to concentrate in appellate work, predominantly in the Tenth Circuit. He also has been involved in a pro bono clinic for immigrants who are victims of domestic violence, in cooperation with local law enforcement personnel and elected officials . . . Michelle Da Silva ('11) has her own immigration and criminal law practice and is Of Counsel to the firm of Denner Pellegrino, where she handles the firm’s immigration cases. Joe Keller ('13) will be joining her as an associate . . . Chris Lindsay (08) has moved to a new office in Marina Bay, Quincy, where she practices real estate law, representing buyers, sellers and lenders. She is a title agent with CATIC, does estate planning and probate and is a member of Wealth Counsel, a nationwide organization of Estate Planning Attorneys. She also handles cases at the Appellate Tax Board, representing property owners challenging assessments by local cities and towns . . . Ruth Deras ('09) is an associate in the Law Office of Ralph Carabatta in Revere, which practices immigration and domestic relations law . . . Gail Nastasia ('04) is practicing criminal law in Methuen . . . Veronica Ciccone ('12) is an associate in the North Andover firm of Consoli & Wilshusen, where she does primarily domestic relations, estate, and landlord-tenant issues. Krista Wilshusen ('06) is a partner in the firm . . . Ambrosia Walsh ('10) is in-house counsel for Straumann USA in Andover, a medical device company. She handles contract negotiations, litigation, regulatory compliance, and labor and employment law issues . . . Zoila Gomez ('05) has an immigration practice in Lawrence. In 2011, she was appointed by Governor Patrick to the Board of Trustees of the University of Massachusetts . . . Tania Palumbo ('09) is an associate in her firm . . . Gary Bloom ('12) has a general practice in South Boston, and is Of Counsel to Arlington’s O’Connell Law Office (Tom O’Connell ('94)), which specializes in patents, trademarks and other IP issues . . . Danielle Thomason ('12) has opened her own practice in Winchendon, where she is focusing on domestic relations cases and divorce mediation . . . Kristen Lambert ('03) is the Vice President of Risk Management for AWAC Services, a Member Company of Allied World Assurance Company Holdings. She is located in Allied World’s Boston office where she provides risk management services to a variety of professions including the legal and healthcare fields . . . Sara Hammond ('07) is a Sessions Clerk in the Middlesex Family & Probate Court in Cambridge. She was mentioned in a lengthy article in the July 22, 2013, issue of The New Yorker magazine focusing on her former employer, Jeanne Geiger Crisis Center and its role in dealing with domestic abuse. Julie Aziz ('08) has taken over for Sara as legal counsel at JGCC . . . Courtney Pasay ('11) is an attorney with the Andover firm of Smolak & Vaughn, which does land use, zoning, commercial closings, and property litigation. She is also a certified mediator and is looking to build her family law practice . . . Joe Orlando ('10) is still working for his dad’s firm in Gloucester, where he is handling personal injury, medical malpractice, and products liability cases. He is a member of the Hamilton (MA) Planning Board and on the Board of “Everyday Heroes,” a non-profit which provides emergency funding to the families of public

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safety and military officers who are injured or killed in the line of duty . . . Joe Krowski (‘98) was embroiled in a highly publicized murder trial representing white supremacist Keith Luke, who was found guilty of two 2009 racially motivated killings. Joe has also been involved in other high profile cases and appeared on “20/20” . . . Darshan Thakkar (‘95) recently received his Ph.D. in education and has been appointed Assistant Principal at Haverhill High School . . . John P. Bossé (‘06) has served as an Assistant District Attorney in Berkshire County for five years. In May, 2013, John received the Spotlight Award at the Annual Prosecutor’s Conference in Boston. The Spotlight Award recognizes one ADA from each DA Office for outstanding service, spirit, and professionalism . . . Beth Smiley (‘06) is working with a group of patent/IP attorneys as an independent contractor and technical specialist while she readies to take the patent bar . . . Pam Saia Rogers (‘00) has been named a director of the American Independence Museum, a non-profit museum and nationally-recognized historic property possessing a collection relating to the Revolutionary War and colonial America. Pam practices criminal defense in Haverhill, and her husband John Rogers (‘04) practices family law, personal injury and criminal defense in his own office . . . Reading Detective Michelle Halloran (‘07) was named Officer of the Year for the Town of Reading for 2012 . . . Mara Dolan (‘03) is Director of Strategic Communications for Maguire Associates, a higher education consulting firm. They consult for colleges, universities, and graduate schools on how to optimize enrollment. Although she is no longer practicing law full time after celebrating 10 years as private counsel with CPCS, she says she will always be a lawyer! . . . Laurie Lemieux (‘11) and Paul Stewart (‘11) are practicing together in Newburyport as The Stewart Law Office. They are doing consumer protection, civil and criminal matters, and Paul is also a private CPCS appellate attorney and is doing a number of appeals and motions for new trials . . . Dave Hoey (‘94) has been practicing in North Reading for many years. About 90% of his practice is representing families and victims of nursing home abuse neglect, assisted living maltreatment, and injuries to the elderly. His practice in this area is nation-wide. He also does wrongful death/PI cases . . . Rich Bromby (‘94) and Dale Andrews (‘11) practice in his firm . . . Benjamin Simanski (‘09) is now an assistant clerk magistrate for the superior court in Franklin County. Raising almost $13,000 for the Massachusetts Eye and Ear Infirmary, he completed the 2013 Boston Marathon in 3:25 (see article on page 9). His wife Kat (Mulligan) Simanski (‘09) just opened her own practice in Greenfield, where she practices child welfare law. They live in Turners Falls with their two dogs, Allie and Tort.

In Memoriam
MSLaw is deeply saddened by the death of Selena Snow (‘13), who passed away unexpectedly last November at age 39. Selena, who was weeks away from graduating when she died, left behind a son and fiancé. Selena’s article on obscenity and pornography in the Internet age appeared in the previous issue of The Reformer, which went to press just before she passed away. MSLaw held a service for her, attended by more than 100 family, friends, and faculty, and awarded her with a posthumous Juris Doctor degree.

Selena earned her B.A. degree at Sarah Lawrence College in Bronxville, New York, in 1999, where she studied theater, dance, and constitutional law. Prior to law school, she recorded, performed, and toured nationally and internationally in her original theatrical rock group, Erocktica. In 2009, she wrote, directed, and performed in her own biographical musical, Porn Rock: The Musical, which was produced for the International Fringe Theater Festival in New York City.

The sympathies of the entire MSLaw community go out to Selena’s family.

Let’s Play Ball!
Once again, the faculty (perhaps abetted by a few staff and alumni) will take on the students in the annual fall softball game. Last year the faculty managed to squeak out another win, but all streaks come to an end at some point.

Following the game, Dean Coyne and his wife (Professor Condurelli) will be hosting their annual backyard barbecue at their home in North Andover. Players, non-players, and everyone else from the MSL family, past and present, are invited to attend. Check your e-mail for the date!
If you happened by MSLaw on June 17 and 18, you would have encountered a unique sight on the second floor. Courtroom scenes of “The Minister’s Wife,” an independent film being shot mostly in the Worcester area, were filmed in MSLaw’s old courtroom. Some MSLaw students and alumni were extras in the scenes shot in the courtroom, serving as the audience or members of a jury hearing the case of a minister on trial for murdering his wife. Based on a true crime story from Texas, the film is being directed by John Stimson of Princeton, MA, and produced by Mark Donadio and Miriam Marcus. Most of the cast and crew are from the Boston area, but the two stars, Gail O’Grady and James McDaniel are both seasoned Hollywood veterans, appearing on *NYPD Blue*. Once the film is done, it will be sold and could appear on TV.

Associate Dean Michael Coyne acted as the expert commentator/consultant for the Whitey Bulger trial on NECN and other notorious legal matters occurring in 2013, including the Aaron Hernandez case. Dean Coyne became a credentialed member of the media, and, when he was not among the few members of the public who got seats in the courtroom for the Bulger trial, he joined other reporters from around the United States and elsewhere in the media room, where he could observe the trial on closed circuit TV.

“Professionally, it’s one of the most interesting opportunities in my career,” stated Coyne. “I am able to use my training and experience to analyze and offer my views on the presentation of evidence, trial tactics, and advocacy of the government and defense in some of the highest profile legal matters in recent years. Being Comcast SportsNet and New England Cable News’s legal analyst on mob boss James “Whitey” Bulger’s trial, George Zimmerman’s trial, and the murder charges brought against Aaron Hernandez has provided me a rare opportunity to have a ‘courtside seat’ for what has been called Boston’s Trial of the Century and an inside look at how the media informs the public about these sensational events.”

Dean Coyne was a particularly appropriate choice for a commentator. He was born and raised in Boston and is familiar with many of the places frequented by Whitey and his pals mentioned in the testimony. Even some of the players were known to him from the neighborhood in which he grew up. He said he was particularly struck by three things. First, he was impressed with the professionalism of the media, and the level of skill and preparation they exhibited. He was also impressed with the quality of the advocates, and finally, he was unfortunately struck by how poorly the government has treated the Bulger victims as they pursued justice in both the criminal and civil courts. “The widespread FBI corruption in the Bulger matter is shameful and was only undone by the First Circuit Court of Appeals decisions vacating, on statute of limitations grounds, the victims’ million dollar awards granted by the District Court. It’s time for our Government to do the right thing by Patricia Donohue and the other victims of the heinous acts of Whitey Bulger and his partners—the FBI.”

The Massachusetts Appeals Court held its annual sitting at the law school last November. The Justices arrived an hour before the sitting to enjoy a light breakfast with faculty and staff. The panel consisted of Justice Joseph Trainor (Presiding Justice), Justice Peter Agnes, (both Justices Trainor and Agnes are long-time members of MSLaw’s adjunct faculty), and Justice Mary Sullivan. The panel heard a combination of seven civil and criminal cases. As in the past, MSLaw invited mock trial teams from area high schools. The Justices took a break in the middle of the session to interact with the audience, explain to the students what they were seeing and allow students to ask questions about the court and the appellate process. Later, at the conclusion of the sitting, the Justices joined MSLaw faculty and students for lunch and engaged in formal and informal discussions with members of the MSLaw community.

Every year, the judges make it a point to tell us that MSLaw is their favorite venue at which to hold arguments. The Justices truly enjoy interacting with the students and having an opportunity to answer questions about how the court works and their lives as litigators prior to being appointed to the bench. We look forward to having the court here again on November 7, 2013.
MSLaw Librarian Starts New Chapter
Professor Wolfe is MSLaw’s First Faculty Retiree

MSLaw wishes a very happy, long retirement to Professor Judith Wolfe. The school’s first retiree, Judith served as the Director of Information Resources and on the full-time faculty for more than 15 years. MSLaw faculty and staff honored her with a luncheon, where they presented her with an MSLaw chair. Always quick to compliment students and staff, we wish her the best of luck and will miss her.
No Objection to this Success

Staying true to form, MSLaw’s trial and appellate advocacy teams turned in outstanding performances in their respective 2013 competitions. For the second consecutive year, MSLaw won the National Black Law Students Association’s Thurgood Marshall Mock Trial Competition for the Northeast Region. The Northeast region is comprised of the 33 law schools in New England, New York, and northern New Jersey. MSLaw defeated Syracuse University Law School to capture the championship while St. John’s University Law School finished in third place.

That victory advanced MSLaw to the National Finals (for the fourth year in a row) in Atlanta, Georgia, held in conjunction with BLSA’s national convention during the first week of March. MSLaw’s Advocacy Team competed for the National Championship against the winners from the other five regions in the country. MSLaw advanced to round three, but was eliminated before the final four.

Team members were Cathrine Okoh, Simran Gill, Andrew Boulanger, Jason Herron, Sam Gould, Ali Shuaib, Rachel Hollingsworth, Jessica Edwards, Calvin Carrasco, Caryl Garcia, Hadler Charles, Poonam Choythani, Kellie Tiller, Anthony McDuffie, Patrick Brown, and Katisha Brown. They were coached by Associate Dean Michael L. Coyne, Daniel Harayda, Darius Greene, and Essex County Assistant District Attorney Kimberly Gillespie.

At the Northeast Region of the American Association for Justice Trial Advocacy competition, also held in early March, MSLaw’s teams got a difficult draw having to play Yale twice and an always-tough University of Connecticut in the preliminary rounds. At the conclusion of the preliminary rounds of the AAJ Northeast Regionals, four teams (including MSLaw) were tied for fourth. The tiebreaker (based on points) went to the eventual champion Suffolk University team: 226 points to MSLaw’s 206. During the AAJ Northeast Regionals, one of MSLaw’s teams lost only to Yale, while its other team won two of its three matches, splitting the vote 2-1 on the only match of the weekend it lost.

AAJ Team Members included Jessica Edwards, Samuel Gould, James Dulany, Stephanie Mello, Jason Feinberg, Jim Hetu, Armando Agnitti, and Caryl Garcia.

Four MSLaw students traveled to Charleston, South Carolina to compete in the Charleston University Moot Court Competition. This year, returning 3L Christine Brigham was joined by Jane Ceraso, Dale Kiley, and Matt Fallon.

OPERATION CHRISTMAS CARDS

Do you have extra holiday cards? Do you like to buy holiday cards? If so, please consider writing some to our deployed military men and women who have sacrificed this time of year away from their loved ones so that we can enjoy our holidays safely with ours. All you have to do is write a minimum of five sentences per card—the more heartfelt, the better. Think quality, not quantity! MSLaw will do the rest. All donations are tax deductible. For more information, contact Denise Dalaklis at dalaklis@mslaw.edu. Cards will be accepted until November 18.
The Marathon and *Miranda*: An Examination of the Public Safety Exception after the 2013 Bombings

By Brian Scott

I. Introduction

What began with a coordinated bombing attack at the finish line of the Boston Marathon on April 15, 2013, ended four days later in a residential backyard in Watertown, Massachusetts. After an intensive round-the-clock investigation, on April 19, 2013, law enforcement personnel captured “Bombing Suspect Number Two,” Dzhokhar Tsarnaev, hiding in a boat behind a home. While Tsarnaev’s arrest led to spontaneous and jubilant celebration throughout the Boston area, the question of what would happen next to Tsarnaev lingered in the celebratory haze.

Following the capture, Carmen Ortiz, United States Attorney for the District of Massachusetts, addressed an assembled throng of media shortly after authorities took Tsarnaev into custody. One of the reporters asked Ortiz if Tsarnaev had been given *Miranda* warnings. Ortiz did not confirm that Tsarnaev had not been read his rights, but she did note there are exceptions to when *Miranda* must be given to a suspect. “There is a public safety exemption in cases of national security and potential charges involving acts of terrorism,” Ortiz said.1 A representative of the Department of Justice gave a more unequivocal statement later that night, “No *Miranda* warning to be given now, the government will be invoking the public safety exception.”2 In fact, authorities interrogated Tsarnaev for 16 hours before giving him his *Miranda* rights.3

Although those involved in law enforcement were doubtlessly aware of the “public safety” exception, few lay people probably knew of its existence at that time, let alone its contours under both federal and Massachusetts law. Although it has been predominantly federal law enforcement that has invoked the exception in recent time, it applies equally to state investigations. Federal law enforcement officers rely on it regularly and advocate broadening its scope in our post 9/11 age. If, during an ensuing trial in federal court, Tsarnaev challenges the admission of statements made prior to his having been afforded *Miranda* rights, is the exception likely to withstand judicial scrutiny? How have Massachusetts courts handled the exception? Do the courts of the Commonwealth construe it as broadly as the federal courts? The following article seeks to answer these questions.

II. The Public Safety Exception

*United States v. Quarles*

The United States Supreme Court carved the public safety exception out of *Miranda* in *New York v. Quarles*.4 In that case, officers apprehended the defendant inside a supermarket. Quarles, the defendant, was a suspect in a rape case, and the alleged victim had informed police Quarles had a gun and was seen entering the store. When he was detained inside the market, he was wearing an empty shoulder holster. After handcuffing the defendant, the officer asked him where the gun was. The defendant “nodded toward some empty quarry in the store.”5

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2 Id.
cartons and said ‘over there.’” The officer retrieved the weapon and only after did he read the defendant his Miranda rights.

The Court allowed the pre-Miranda statement acknowledging the location of the weapon, holding “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” The Court recognized public safety as a “narrow exception to the Miranda rule.” However, in the years since that decision, the boundaries of the public safety exception have been greatly expanded, a growth driven not primarily by the courts, but by the executive branch of the federal government.

III. Quarles Post-9/11

The events of 9/11 breathed new life into the public safety exception. In the days following the attacks, the Minnesota office of the FBI attempted to question the so-called “20th Hijacker,” Zacarias Moussaoui, about the extent of his knowledge of the plot. At that time, FBI headquarters would not allow its agents to conduct custodial interrogations in the absence of Miranda warnings. In May, 2002, Special Agent Coleen Rowley fired off a 13-page memorandum to then FBI Director Robert Mueller decrying the botched opportunity to gain any intelligence because of the insistence on Mirandizing the suspects. “[I]f prevention rather than prosecution is to be our new main goal, we need more guidance on when we can apply the Quarles ‘public safety’ exception to Miranda’s 5th Amendment requirements.” Though Rowley went so far as to testify before the Senate Committee on the Judiciary Oversight Hearing on Counterterrorism in an effort to codify the exception, Congress took no action.

On Christmas Day 2009, passengers aboard a Northwest Airlines flight bound for Detroit subdued Umar Farouk Abdulmutallab before he could ignite explosives hidden in his underwear. Unlike the Moussaoui interrogation in the days after 9/11, in this case the FBI did invoke the public safety exception and interrogated him without Miranda for 50 minutes. The FBI characterized the information gathered as “valuable.”

In May 2010, authorities in New York City caught Faisal Shazad attempting to detonate a car bomb in Times Square. Again, the FBI invoked the public safety exception, interrogated the suspect without giving him a Miranda warning, and gathered what it called “useful” information. Emboldened by the apparent successes federal intelligence agencies were having in collecting unwarned statements from terrorism suspects, Senator John McCain declared “Our top priority should be finding out what intelligence [suspects] have that could prevent future attacks and save American lives, our priority should not be telling them they have a right to remain silent.”

Then in October 2010, the Justice Department took it upon itself to give the public safety exception a reach far beyond the borders of the Court’s Quarles decision. An internal memorandum obtained and published by the New York Times stated in relevant part:

There may be exceptional cases in which, although all relevant public safety questions

5 Id. at 649.
6 Id.
7 Id. at 657.
8 Id. at 658.
13 Id.
14 Id.
have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government’s interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.\(^{15}\)

The determination of what constitutes an “exceptional case” where “continued unwarned interrogation is necessary” lies initially in the hands of the FBI or other federal agency involved in consultation with the Department of Justice.\(^{16}\) The federal government appears to have made a policy determination that even if a court suppresses Tsarnaev’s statements, the costs of giving him \textit{Miranda}, such as his noncooperation, outstrip the benefits of doing so, such as using his incriminating statements in court.\(^{17}\) As of this date, no challenge to this policy specifically has been addressed in any federal court.\(^{18}\)

\section*{IV. \textit{Quarles} in the First Circuit}

No case in either the Federal District Court for the District of Massachusetts or the First Circuit deals with the public safety exception as it relates to the use of bombs or other explosive devices, but recent cases in this jurisdiction could be predictive of how the District Court will rule in the Tsarnaev case.

In \textit{United States v. Oung}, DEA agents raided an apartment in Lowell, Massachusetts, believed to be the center of a drug trafficking and illegal firearm operation.\(^{19}\) Evidence gathered through wiretaps gave agents specific information the house contained “a veritable arsenal of weaponry, including an AK-47 assault rifle, a MAC-11 submachine gun, and hollow point ammunition.”\(^{20}\) Upon the agents’ arrival, two suspects voluntarily surrendered. The arresting agent placed both in handcuffs and, prior to giving the \textit{Miranda} warnings, asked if there were weapons inside the apartment, to which one of the suspects replied affirmatively.\(^{21}\)

The court upheld the use of the public safety exception on three grounds. First, the question posed by the agent “stemmed from an objectively reasonable apprehension of danger; the defendants had been overheard speaking about guns just three days earlier.”\(^{22}\) Second, the agent’s questions “were not investigatory in nature or crafted to elicit a testimonial response. The questions [concerning the existence and location of weapons] were tailored to address the danger at hand, and consistent with those permitted under \textit{Quarles.”}\(^{23}\) Finally, the agents “were not taking advantage of a manufactured exigency to avoid their constitutional obligations. The [agents’] actions were a reasonable response to a rushed and chaotic situation where they faced the ever present threat of violence from the defendants.”\(^{24}\)

The agent’s questions thus did not violate the defendant’s Fifth Amendment rights.\(^{25}\)

Conversely, in \textit{United States v. Jackson}, the First Circuit reversed in part the defendant’s conviction, holding the public safety exception inapplicable.\(^{26}\) Here, officers suspected the defendant had purchased an unregistered firearm in violation of his probation. Under questioning outside...


\(^{16}\) Id.


\(^{18}\) Bazelon, \textit{supra} note 12. It is important to note that the Memorandum appears to rely on Supreme Court cases that hold a Fifth Amendment violation occurs only when statements made without benefit of \textit{Miranda} are sought to be introduced into court. \textit{See United States v. Patane}, 542 U.S. 630 (2004); \textit{Chavez v. Martinez}, 538 U.S. 760 (2003); \textit{United States v. Verdugo-Urquidez}, 494 U.S. 259 (1990). \textit{See also Wadie Said, The Message and Means of the Modern Terrorism Prosecution}, 21 Transnat’l L. & Contemp. Probs. 175 n.13 (2012), and Part VII of this article \textit{infra} P.____.

\(^{19}\) 490 F. Supp. 2d. 21 (D. Mass. 2007).

\(^{20}\) Id. at 33.

\(^{21}\) Id. at 26-27.

\(^{22}\) Id. at 33.

\(^{23}\) Id. at 34.

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) 544 F.3d 351 (1st Cir. 2008).
his girlfriend’s apartment, the defendant admitted buying the gun and hiding it in a box of cereal in the apartment. The officers found the weapon, arrested the defendant and later gave the Miranda warnings at the police station.27

The court found defendant’s pre-Miranda statements about the location of the gun violated his Fifth Amendment rights and the government’s contention that there existed a threat to public safety was without merit.28 “The gun, stuffed inside a cereal box in the refrigerator, was clearly outside the reach of [defendant], who was not even in the apartment, and in any event, was surrounded by a number of police officers. The mere fact a gun was involved is not sufficient.”29

V. Quarles in Other Federal Courts

Although the new federal policy construing the public safety exception in our terrorism infused world has not been specifically addressed by federal courts,30 numerous convictions have been upheld where the exception was used to justify interrogations, particularly those related to domestic bombing investigations. In United States v. Spoerke, the arresting officer found suspicious devices in a vehicle after a search.31 The officer, who had stopped the vehicle after seeing an occupant throw something out the window, asked the occupants to exit the vehicle after initial questioning. He noticed suspicious contents in the car’s interior, including what looked to him to be incendiary devices. He then asked the defendant, who had been in the passenger seat, what the devices were and the latter replied “pipe bombs.”32 The officer then Mirandized the defendant. The court held Spoerke’s initial statement fell under the public safety exception because “[the officer’s questions] were designed to discern the threat the bombs presented to the officers and the nearby public.”33 The court found “the threat posed by two pipe bombs in a vehicle on a city street outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”34

In United States v. Hodge, officers suspected the defendant had a methamphetamine lab in his home and obtained a search warrant to obtain evidence relating to the offense.35 While executing the warrant, a sheriff’s detective questioned him about any explosive compounds that may be present in the residence prior to completing the search. The defendant “told [the officer] [a] bomb was wrapped in a towel and sitting on top of a kitchen cabinet.”36 The court found that the possible existence of bombs, as opposed to guns, warranted expanding the Quarles exception. “On its own, the gun does not raise a reasonable threat of danger. Bombs are potentially unstable and may cause damage if ignored or improperly handled by the police.”37 Thus, the trend in the federal courts is to allow the public safety exception for bombs based on their inherent potential threat rather than their immediate actual threat.

Review of some federal cases involving circumstances other than bombs shows that circuits are occasionally inconsistent in the standard to be applied in ascertaining whether the public safety exception has been properly invoked. One thing is reasonably clear: the federal courts, in general, apply the exception very broadly. For example, in United States v. Reese, the Court of Appeals affirmed the lower court’s denial of a motion to suppress statements where the defendant was charged with participation in a wide scale identity theft scheme.38 Although precedent in that jurisdiction condoned resort to the public safety excep-

27 Id. at 355.
28 Id. at 360 n.9.
29 Id.
30 Although the issue was not discussed in depth, in United States v. Khalil, 214 F.3d 111 (2d Cir. 2000), a pre-9/11 case, the Court of Appeals upheld the trial court’s denial of a motion to suppress statements given by one of the defendants citing the public safety exception. The statements were made while the accused was awaiting surgery for a gunshot wound sustained during a raid on his apartment, in response to questions about how bombs found

in his apartment operated and how they could be disarmed. Id. at 122.
31 568 F.3d 1236 (11th Cir. 2009).
32 Id. at 1241.
33 Id. at 1249.
34 Id.
35 714 F.3d 380 (6th Cir. 2013).
36 Id. at 383.
37 Id. at 386.
tion when either the public or law enforcement might gain access to a weapon, the Sixth Circuit ultimately determined there were sufficient facts (including the defendant’s prior record) to justify law enforcement’s belief that there might be both guns and at least one other individual in the residence where the arrest took place.

In what can only be described as an extreme stretch of the parameters of the exception, the Second Circuit affirmed denial of a motion to suppress where the evidence demonstrated that the accused was questioned without warnings more than one hour after his arrest. In *United States v. Ferguson*, police possessed evidence, at the police station, through a 911 call, that Ferguson had been in possession of and had fired a shotgun in a public area, but no weapon was found when he was arrested about an hour later. Emphasizing that questions concerning the whereabouts of the firearm posed an hour after the arrest were neither investigatory in nature, nor a subterfuge to obtain incriminating statements for use in the prosecution, the Court of Appeals affirmed use of the public safety exception, relying on *United States v. Estrada*. The Court did not seem overly concerned with the fact that the police possessed no evidence as to the whereabouts of the alleged weapon at all, let alone that it could be accessed by the public or law enforcement, thus posing a threat to public safety.

On the other side of the spectrum lies *United States v. Mikolon*. In that case, the defendant, who was a fugitive wanted in connection with sex charges, was arrested in his truck in a state park and charged with possession of a firearm seen in the vehicle in plain sight. After Mikolon was handcuffed, but before reading him his *Miranda* rights, the deputy asked Mikolon whether he had any more weapons in his truck. The defendant responded affirmatively and explained where in the truck the arms were located. The Court of Appeals held the trial judge erroneously denied the motion, because the facts of Mikolon did not fit the limited exception carved out in *Quarles*, which the Tenth Circuit had adopted in 2009. “[F]or an officer to have a reasonable belief that he is in danger, at minimum, he must have a reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.” Although the police had information that he had purchased numerous weapons before heading for the park where he was captured, that evidence was insufficient to justify the unwarned questioning. However, the Court of Appeals stated the district court’s error was harmless, did not contribute to Mikolon’s decision to plead guilty, and thus, the conviction would stand.

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39 Id. at 501-02.
40 Id. at 502.
41 702 F.3d 89 (2d Cir. 2012).
42 Id. at 90.
43 Id. at 93-94, citing *United States v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). The Court in *Estrada* emphasized that unwarned questioning that may be admissible under *Quarles* may not be investigatory in nature or “designed solely to elicit testimonial evidence from a suspect.” 430 F.3d at 612. Relevant to that inquiry, then is the question of how a court is supposed to determine the purpose of police questioning. The Supreme Court recently reiterated that in various areas of criminal procedure, “the relevant inquiry [in determining the purpose of an interrogation] is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascer-

44 Id. Some cases are less controversial because the facts arguably sustain a reasonable belief on the part of the officers that weapons could be located in proximity to the defendant at the time the defendant was questioned. *See*, e.g., *United States v. Miller*, 456 Fed. Appx. 595, 597-8 (7th Cir. 2012)(firearm would have been inevitably discovered as well); *United States v. Simmons*, 661 F.3d 151 (2d Cir. 2011); *United States v. Basher*, 629 F.3d 1161 (9th Cir. 2011).
45 _ F.3d _, No. 12–2139, 2013 WL 389451 (10th Cir. July 9, 2013).
46 Id. at *3.
47 Id., quoting *United States v. DeJear*, 552 F.3d 1196, 1220 (10th Cir. 2009).
48 Id. at *4.
VI. Public Safety Exception in Massachusetts State Courts

Massachusetts state courts’ treatment of the public safety exception has been far less expansive than that of the federal courts. No case in Massachusetts prior to the Marathon attack had addressed Quarles where the public threat was a bomb as opposed to a gun. In fact, application of the exception by Massachusetts state courts has been limited to cases where public possession of guns may reasonably pose an immediate threat to the safety of officers or the public.

In Commonwealth v. Alan A., a juvenile suspect stole a loaded handgun from his father and brought it to his girlfriend’s home.49 When the police entered the girlfriend’s home and found the juvenile inside, they asked where the weapon was. The juvenile responded “I don’t have it anymore.”50 The court held this statement fell under Quarles because “the officer did not know if the firearm was on the juvenile’s person or whether another person could gain access to it. The police reasonably feared that if the firearm were not secured immediately, the juvenile would harm himself or others who were present.”51

In Commonwealth v. Clark, the defendant exchanged gunfire with a state trooper, resulting in injuries to both.52 A second officer arrived on the scene and asked the defendant whether the defendant was alone. The defendant replied affirmatively.53 The Court found the unwarned statement admissible under Quarles because when the second officer arrived, the defendant’s weapon had not yet been found and “the officer needed an answer to his question not simply to make his case against [the defendant] but to ensure further danger to the public did not result.”54

The Massachusetts courts are unlikely to follow federal courts because the state courts are not bound by the Department of Justice edict, and Massachusetts courts have historically, as Associate Justice Peter W. Agnes Jr., of the Massachusetts Appeals Court has noted, been more protective of a defendant’s rights than their federal counterparts.55 This includes acknowledging enhanced protections under Miranda in light of Art. 12 of the Massachusetts Declaration of Rights. Justice Agnes posits, “recent [SJC] decisions indicate a trend whereby aspects of the Miranda doctrine jettisoned by the U.S. Supreme Court are adopted as a matter of state common or constitutional law.”56 These include “a greater burden of proof as to a suspect’s waiver of Miranda, a more consequential exclusionary rule, and a less exacting standard for determining that a suspect has asserted the right to remain silent at

50 Id. at 273.
51 Id. at 274.
52 452 Mass. 1, 3 (2000).
53 Id. at 4.
54 Id. at 13.
55 Peter W. Agnes, Jr., Police Interrogations and Confessions in Massachusetts, PIC MA-CLE 1-7 (2012 ed.). The basis for providing greater protections to persons under state law is the doctrine of adequate and independent state law grounds. See, e.g., Commonwealth v. Upton, 393 Mass. 363, 372-75 (1985) (Article 14 of Declaration of Rights is more demanding than the Fourth Amendment). In the context of the Miranda doctrine, the SJC has found greater safeguards exist under Article 12 of the Declaration of Rights than are required by the federal constitution. See, e.g., Commonwealth v. Clarke, 461 Mass. 336 (2012) (rejecting federal standard for determining whether suspect has asserted the right to remain silent at the outset of an interrogation). Different analytical approaches in the context of the Miranda doctrine are justified by differences between Article 12 of the Declaration of Rights and the Fifth Amendment. “The text of art. 12, as it relates to self-incrimination, is broader than the Fifth Amendment. The Fifth Amendment, in relevant part, states: ‘[N]or shall [any person] be compelled in any criminal case to be a witness against himself.’ Article 12, however, commands that ‘No subject shall ... be compelled to accuse, or furnish evidence against himself.’ “Based on the textual differences between art. 12 and the Fifth Amendment, we have consistently held that art. 12 requires a broader interpretation of the right against self-incrimination than the Fifth Amendment.” Commonwealth v. Mavredakis, 430 Mass. 848, 858 (2000). See also Commonwealth v. Johnson, 417 Mass. 498, 501, 502 n.4 (1994). In Mavredakis, the SJC also explained that “[t]he history of art. 12, and our prior interpretations of its self-incrimination provisions, also lead to the conclusion that art. 12 provides greater protection than the Federal Constitution does ... Article 12 and other similar State constitutional provisions evolved from a sense of disapproval of the inquisitorial methods of the Star Chamber and ecclesiastical courts in England. Our precedents have often interpreted art. 12 expansively.” See, e.g., Emery’s Case, 107 Mass. 172, 181 (1871).” Mavredakis, 430 Mass. at 859.
56 Id. at 1-1.
the outset of an interview.”57

For example in Commonwealth v. Clarke, the SJC “specifically rejected the U.S. Supreme Court’s enhanced implied waiver doctrine enunciated in Berghuis v. Thompkins.”58 In Clarke, a suspect held for custodial interrogation shook his head from side to side when asked if he wanted to speak with the police. Further questions were asked and the suspect did make incriminating statements. The SJC found the non-verbal answer a valid invocation of the Fifth Amendment privilege. The Court held “we decline to adopt the Thompkins approach to invocation which permits police to continue questioning a person in custody who has never waived his right to remain silent until such time as that person articulates with utmost clarity his desire to remain silent.”59 As a matter of state law, the Court held “we continue to impose a heavy burden on the Commonwealth in proving waiver. The ambiguity of a defendant’s invocation, if not clarified, may itself hamper the Commonwealth in establishing, beyond a reasonable doubt, the validity of any subsequent waiver.”60

Likewise, in Commonwealth v. Mavredakis,61 the SJC rejected the United States Supreme Court’s holding in Moran v. Burbine, in which that Court held failure to inform a suspect in custody that an attorney acting on his behalf had contacted the police did not adversely affect the legality of any custodial statements made, or violate the accused’s right to counsel, where the suspect had not personally invoked that right.62 The SJC relied on the broader protection afforded by art. 12 of the Massachusetts Declaration of Rights than by the comparable provision of the United States Constitution.63 Thus, it is not likely that Massachusetts courts would read the public safety exception with anywhere near the breadth that federal courts have, or that federal law enforcement would like.

VII. Supreme Court Contraction of the Scope of Miranda

While it has not expanded the public safety exception post-Quarles, The Supreme Court of the United States has incrementally narrowed the scope of Miranda in recent decisions. In Berghuis v. Thompkins, the Court held that the defendant had waived his Fifth Amendment privilege against self-incrimination by affirmatively answering a question posed by police about his belief in God after nearly three hours of silence during questioning.64 The defendant was arrested in connection with a shooting and given the Miranda warnings prior to questioning. The defendant remained silent during his interrogation, neither stating his wish to remain silent nor stating he did not want to speak with the police. After three hours, an officer asked the defendant “Do you pray to God to forgive you for shooting that boy down? [The Defendant] answered ‘yes.’”65 The Court found this a valid waiver of Miranda.66 Writing for the majority, Justice Kennedy reasoned the defendant “knew what he gave up when he spoke.”67 Even though the defendant did not explicitly waive his Miranda rights, the Court was satisfied he had implicitly done so. “The fact that [Defendant] made a statement about three hours after receiving a Miranda warning does not overcome the fact that he engaged in a course of


58 Id. at 1-1. See discussion of Thompkins, infra Part VII.


60 Id.


63 Mavredakis, 430 Mass. at 859. For other areas in which the SJC has held the Massachusetts Declaration of Rights affords those accused, charged or convicted of crimes more protection that the United States Constitution, see Robert Cordy, Criminal Procedure and the Massachusetts Constitution, 45 New Eng. L. Rev. 815 (2011).


65 Id. at 2257.

66 Id. at 2257.

67 Id. at 2263.
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conduct [emphasis added] indicating waiver. . . . [A Defendant’s] answer to [the officer’s] question[s] about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver.” 68 Therefore, in the wake of Berghuis, a suspect must expressly invoke her Fifth Amendment rights or she will be deemed to waive them.

The erosion of Miranda continued in the Court’s most recent term with the extension of both the “express invocation” and “course of conduct” doctrines in Salinas v. Texas. 69 Here, the Court held, as it did in Berghuis, that a suspect’s course of conduct constitutes an express waiver of his Fifth Amendment rights in the absence of an express invocation of the privilege. 70 The defendant voluntarily accompanied police to answer questions about the murder of two brothers the defendant knew. As the interview was non-custodial, the defendant did not receive any Miranda warnings. When asked if the defendant’s shotgun would match shell casings found at the crime scene, the defendant “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up.” 71 The Texas court allowed the State to use the defendant’s conduct as evidence of his guilt of the murders. Salinas was convicted and sentenced to a 20-year prison term. 72

The Supreme Court upheld the decision, finding that the defendant must expressly invoke the Fifth Amendment privilege, because he was not subjected to the “inherently compelling pressures of an unwarned custodial interrogation.” 73 Writing for the majority, Justice Alito reasoned that because the defendant appeared voluntarily, that placed him “outside the scope of Miranda and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege.” 74 All the defendant had to do, according to the Court, was to “say that he was not answering the officer’s question on Fifth Amendment grounds. Because he failed to do so, the prosecution’s introduction of his reaction to the questioning, e.g., his noncustodial silence, did not violate the Fifth Amendment.” 75

The Court applied Berghuis to Salinas, finding that “if the extended custodial silence in that case [nearly 3 hours] did not invoke the privilege, then surely the momentary silence in this case did not do so either.” 76 However, the most glaring difference between the two is that unlike Berghuis, Salinas was not under arrest at the time of his supposed Fifth Amendment “waiver.” Consequently, pre-arrest silence or certain courses of conduct during a non-custodial interview with police now fall outside of Miranda protection, unless an express invocation of the Fifth Amendment privilege is made.

VIII. The Public Safety Exception and Tsarnaev’s Case

Tsarnaev’s legal team will likely argue that once he was captured and physically restrained, no threat to the public or to officers existed, particularly in light of the fact that he was severely injured and transported immediately to a hospital where he was under constant police guard for a considerable period of time. And they will certainly argue no imminent threat existed some sixteen hours after his capture when the agents finally were able to question him. 77 There is no evidence that Tsarnaev would have been able to retrieve any weapons, detonate any incendiary devices, even remotely, or contact any accomplices to detonate remaining bombs or use any weapons. However, given both the broad manner in which the public safety exception has been construed by federal courts, the existence and use of numerous guns and pipe bombs days and hours before he was captured, and the extreme atrocity of his prior conduct, any statements Tsarnaev made prior to being given the Miranda warning may well be

68 Id.
70 Id. at 2181.
71 Id. at 2178.
72 Id.
73 Id. at 2180.
74 Id.
75 Id.
76 Id. at 2182.
77 Tsarnaev’s initial responses to investigator’s questions were communicated in writing because of a throat wound suffered in his confrontation with police.
admissible under the Quarles public safety exception if the government chooses to offer them. As demonstrated above, even though the Supreme Court originally deemed Quarles a narrow exception to Miranda and held it only permissible to cure threats of immediate necessity, the exception has expanded almost beyond recognition in the post 9/11 world. And, although the First Circuit has narrowly construed the exception to apply to cases where the facts support a finding that the defendant was unable to access a weapon believed to exist, this may be a case where this court follows the trend of expansion blazed by other federal courts and advocated by federal law enforcement.

There exists a real question of whether an imminent threat to public safety existed after Tsarnaev’s arrest because law enforcement officials at that time officially declared the threat to the public over and were in control of the crime scene. However, there is precedent from other circuits which supports the government’s position, even in light of this evidence. In United States v. Khalil, police questioned a suspect while he lay in the hospital as to whether or not he “planned to kill himself” with bomb making materials found in the suspect’s apartment. The Court of Appeals affirmed the lower court’s denial of the motion to suppress the statement under Quarles because “it had the potential for shedding light on the bomb’s stability.” Not thoroughly addressed by the court is the question of whether a secured crime scene has any bearing on the questioning of suspects in a neutral location. In Tsarnaev’s case, the police already had complete control of the crime scene when the officers interviewed the suspect in the hospital.

In Spoerke, the Eleventh Circuit made a determination that police control over a crime scene is not dispositive that the public safety exception applies. The arresting officer in that case had already secured the devices (which later proved to be pipe bombs) before he began questioning the suspect. As was the case in Khalil, there was no possibility of the bombs falling into the hands of a third party, and the scene had been secured prior to the officer’s questions.

The government will most likely argue that the conduct of Tsarnaev and his brother over the previous week makes the potential existence of other bombs capable of detonation by someone acting on Tsarnaev’s behalf, or in coordination with Tsarnaev, a real threat to public safety. Although various locations known to be occupied or frequented by the bombers had been searched and supposedly secured, there remained the possibility that other persons or places could be involved. Support for this position comes from United States v. Hodge, in which the Sixth Circuit relied on both Khalil and Spoerke. The police in Hodge had secured the suspect’s home prior to questioning him about the location of any bombs or explosives contained within. The Hodge court found questions directed to “obtaining information about [a] bomb’s construction and stability admissible under Quarles.” Thus, the trend in the federal circuit courts is to allow the public safety exception even if the crime scene is secure and there is no possibility a third party may encounter the bomb. Thus, Tsarnaev’s statements, if any, regarding the existence of other explosive devices, or firearms, or component parts of wither, will likely come in under Quarles even if no threat to the public existed at the time of his capture.

In the unlikely event Tsarnaev could show the perceived threat to the public as he lay in the boat came from a gun as opposed to a bomb or other incendiary device, he may be able to use Jackson to support his argument that any pre-Miranda statements should be suppressed. As in Jackson, Tsarnaev, when captured, “was surrounded by a number of police officers.” Similarly, “the fact a gun is involved is not sufficient [to warrant application of the public safety exception].” Unlike Jackson, any weapon Tsarnaev had access to would most certainly have been within his reach in the boat, increasing the likelihood the exception would apply. But, once he was removed from the

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78 Gerstein, supra note 1.
79 214 F.3d 111, 115 (2d Cir. 2000).
80 Id. at 121.
81 568 F.3d at 1248.
82 Id. at 1242.
83 714 F.3d 380, 386 (6th Cir. 2013).
84 Id.
85 Jackson, supra note 26, at 360.
86 Id.
boat, it is hard to argue the danger existed.

However, to the extent that Tsarnaev’s questioning went beyond the existence of bombs, guns or other weapons, and delved into facts concerning his relationship with and/or connection to other terrorists and/or terrorist groups, or to the motive for the brother’s horrific acts, a federal court should be hard pressed to allow such statements, clearly of an investigatory nature, to be admitted under the public safety exception. It is apparent that the Justice Department intended to question Tsarnaev about these very subjects. Speaking the night of Tsarnaev’s capture, a DOJ official told the Associated Press “we plan to invoke the public safety exception to order to question the suspect extensively about other potential explosive devices or accomplices and to gain critical intelligence.”

Nowhere in the Quarles decision is there any mention of using the public safety exception as an intelligence-gathering tool where the information goes beyond the immediate protection of the public. The government should not be allowed to use the public safety exception to introduce evidence at Tsarnaev’s trial that does not directly respond to questions concerning the imminent public danger occasioned by the existence of bombs or other explosive materials and/or firearms in locations where such harm is likely and imminent. However, the broad manner in which the narrowly crafted exception has been applied by federal courts does not assure the above with any degree of confidence.

**IX. Conclusion**

Something lost in even the massive minute-by-minute coverage of the marathon attacks and subsequent pursuit and capture of the alleged offenders is the simple fact officers were not constitutionally mandated to read Tsarnaev—or anyone taken into custody for that matter—the *Miranda* warning. As a society, we have become accustomed to believing that once someone is arrested, those warnings must follow immediately. In a plurality decision in *United States v. Patane*, the Supreme Court found “police do not violate a suspect’s constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” So if officials do not intend, or even need, to offer Tsarnaev’s unwarned statements at his trial, a likely scenario based upon statements Tsarnaev and his brother made and where Tsarnaev was discovered, why the focus on whether the public safety exception applies at all?

The answer is twofold. First, the *Quarles* exception was not meant to be a blank check allowing unlimited police conduct whenever, in law enforcement’s sole determination, the public safety may be in jeopardy. It was designed from the outset to be a limited, narrow exception to a broad prophylactic rule. Therefore, even if the exception is found properly invoked and Tsarnaev’s unwarned statements are used against him in court, the government cannot use *Quarles* to admit statements that may have been coerced, or if Tsarnaev was denied a lawyer if he asked for one.

Second, and perhaps more significantly, Dzhokhar Tsarnaev is a United States citizen, and however the government empowers itself to “bring him to justice” establishes precedent and lays a foundation for how all United States citizens may be treated on United States soil. It’s easy to isolate Tsarnaev in the names of those he is accused of killing and injuring and in the fight...

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89 Julia Dahl, *Suspect told car jacking victim he did it*, *Justice Dept. says*, CBS News (Apr. 22, 2013), http://www.cbsnews.com/8301-504083_162-57580776-504083/boston-marathon-bombings-update-suspect-told-carjacking-victim-he-did-it-justicdept-says/. Dzhokhar and his brother Tamerlin reportedly told their car-jacking victim they were the Marathon bombers the authorities were pursuing.


91 Goodman, *supra* note 17.
against terrorism. But the more elasticity we allow our government to have over constitutional safeguards in these (in the words of the Department of Justice) “exceptional cases,” the greater the chances abusive interrogations incrementally become the norm rather than a mere exception.

Regardless of the outcome of Tsarnaev’s trial, the executive branch should not have the power to unilaterally determine any suspect’s rights under the Constitution. Congress, and not the Justice Department, creates the law, and then the courts determine its constitutionality. The Obama administration, by carving the public safety exception anew, erodes the checks and balances between the branches and takes from the courts the power “to regulate the discretion of Executive Branch law enforcement officials, particularly the police, when it trenches upon fundamental constitutional rights.”92

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92 Agnes, supra note 55, at 2.
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echnology has never been kind to the practice of law. As the technological landscape shifts at a frenetic pace, one thing that remains certain is that decisions coming from state and federal courts regarding technology are generally years behind the latest advancements. No other place has this become more apparent than in the arena in which cellular phones and criminal procedure intersect.

Over the past five years, courts across the United States have been called upon with increasing frequency to adjudicate the legality of warrantless searches of a person's cell phone for numerous categories of information. The Supreme Judicial Court has addressed this issue in two recent cases and has taken a position that is fairly consistent with many courts of other states and of the United States. However, the national landscape of this area of the law is rife with inconsistent decisions. Although the weight of authority in sheer numbers tips in favor of allowing searches of cell phones incident to a lawful arrest, a growing minority of courts strictly adhere to the principles that underlie this exception, as espoused by the United States Supreme Court, and refuse to justify such searches.

Evolution of the Doctrine of "Search Incident to an Arrest"

When examining the evolution of the search incident to arrest exception of the Fourth Amendment, four cases have played a major role in identifying the parameters that police officers should follow in conducting these searches today: Chimel v. California, United States v. Robinson, New York v. Belton, and Arizona v. Gant.

The first of these cases, Chimel, set the guidelines for a legal search incident to an arrest without the need for a warrant. In Chimel, police officers went to the defendant’s home with a warrant for his arrest for burglarizing a coin shop. Chimel was handed the arrest warrant and an officer asked if they could “look around.” Disregarding Chimel’s objection, the officers proceeded to search the premises. The search extended throughout the house. Based on evidence gathered during the search, Chimel was convicted by a jury. The Supreme Court granted certiorari, and in the Court’s opinion, the parameters for such searches were established.

The standard set forth by Chimel allows officers to search the arrestee’s person and the area within the arrestee’s immediate control. The Court justified this type of search as reasonable when officers perform a valid arrest: first, to remove any weapon the arrestee may be carrying or might obtain that may be used to escape or resist arrest, and second, to seize any evidence in the possession or under the control of the defendant to prevent its concealment or destruction.

Following Chimel, the Supreme Court elabo-
rated on the parameters for a search incident to an arrest in its ruling in Robinson. In that case, the defendant was arrested for driving a vehicle with a revoked license. Upon his arrest, the defendant was searched by an officer who felt something in the defendant’s pocket but could not identify what the object was, nor could he ascertain its precise size.11 The officer proceeded to reach into the pocket and pull out a cigarette package. The officer reported that he felt the outside of the package, but still did not know what it was. The officer opened and looked into the package, finding fourteen capsules filled with a white substance believed (and what turned out) to be heroin. 12 A jury convicted the defendant, but the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the two reasons for searching an arrestee set forth in Chimel, i.e., preserving evidence related to the crime and removing weapons, were not relevant here, where the suspect was under custodial arrest for a traffic offense.13 That court held that a full search of the defendant’s person was not necessary for a person arrested for violation of “a mere motor vehicle regulation.”14

The Supreme Court rejected the Court of Appeals’ rationale that the nature of the offense for which the arrest is made dictates the permissible breadth of a search incident to arrest. The Court held that “a police officer’s decision as to the parameters of a search incident to an arrest . . . does not require a case-by-case analysis to determine whether evidence or weapons would in fact be found on the arrestee’s person.”15

The mere fact that a lawful arrest occurred establishes the authority of an officer to search an arrestee without any additional justification. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.16

In Robinson, the Court extended the valid search area during a lawful arrest set forth in Chimel to not only encompass the arrestee’s person and the area within the arrestee’s immediate control, but also to include the search of closed containers found on an arrestee.17

The area that a police officer can lawfully search incident to an arrest was further extended by the Supreme Court in Belton, where a police officer stopped a vehicle for speeding. In the process of determining that none of the four occupants owned or was related to the registered owner of the vehicle, the officer smelled marijuana and viewed an envelope on the vehicle’s floor which he suspected contained marijuana. After removing the occupants from the vehicle and arresting the men, the officer searched the vehicle. Inside, he found a jacket belonging to the defendant, and upon opening the pockets, he found cocaine.18

The New York Court of Appeals reversed the trial court’s denial of the motion to suppress, holding “‘zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.’”19

The Supreme Court reversed, and extended the area that officers may lawfully search incident to an arrest, where the accused was travelling in a motor vehicle, to the passenger compartment of a vehicle as well as any container found within. The Court defined container as “any object capable of holding another object includ[ing] closed or open glove compartments, consoles, luggage, boxes, bags, clothing, and the like.”20

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11 Robinson, 414 U.S. at 223.
12 Robinson, 414 U.S. at 223.
13 Id. at 476, citing 471 F.2d 1082, 1095 (1972) (en banc plurality opinion).
14 471 F.2d at 1104.
15 Id. at 235.
16 Id.
17 Id. at 236.
18 Belton, 453 U.S. at 455-56.
19 Belton, 453 U.S. at 455-56.
20 Id. at 461 n.4. Significantly, the Court discussed the importance to law enforcement of crafting a standardized rule governing the scope of a warrant-
In 2009, the Supreme Court decided *Gant*, which arguably retracted the breadth of allowable searches established by *Belton*. In *Gant*, the defendant was pulled over and arrested on an outstanding warrant for driving with a suspended license. Gant was arrested approximately 10 feet from his vehicle, placed in handcuffs, and then locked in the backseat of a patrol car. The officers on scene then searched Gant’s vehicle. The Arizona Superior Court denied Gant’s motion to suppress the evidence obtained in the search and the Arizona Supreme Court reversed, holding that the search was not justified. The Supreme Court upheld the Arizona Supreme Court, concluding that the search incident to the lawful arrest failed to meet the criteria set forth in *Chimel*.

The Supreme Court reiterated the bases for establishing the search incident to arrest exception and reviewed the reasons that it permitted a warrantless search incident to an arrest as set forth in *Chimel*: (1) protection against the destruction of evidence on the arrestee’s person or in an area under his control, and (2) protection of officers from the use of weapons the arrestee may have or might obtain. In *Gant*, when the search of the automobile was conducted, the defendant was in handcuffs and locked in the backseat of a patrol car. The defendant did not have an opportunity to reach for a weapon or to destroy any evidence in the vehicle. Therefore, the Court found that without the existence of facts supporting either of the reasons for the warrant exception, the officers should have obtained a warrant prior to searching Gant’s vehicle.

The opposing results, in light of the superficial similarity between *Gant* and *Belton*, necessitated that the Court closely compare the two cases and review the guidelines established in *Belton*. In justifying its decision in *Gant*, the Court emphasized that the facts in *Belton* were, in reality, considerably different. In *Belton*, a sole officer stopped a speeding car and smelled marijuana while obtaining information concerning the identity of the four occupants. The search occurred while the occupants were “under arrest,” but not restrained in any way, so conceivably, the interior of the passenger compartment was an area into which they could reach to obtain evidence or weapons. The *Gant* decision, however, reined in an officer’s ability to conduct a warrantless search of a vehicle by allowing the search only when the arrestee is unrestrained and within reaching distance of the passenger compartment at the time of the search.

Between 1969 and 2009, then, the Supreme Court’s rulings on the above cases set forth the boundaries still guiding police today in conducting a search incident to a lawful arrest. Officers can search the person of the arrestee, the area in the immediate control of the arrestee, any closed containers found on the person of the arrestee, and, if the arrestee is unrestrained, the passenger area of a vehicle and any container found within the passenger area of a vehicle. The two reasons the Court set forth in *Chimel* remain the backbone of the officers’ right to conduct these warrantless searches: in order to find weapons that may be used for escape or to resist arrest and the protection of evidence. The debate surrounding cell phone searches centers not only on whether they fit into the basic parameters of a permissible search incident to an arrest, but also, if so, what is the permissible scope of a search and should cell phones fit the Supreme Court’s criteria of a “container.”

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22 *Gant*, 556 U.S. at 335.
23 *Gant*, 556 U.S. at 335.
24 *Id.* at 343-44.
25 *Id.* at 340-41.
26 *Id.* at 351.
27 There appears to be some inconsistency in the temporal parameters of a lawful search incident to arrest. In *United States v. Edwards*, 415 U.S. 800 (1977), the Supreme Court permitted a search of items seized contemporaneously with the arrest, even though the search occurred some ten hours after the arrest. However, in *Gant*, which postdated *Edwards* considerably, the Court confirmed the right to search as being one conducted “essentially contemporaneous” with the arrest. *Gant*, 556 U.S. at 340. For a more complete review of this issue, see *Warrantless Searches and Seizures*, 41 Geo. L.J. Ann. Rev. Crim. Proc. 46, 147 n.173 (2012).
The Massachusetts Cases: Commonwealth v. Phifer, Commonwealth v. Berry

The Supreme Judicial Court first delved into the rapidly changing law in 2012 in two factually similar cases involving warrantless cell phone searches pursuant to the search incident to an arrest exception to the warrant requirement. In both Commonwealth v. Phifer\(^28\) and Commonwealth v. Berry,\(^29\) the SJC held that police can search a cell phone incident to an arrest, but it took care to express caution that the holdings created were narrowly drawn exceptions to the warrant requirement.

In examining Phifer and Berry, it is clear the court wanted to address a specific issue. In both cases, the SJC chose not to make a general statement concerning the legality of searches of cell phones incident to a lawful arrest, but rather limited its decisions to the facts of the two cases. In both cases, the SJC stated that “we do not suggest that the assessment necessarily would be the same on different facts, or in relation to a different type of intrusion into a more complex cellular telephone or other information storage device.”\(^30\)

In Phifer, the defendant was charged with drug distribution and moved to suppress evidence obtained from a warrantless search of his cellular phone. Two officers from a drug control unit saw the defendant standing on a street corner. The officers recognized the defendant and knew he was the subject of two outstanding warrants relating to drug charges. The officers observed a vehicle driven by a woman, also a known drug user, accompanied by another known drug user in the passenger seat, stop and pick up the defendant. The officers observed what they described as “an exchange” between the defendant and the driver, and they then saw the driver drop the defendant off. The defendant was arrested, and a search of the defendant’s person resulted in the officers’ seizing the defendant’s cellular phone. After transport to the police station, one detective conducted “a few simple manipulations” of the cellular phone, revealing the recent call log. The officers spotted several received calls from the number associated with another cellular telephone belonging to the passenger in the motor vehicle, who had just been arrested in possession of cocaine.\(^31\)

In Phifer, the SJC considered the reach of both the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights, which governs searches and seizures under the Commonwealth’s constitution. It held that the search did not violate either provision because it was reasonable — limited to a search of telephone numbers recently called from the call log of the phone. The search did not include email or text messages. After noting that the majority of courts considering the issue had approved searches of cell phones incident to a lawful arrest, the SJC reviewed its own precedent, noting that the search incident to arrest doctrine in Massachusetts requires that that “there is also probable cause to believe that the bag contains evidence of the crime for which the arrest was made.”\(^32\)

The Court continued by stating, “In reaching this decision, we leave open for another day questions concerning whether, when a cellular telephone is validly seized incident to an arrest, it may always, or at least generally, be searched without a warrant, and if so, the permissible extent of such a search.”\(^33\) Thus, in Massachusetts, an officer may conduct a limited search (extending at least to recently dialed calls) to obtain evidence of a cellular phone seized in a valid search incident to an arrest.

Berry essentially followed Phifer. In that case, two experienced police officers in the drug control unit were on duty in a residential area known for illegal drugs. The officers sat in an unmarked cruiser and watched as the defendant drove up in a car, picked up the co-defendant, drove around for less than five minutes, and then dropped off the co-defendant at his original pick-up location. The officers testified that they observed behavior

\(^ {28} \) 463 Mass. 790 (2012).
\(^ {29} \) 463 Mass. 800 (2012).
\(^ {30} \) Phifer, 463 Mass. at 797; Berry, 463 Mass. at 807 (quoting Phifer).
\(^ {31} \) Phifer, 463 Mass. at 791-92.
\(^ {33} \) Id. at 791.
that was consistent with a drug transaction and that cell phones were often used to set up drug transactions. The officers from the drug unit stopped and arrested both the defendant and co-defendant. They seized drugs and a cell phone from each defendant. Once the defendants were brought to the station, the officers picked up one of the cell phones, not knowing which defendant it belonged to, and pressed one button to reveal the call list of the telephone.

The municipal court judge suppressed the evidence, holding it was not incident to an arrest in time or in place. Upon appeal, the SJC reversed the decision holding that "the warrantless search of the cellular phone here was not rendered invalid because it occurred sometime after the defendant's arrest and at the police station rather than contemporaneously with his arrest." Further, the SJC held, in a discussion amounting to no more than a paragraph, that the scope of the search was consonant with the principles of the search incident to arrest doctrine; therefore, in the present case the police conducted a valid, limited search of the cell phone. According to the court, the officers merely pressed one button to reveal the phone's call log, read the most recent number, and then dialed the most recent number shown. The court explained that the police had reason to search the recent call list because the officers had testified that cell phones were often used in drug transactions, and one exception to the warrant requirement is to reveal and protect evidence related to the crime for which the defendant was arrested.

There have as of yet been no Massachusetts cases or rulings that deal with more extensive searches of generic cell phones or searches of more technologically advanced items such as a "smart phone." It is fair to say, the more complex the device, the more complicated the decision is likely to be.

### Cell Phone Searches in the First Circuit and Elsewhere

The constitutionality of warrantless cell phone searches has been the subject of numerous federal cases since 2007. In May 2013, the First Circuit had occasion to address this issue in *United States v. Wurie*. In that 2-1 decision, the defendant was observed by a Boston detective driving a Nissan Altima. He was seen stopping in the parking lot of a convenience store where he picked up a man later identified as Fred Wade. There, he engaged in what the detective believed was a drug sale in the car. The detective and another officer subsequently stopped Wade and found two plastic bags in his pocket, each containing 3.5 grams of crack cocaine. Wade admitted that he had bought the drugs from "B," the man driving the Altima. Wade also told the officers that "B" lived in South Boston and sold crack cocaine. A third officer following Wurie in the Altima was notified of this information. Wurie parked the car, was arrested, and taken to the station for booking. At that time, he had two cell phones, a set of keys, and over $1,000 in his possession.

Five to ten minutes later, before Wurie was booked, one of the officers noted that one of the cell phones was repeatedly receiving a call from a number identified as "my house" on the phone screen. Five minutes later, the officers opened the phone and looked at the call log. They noticed that the phone's "wallpaper" consisted of a photograph of a black woman and a baby. They retrieved the number connected to "my house" on the cell phone log, typed it into an online white pages directory, and found it was listed to an

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34 *Berry*, 463 Mass. at 802. The passenger was pursued on foot by one officer, a scuffle ensued, and the co-defendant was arrested. The officer then observed a bag of heroin by the co-defendant’s feet. This information was radioed to another officer who, with the assistance of a marked patrol car, stopped Berry, still driving his vehicle, and arrested him. *Id.*

35 *Id.* at 803.

36 *Id.* at 806.

37 *Id.* at 807.

38 _ F.3d _, No. 11-1792, 2013 WL 2129119 (May 17, 2013), _ F.3d _ _, 2013 WL 3869965 (July 29, 2013). In her statement on denial of rehearing en banc, Justice Lynch recognized the division in the precedent, expressing her opinion that the dispute is more appropriately resolved by the United States Supreme Court.

39 *Id.* at *1.

40 Although the majority of the First Circuit did not consider the "plain view" doctrine and the argument that as to the information that appeared on the screen, there was no search under the Fourth Amendment, other courts have. See, e.g., *United States v. Gomez*, 807 F. Supp. 2d 1134, 1142 (S.D. Fla.
address on Silver Street in South Boston. The name connected to that address was Cristal.41

After he was given his Miranda rights, Wurie denied he had been to the convenience store, denied he had engaged in a drug deal, and claimed to live on Speedwell Street. Police took the keys they had removed from Wurie’s person at the station and went to the Silver Street address where they saw one of the mail boxes bore the names “Wurie” and “Cristal.” Through the first floor window they saw a woman who appeared to resemble the person on the cell phone wallpaper. They froze the home, obtained a warrant, and ultimately found cocaine, drug paraphernalia, firearms, and cash in the apartment.42

The trial judge denied the motion to suppress, Wurie was found guilty on all three counts, and he was sentenced to 262 months.42

On appeal, the First Circuit took quite a different approach. In a 2-1 decision, after noting the divergence in precedent from both state and federal courts on the issue, the First Circuit held that because of the unique nature of today’s cell phones, items that have the capacity to hold extensive personal data, a warrantless search of this device is not authorized as a search incident to an arrest.44 In reaching this conclusion, two justices emphasized that the Chimel exception rested on two rationales: protecting officers’ safety, and safeguarding of evidence from destruction or concealment by the arrestee. The majority rejected the government’s argument that a cell phone is just like any other possession carried on the person at the time of arrest, such as a cigarette package, wallet, or address book.45 Instead, the justices determined that today’s cell phone is more akin to a computer which can hold reams of private information, such as photos, videos, messages (written, audio and/or video), and even entire documents. Once removed from the defendant’s possession contemporaneous with an arrest, the device aligns more with the circumstances addressed by the Supreme Court in Chadwick46 and Gant. Those two cases clearly establish that there are certain categories of items which do not fall into Chimel’s exception because their search and/or seizure is not necessary to protect the officer’s safety or to protect evidence from destruction or disappearance.

The majority readily acknowledged that other federal courts had reached contrary conclusions. “In the end we part ways with the Seventh Circuit, which also applied the Chimel rationale in Flores-Lopez.”47 The Wurie justices distinguished Flores-

2011) (Observation by law enforcement of the name that appeared on screen from incoming call was in plain view). The dissent in Wurie did address the plain view issue. Wurie, 2013 WL 2129119 at *14.
41 Id.
42 Id. at *1-*2.
43 Id. at *2.
44 Id. at *6.
45 Id. at *7. More specifically, it rejected the government’s argument that the search was “arguably” necessary to protect the evidence from destruction. As in the cases, infra, that rely on the exigent circumstances exception, the claim was that crucial information could be overwritten or remotely erased. The court noted law enforcement has three options to prevent the aforementioned from occurring: (1) turn off the phone or remove the battery; (2) put the phone in a Faraday enclosure that shields the device from outside electromagnet forces, and (3) copy the entire cell phone contents to be held in reserve, if, as the government fears, the cell phone contents are altered. Id. at *9. For a more complete discussion of Faraday containers and alternatives to a search to protect the evidence from erasure, see Charles E. MacLean, But, Your Honor, A Cell Phone Is Not A Cigarette Pack: An Immodest Call for A Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest, 6 Fed. Cts. L. Rev. 37, 50 (2012); Sara M. Corradi, Be Reasonable! Limit Warrantless Smart Phone Searches to Gant’s Justification for Searches Incident to Arrest, 63 Case W. Res. L. Rev. 943, 959-60 (2013); and Cassie Weathersbee, A Constitutional Ringtone: Cell Phones and the Search Incident to Lawful Arrest Warrant Exception Post Gant, 6 Charleston L. Rev. 807, 818-819 (2012). Of course, there is nothing except convenience to stop a phone owner from password protecting access to his cell. Although that arguably creates a hurdle for law enforcement, which would necessitate obtaining a warrant before conducting a search, such a result is not inevitable. See Adam Gershowitz, Password Protected? Can A Password Save Your Cell Phone From a Search Incident to Arrest?, 96 Iowa L. Rev. 1125 (2011).
46 433 U.S. 1 (1977)(once locked container was removed from vehicle and put under control of law enforcement, warrant was necessary for search; warrantless search of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest or if no exigency exists).
47 Id. at *11 (citing United States v. Flores-Lopez, 670 F.3d 803, 809 (7th Cir. 2012)).
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Lopez based upon the existence of Seventh Circuit precedent establishing that searches incident to an arrest are subjected to a balancing or reasonableness test. In Flores-Lopez, for example, the court held the minimal nature of the intrusion (only for the phone’s number), made the search reasonable.48 The First Circuit rejected utilization of an ad hoc test in light of the Supreme Court’s insistence that courts formulate bright line tests under the Fourth Amendment.49

A series of opinions allowing some cell phone data searches but not others, based on the nature and reasonableness of the intrusion, would create exactly the “inherently subjective and highly fact specific” set of rules that the Court has warned against and would be extremely difficult for officers in the field to apply. Thus, while the search of Wurie’s call log was less invasive than a search of text messages, emails, or photographs, it is necessary for all warrantless cell phone data searches to be governed by the same rule. A rule based on particular instances in which the police do not take full advantage of the unlimited potential presented by cell phone data searches would prove impotent in those cases in which they choose to exploit that potential. (internal cite omitted)50

Only time will tell whether the Wurie court’s bold step will be followed by other federal courts.51

As stated, the majority of courts to consider this issue have upheld warrantless searches of information contained on a cell phone as a valid search incident to arrest. In one of the earliest (and most cited) cases to address the issue, United States v. Finley, Finley and his passenger were arrested for drug related offenses.52 A contemporaneous search of the vehicle turned up drug paraphernalia, and the officers seized Finley’s phone. They did not search it until an hour later, back at the passenger’s residence, while conducting a search pursuant to a warrant. Finley’s phone, which the court deemed to be a “container,” held inculpatory evidence proving his complicity in drug deals. Since the phone was seized at the time of arrest, the fact it was not searched for an hour did not destroy the government’s argument that it was a search incident to an arrest. The arrest provided justification, without more, to “look for evidence of the arrestee’s crime on his person in order to preserve it for use at trial.”53

Similarly, in United States v. Young, the Fourth Circuit, following Finley, relied on the preservation of evidence argument to justify a search of the defendant’s phone seized at the time of his arrest, and the copying of text messages on the grounds that the police did not know whether the messages would erase themselves.54

The Supreme Court of California has taken the categorical position that a cell phone on an arrestee’s person (in the context of an automobile arrest) is “immediately associated with the person,” like a cigarette package, and therefore, can be searched after the seizure, and without additional cause.55 The high court rejected the claim that the nature of a cell phone distinguished it from other items that might be deemed possessions “associated with the person.”56

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48 Id.
49 Id. at *11.
50 Id. Some commentators reject application of a bright line rule, advocating instead for the kind of flexible test rejected by the First Circuit. See Matthew Orso, Cellular Phones, Warrantless Searches and the New Frontier of Fourth Amendment Jurisprudence, 50 Santa Clara L. Rev. 183, 219-223 (2010) (citing Adam Gershowitz, The iPhone Meets the Fourth Amendment, 56 UCLA L. Rev. 27 (2008)).
51 At least one court thus far appears to have been influenced by Wurie. United States v. Aispuro, No. 13-10036-01-MLB, 2013 WL 3820017 (D. Kan., July 24, 2013). The defendant successfully relied on Wurie, and the trial judge rejected the government’s argument that the majority of other courts have justified searches under similar circumstances under the search incident to arrest exception. The court noted that the phone was and had been in the custody and control of law enforcement and out of the reach of the defendant at all relevant times. Id. at *12.
52 477 F.3d 250 (5th Cir. 2007).
53 Id. at 259-60. The reasoning and result was recently confirmed by the Fifth Circuit in United States v. Curtis, 635 F.3d 704, 713 (5th Cir. 2011) and United States v. Rodriguez, 702 F.3d 206, 209-10 (5th Cir. 2012), in which the court expressly rejected the argument that Gant overruled Finley.
54 278 F. App’x 242, 245-46 (4th Cir. 2008) (per curiam).
56 51 Cal. 4th 84, 94 (citing United States v. Ross, 456 U.S. 798, 825 (1982)).
Supreme Court affirmed that a search of a container found within a vehicle’s passenger compartment at the point of arrest is permitted, regardless of the nature of that container, because “the central purpose of the Fourth Amendment forecloses such a distinction.”

Some courts, as did the SJC, consider the nature of the offense and whether there is reason to believe the phone holds relevant information in determining if the search is valid as one incident to an arrest. In United States v. Williams, the judge denied the motion to suppress, focusing on the fact that the defendant was under arrest for a drug crime, and “the agents had reason to believe the Defendant used these phones to setup oxycodone sales, including the controlled transaction that morning.” The same result was reached in United States v. Gomez, where the phone was within the defendant’s “reaching distance,” and he was seen talking on it in his car, into which he put a package known to contain cocaine.

On the other hand, in Smallwood v. State, a divided court pronounced in May 2013, that the rationale of Robinson did not authorize police officers to conduct a warrantless search of a cell phone seized from the defendant at the time of arrest for photographs in the absence of any reasonable belief the phone contained evidence of a crime. The Court noted the fact that only five (allegedly pornographic) photographs were admitted at trial did not mean that the police had not scoured the phone for additional evidence it did not find or did not introduce. The court rejected the argument that a cell phone is a “container” and the dissent’s contention that the limited nature of the invasion is a factor controlling the legality of the search. Additionally, the Supreme Court’s decision in Gant, the majority said, made it clear “that once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply.”

In United States v. Park, the trial judge suppressed information found in the defendants’ cell phones seized at the police station, following an arrest that occurred elsewhere more than an hour and a half earlier. The court analogized the phone to a computer, and found that the phone was a “possession within the arrestee’s control” rather than an item on the person at the time of arrest. Consequently a warrant should have been secured for the search. And, in United States v. Quintana, the court suppressed evidence from the defendant’s cell phone (inter alia, a photograph of the “grow house”) which was retrieved from the

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57 Id. at 95 (citing Ross, 456 U.S. at 822)). An effort to statutorily overrule this decision passed both houses of the legislature but was vetoed by Governor Brown. See Caitlin Keane, People v. Diaz, Senate Bill 914, and the Fourth Amendment, 35 Hastings Comm. & Ent L.J. 331 (2013).

58 This approach would be most justified in cases where use of the cell phone constitutes the offense itself, such as texting or using a phone while driving. See Adam Gershowitz, Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches, 54 Ariz. L. Rev. 577, 580 (2012); Eunice Park, Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone as “Hybrid,” 60 Drake L. Rev. 429, 494 (2012).

These cases are distinguishable, however, from those cases in which law enforcement argues that drug dealers use cell phones to conduct their business without advancing particular evidence that a particular phone contains evidence related to the crime for which the arrest was made.


60 807 F. Supp. 2d 1134, 1145 (S.D. Fla.,2011)

61 113 So. 3d 724, 732 (Fla. 2013).

62 Id. at 733.

63 Id. at 735.


65 Id. Resolving the issue of whether a cell phone is a container necessitates consideration of the similarities between modern day cell phones and computers. It is beyond the scope of this article to comprehensively address the law on computer searches except as it is reflected in decisions concerning cell phone searches. For discussions of computer searches and the applicability of various exceptions to the warrant requirement, see United States v. Carey, 172 F.3d 1268 (10th Cir. 1999) and J.C. Lundberg, When is a Phone a Computer?, 8 Wash. J. L. Tech. & Arts 473 (2013).

66 Id. Park has been subsequently cited to support the proposition that the search of the cell phone was not a valid “inventory search.” See United States v. Cole, 1:09-CR-412-ODE-RCV, 2010 WL 3211027, n.25 (N.D. Ga. May 12, 2010) and cases cited therein. In Park, the court called it a “booking search,” which we assume is synonymous with inventory search. In any event, the Park court rejected that rationale, because the criteria for inventory searches were not present.
defendant’s pocket around the time of his arrest without the defendant’s consent.\textsuperscript{67} The court held that the seized evidence went beyond the scope of a search incident to an arrest.\textsuperscript{68} However, it did comment that Quintana had been arrested for a motor vehicle violation, even though the officers detected an odor of marijuana emanating from the vehicle, and searches of cell phones under this doctrine have been allowed where the underlying offense was related to drugs.\textsuperscript{69}

Finally, in \textit{State v. Smith}, the Ohio Supreme Court suppressed evidence retrieved from the defendant’s cell phone, which was seized from his person at the time of arrest at his residence on drug charges and searched some unspecified time later.\textsuperscript{70} The Court emphasized the unique nature of a cell phone, its capacity to store and access a broad spectrum of personal information, and rejected outright Finley’s conclusion that a phone is a closed container found on an arrestee’s person searchable without a warrant under the search incident to arrest doctrine.\textsuperscript{71}

**Exigent Circumstances Exception**

A few courts have chosen to decide warrantless cell phone cases pursuant to the “exigent circumstances” exception to the warrant requirement. In \textit{United States v. Parada}, one of the earliest recorded decisions, the District Court found that the seizure of the phone from the automobile in which the defendant was traveling when he was arrested was valid as a search, and the exigent circumstances doctrine justified the search of the call log for numbers associated with incoming calls.\textsuperscript{72} The court noted without pointing to the source of this evidence, that it is possible further incoming calls could erase or write over information relating to prior calls, hence the exigency.\textsuperscript{73}

**Conclusion**

Thus, it is clear that case law, pre- and post-\textit{Gant} continues to generate inconsistent results when it comes to warrantless searches of cell phones incident to an arrest. Some courts pay little attention to the facts, holding outright that a phone seized during an arrest is subject to search pursuant to \textit{Chimel}. Others, such as the SJC, focus on the limited scope of the search. Still others look to the nature of the crime with which the defendant is charged, holding, for instance, that drug dealers use phones, therefore, there is cause to believe that a cell phone on a drug dealer will contain incriminating evidence that may be subject to destruction by a defendant.\textsuperscript{74}

Close adherence to the Supreme Court’s search incident to an arrest cases do not justify any search of a cell phone seized once a person is placed under arrest and the device comes into the sole control of law enforcement. Today’s cell phones, which are really more like computers in many instances, cannot be likened to a cigarette case, wallet, or address book. Once a member of the public (or more important, law enforcement) gets a hold of those items, for example, little additional action is necessary to obtain further information concerning its contents. Thus, a person’s

\textsuperscript{67} 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009).
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1299-1301.
\textsuperscript{70} State v. Smith, 124 Ohio St. 3d 163, 164 (2009).
\textsuperscript{71} Id. at 168.
\textsuperscript{72} 289 F. Supp. 2d 1291, 1303-04 (D. Kan. 2003).
\textsuperscript{73} Id. at 1303. Some courts agree with this rationale. United States v. Young, CRIM.A. 505CR6301, 2006 WL 1302667, *13 (N.D.W. Va. May 9, 2006) (evidence was that the particular phone, a Motorola V3 “Razer,” had an automatic delete function that could be exercised by owner justifying search for text messages under exigent circumstances exception); United States v. Morales-Ortiz, 376 F. Supp. 2d 1131, 1142 (D.N.M. 2004) (holding because the search of the phone’s memory was more extensive than that in \textit{Parada}, which went only to the call log, exigent circumstances did not apply). See contra United States v. James, 1:06CR134 CDP, 2008 WL 1925032, n.3 (E.D. Mo. Apr. 29, 2008) aff’d in part sub nom. United States v. Dimovski, 618 F.3d 821 (8th Cir. 2010) (citing other cases). See Orso, supra note 50 at 197-200, for a fuller treatment of this issue.
\textsuperscript{74} Linking the search to the nature of crime for which the arrest was made was arguably rejected as relevant in \textit{Robinson}. See supra pp.____. That has not stopped courts from relying on this factor. See also, United States v. Nguon, No. CR. 12-40017-01-KES, 2013 WL 1338192, at *4 (D.S.D. March 29, 2013)(defendant was charged with sex trafficking offenses; a blackberry was seized from her car at time of arrest. Subsequent search upheld as incident to arrest in part because “cell phones are commonly used for pimping.” Id. at *1.)
expectation of privacy in such items may not be significant. On the other hand, even the simplest of cell phones requires the seeker to take multiple, affirmative steps to access any information, indicating the owner or possessor did not wish to share its contents with the world.75 If a defendant were arrested in his home, law enforcement would need a warrant to obtain records of his land line and probably his computer. The fact that devices performing the same functions as the aforementioned are now portable (and combined) should not justify intrusions without a warrant.

Further, courts that apply the search incident to arrest exception to justify warrantless searches of cell phones once the defendant is in custody, and/or the phone is in full control of law enforcement, are arguably undermining the fundamental tenets upon which Chimel and its progeny, particularly Gant, are based. In the later case, the Supreme Court noted that all the parties appeared to agree that the exception did not apply when there was “no realistic possibility” that the arrested could access the location where the evidence could be located, which in Gant, was a vehicle.76

Additionally, the fact that some crimes are facilitated by the use of cell phones should not be the sine qua non of a valid search, because, given the extensive use of cell phones today for all sorts of transactions and communications, criminal or not, the once limited exception to the warrant requirement would be expanded beyond manageable bounds.

It may be that court decisions affirming searches incident to arrest are, sub silentio, acknowledging the difficulty law enforcement encounters in this techno-crazed age, where spur-of-the-moment decisions to search must be made and resources to protect a cell phone against remote wiping may not be existent. Although some judges and commentators disagree, as a practical matter, there are few, if any, affordable and readily available ways that law enforcement can prevent destruction of information on the device, by the defendant or some other person, remotely or otherwise. The accessibility of such protective devices or tools to local law enforcement ought to play a part in determining whether this exception to the warrant requirement is going to subsume the rule.

The SJC has made it clear that its holdings are limited in that it has approved searches of only the most minimal scope, and it has intimated that permission to go further may not be readily forthcoming. However, the question still remains whether loyal adherence to the principles underlying the Supreme Court’s case law regarding warrantless searches pursuant to an arrest would permit even the slightest intrusion into the contents of a cell phone in the vast majority of cases decided thus far.

Although the SJC’s decisions do not necessarily strictly follow the parameters set forth in the United States Supreme Court’s search incident to arrest cases, its approach (resolution depends on the scope of the search under the circumstances) is consistent with the overarching principles of Fourth Amendment search law—reasonableness in light of one’s expectation of privacy. Thus, a third party accessing a cell phone by manipulating it one or two steps to access a “calls made” or “incoming calls” list is vastly different from conducting a wide scale search by a multitude of taps into a phone’s history of text messages, e-mails, documents, or photographs. Such a fact-based approach is arguably inconsistent with the high court’s insistence on creating a bright line test to govern the constitutionality of warrantless searches, but it may be the most practical resolution of the competing interests of law enforcement, privacy, and technology.

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75 How social media such as Facebook and Twitter affect the question of whether Americans have any legitimate expectation of privacy in stored and/or shared information, whether or not attempts are made to restrict access to that information is relevant to, but well beyond the subject of this article.
76 556 U.S. at 340.
One of the graduates of MSLaw’s inaugural class returned to Andover—not as a lawyer but a judge—to speak to the school’s newest graduates on May 31.

Justice John F. Lakin (’90), one of the newer members of the 12th Judicial Circuit Court in Florida (Sarasota, Manatee, and DeSoto Counties), emphasized the importance of practicing civility as they enter the legal profession. “You need to be a person of action, but still be a person of reflection,” Lakin instructed. “You should not be driven by your own self-aggrandizement; your goal and responsibility is to protect your client’s interest first, not your own. Remember that the reputation you make early on as a lawyer will last a long time.” Lakin cited Nelson Mandela and Raymond Aubrac (leader of French resistance during World War II) as heroic examples of individuals overcoming years of personal injustice and obstacles to effect justice for others. “They did not let revenge or their own self motives be the rule of the day, nor did they allow their positions of power to abuse the rights of others. This is the essence of the law: the justice system can be slow, but in the end, it is the rule of law, and not the sword, that matters the most.”

The judge was instrumental in founding the law school, as he physically helped build the interior of MSLaw’s first building. He served as the school’s first president of the Student Bar Association, and after graduating, he practiced criminal defense in Boston before starting his own firm in Andover (Broadhurst, Lakin & Lakin) with his twin brother Ken and fellow graduate (and current MSLaw Trustee) Arthur Broadhurst.

Sullivan Scholars Christine Brigham and Kristen Veitch addressed the 163 graduates with stories of their experience, appreciation for their professors, and advice for going forward. Associate Dean Michael Coyne then acknowledged and thanked Assistant Deans Diane Sullivan and Paula Kaldis for their role in creating the school, by believing in it in its infancy and working tirelessly to contribute to its success.
Leading the Way

In 1990, MSLaw graduated its first class of 15 students. In 2013, more than 150 students received their J.D. from MSLaw. MSLaw thanks those alumni who believed in the school in the beginning, paving the way for more the 3,000 lawyers since.

CLASS OF 1990

Richard Ahern  Kenneth Lakin
John Cascarano  Jo Anne Lanza
Debra Dewitt    Evan Pilavis
Celeste Difruscia Tim Stark
Robert Emmons   Diane Sullivan
Judy Forgays    Al Zappala
William Kring   Christian Zouzas
John Lakin

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In October 2012, MSLaw established a chapter of the International Law Students Association after Ali Shuaib (2L) and Catherine Okoh (3L) discovered their mutual interest in pursuing an international law career. They wanted to create a student organization that would promote both the study of international law on campus and the growth of educational and career opportunities in the field. They were soon joined by Fress Aritice, and the three formed an executive board. The group is part of the International Law Students Association (ILSA), a world-wide organization of law students and lawyers dedicated to the study and practice of international law.

MSL-ILSA hosted its first event a month later: a “Meet & Greet” that featured several speakers who shared their knowledge and experience in the field. Professor Thomas Martin was a member of ILSA’s predecessor organization during his years as a student at Harvard Law School, where he completed an internship in Kenya. Professor Martin spoke about how his ILSA experience expanded his knowledge and helped his legal career. Professor Kurt Olson explained how the legal field has become globalized due to the existence of the World Wide Web and cyberspace, citing *Yahoo!, Inc. v. La Ligue Contre de Racisme et L’Antisémitisme* to demonstrate how the Internet has created issues concerning jurisdiction and choice of law when it is used as a vehicle for the sale of products internationally. Finally, Professor Ursula Furi-Perry gave insight into the practical aspects of international business law, including drafting contracts between parties in different countries. The speakers identified the many areas of domestic law that have international ramifications, such as human rights, the internet/cyberspace, global warming, and intellectual property.

Attendees were also encouraged to enroll in the International law course offered by Professor Robert Forrest, who has worked as an attorney in Russia, has represented multiple foreign clients in the U.S. and abroad, and has conducted many international business transactions.

The group also makes information available regarding opportunities to study abroad. In fact, Aritice completed a summer program in the Netherlands at the Summer Institute for International Law and Policy. While there, he participated in six international and comparative law courses and took field trips to institutions such as the headquarters of the International Court of Justice, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the International Criminal Court, the Permanent Court of Arbitration, headquarters of NATO, and the Council for European Union.

In the spring, MSL-ILSA hosted two more successful events. The first was a panel discussion on Religious Law and the Legal System, attended by faculty members, staff, and students. Justice Joseph Trainor of the

**MSLaw Has International Flavor**

Professor Forrest emphasizes his point
Massachusetts Appeals Court (and an adjunct professor at MSLaw) spoke about religion’s role within the U.S. legal system and the challenges it presents. He discussed how a legal system is influenced by religious laws, what roles religion plays in a legal system and in international law, and whether religious laws can co-exist within a secular legal system. Professor Martin talked about the influence of religion and Christianity’s role on the law of equity jurisprudence and its development into modern U.S. law, and Professor Forrest described the influence of religion on international law and how different nations interact with each other when issues of contracts and financial transactions arise. A Question & Answer segment concluded the presentation.

Going from religion to recreation, MSL-ILSA then held an indoor international soccer tournament at Turf Time in Tewksbury. The event was aimed at getting the student body to come together and enjoy a day of fun before their final exams approached. Many students came and displayed their soccer skills.

Overall, the organization enjoyed a very successful first year and looks forward to sponsoring more events and activities which will give the student body deeper insight into the international legal field. The board already has plans to write an international law column in The Verdict and intends to participate in the Jessup International Moot Court Competition and the International Law Weekend.

Officers and members of MSL-ILSA look forward to growing and expanding within the MSLaw community. Students and alumni interested in joining ILSA or learning more about the organization are encouraged to contact any of the officers at mslaw.ilsa@gmail.com.
MSLaw Fosters Competitive School Spirit

MSLaw held its first interschool appellate advocacy competition on Saturday, December 1, 2012, a competition now to be run every semester at the conclusion of the Writing & Legal Advocacy class.

All students registered for Writing & Legal Advocacy are entered in the competition. Its purpose is to recognize excellence in written and oral advocacy. Rather than affording entrance to only a select few as most law schools do, MSLaw opens this competition to all the students as they prepare and argue a mock appeal at the conclusion of the Writing & Legal Advocacy class.

Awards are given to students for Best Brief and Best Oral Advocate. Students who advance to rounds two through four also are recognized. In round one, all students submit final briefs and argue in front of a three-judge panel. This also serves as the student’s final exam for the course. Eight students then advance to round two, the quarterfinal round. Four students then advance to round three, the semi-final round. Two of these four are chosen to compete in the finals.

The winner of the final round is named Best Oral Advocate of the competition. There is also an award for Best Brief, chosen by the course writing faculty.

For the December competition, the following eight students were chosen to advance to the quarterfinal round: Rhonda Bachrach, Mike Bencal, Judy Cox, Matthew Fallon, Kelly Maguire, Brian Scott, Ekaterina Zavadskaya, and Sofia Williams. Bachrach, Bencal, Cox, and Williams then advanced to the semi-finals. The finalists were Bachrach and Cox, with Cox winning overall and earning the title of Best Advocate. Ekaterina Zavadskaya was given the award for Best Brief.

In the spring competition, the following eight students advanced to the quarterfinal round: Ahmed Abusuliman, Mark Berry, Jessica Edwards, James Hetu, Bridgette Mercier, Marsha Springette, Vincent Van DerLinden, and Christopher Worthington. Edwards, Hetu, Mercier, and Worthington moved on to the semi-finals. The finalists were Edwards and Hetu. Hetu took top honors in both categories, winning Best Advocate and Best Brief for the appellee. Nice job, James! Lindsay Stewart won Best Brief for the appellant.

“These students were amazing advocates, who worked hard,” lauded Assistant Dean Paula Kaldis. “All students in the course took the competition seriously and did their best. Professors Alba Baccari, Paula Colby, Chris Cook, and Victoria Dickinson also deserve recognition for their work with all of the students. It is always a pleasure working with them, and I look forward to continuing this competition.”
On Monday, October 14, MSLaw will hold its 7th annual Columbus Day Golf tournament at Stow Acres Country Club. As always—and perhaps due to divine consideration and/or fear of angering Professor Sullivan—the weather will be sunny and warm (at least for October).

Last year’s event was a fine time for all in attendance, including celebrity guests and contestants Dan Rea and Mike Macklin of WBZ.

The tournament raised $7,000 dollars for the Shadow Fund, and the winning foursome of Michael Leamy, Keith Giannini, Scott Aubuchon, and Bryan Gauvin took home a VIP Tailgate Package for the December 10 Patriots/Texans game that included a VIP party with the players and four VIP tickets.

Ellen Di Pasquale studies her putt

Professor Olson measures distance for Closest to the Pin

Shadow Fund-raiser Extraordinaire Nolan Doherty practices his putts before teeing off
The Reformer

Students, alumni, faculty, and staff gathered on May 30th, 2013, to celebrate the Massachusetts School of Law’s 25th Anniversary and the 2013 graduating class. Associate Dean Michael Coyne orchestrated the party, which included more than 200 students and alumni on MSLaw’s back patio. Faculty, staff, and students enjoyed catching up and networking over drinks and appetizers.

Alum Chantelle Hashem (11’) remarked, “I celebrate the fact that my law school has been open for 25 years. I was two years old when my future was founded! I could not be more proud to have graduated from the finest law school in the country. Best wishes to the graduates of 2013! I will say that the Massachusetts School of Law at Andover has an outstanding legal program, brilliant professors and the best staff one could ask for!"

Since its founding in 1988, the school has now graduated more than 3,000 alumni. Dean Lawrence Velvel said, “In 1988, who would’ve thunk it?”

MSLaw Throws Birthday Party for 200 of its Closest Friends

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Radio Show Airs at MSLaw

By Paula Colby-Clements, Esq.

During the 2012-2013 academic year, MSLaw twice participated in WBZ radio’s popular Talk the Vote series. In October 2012, prior to the November election, Nightside with Dan Rea broadcast live from MSLaw’s historic old courtroom. The broadcast focused on issues surrounding the 2012 United States Presidential election. On the show with Dan Rea were political analyst Gene Hartigan and Paul Gelinis of the Boston Herald. The panelists discussed issues ranging from the economy, health care reform, and immigration to national security and terrorism. Dan Rea fielded questions from the live “studio” audience as well as from callers throughout the eastern seaboard. During the last 45 minutes of the show, Professors Paula Colby-Clements and Andy Starkis joined the panel to weigh in on the issues and take questions from MSLaw students.

Nightside with Dan Rea returned to the law school in June 2013, this time focusing on the Massachusetts Senate Special Election. On this occasion, Dan Rea was joined by Middleton Attorney and former Senate hopeful Marisa DeFranco, political analyst and commentator Adriana Cohen, and Scot Lehigh of the Boston Globe. The show was again broadcast live in front of a full studio audience. The debate became heated at times, as the panelists clashed over whether Ed Markey or Gabriel Gomez should be the person to take Senator Kerry’s long held seat. Public safety, mounting debt, immigration, and unemployment took center stage at that debate with candidates ultimately concentrating on whether Gomez or Markey could help the U.S. right the ship and get the economy moving at a better pace.

Having Nightside with Dan Rea broadcast from our courtrooms energized the building and those in attendance – both members of the MSLaw community and the public at large. On both evenings, WBZ radio listeners could hear the intelligent and probing questions coming from MSLaw students (and others) in the audience. “It is a pleasure having Dan Rea here,” commented Professor Paula Colby-Clements, who organized the events. “He has always been a big supporter of MSLaw and has, on many occasions, talked about MSLaw on his show. We hope to bring him and WBZ back to MSLaw sometime in the not too distant future.”

Professors Colby-Clements and Starkis field audience questions

Audience members asked questions on the air
**Flag Day**  
**Veterans’ Group Erects Flagpole on Law Day**

Shots rang out in front of the Massachusetts School of Law on a beautiful day in May as Revolutionary War re-enactor Daniel Murphy (’95) fired a rifle in an honorary salute. The salute began a solemn and moving ceremony attended by students, faculty, and members of the MSLaw board of trustees, as a United States flag was raised outside the school for the first time.

Two years ago, student Deanna Deveney realized the need for a flag outside of the school. With the support of Associate Dean Michael Coyne, she formed the MSLaw Veterans’ Association, to raise the money for the flag, flagpole, and granite marker honoring veterans. The 25-member-strong organization, led by Deveney and Vice President Hadler Charles—an Army staff sergeant—raised the $5,000 needed for the project by selling shirts, running benefits at local restaurants, and holding bake sales. Professor Paula Colby-Clements aided the group’s efforts and acted as its faculty advisor.

On May 4th, 2013, MSLaw dedicated the new pole and raised the flag with MSLaw alum Major John Kimball (’09) acting as Master of Ceremonies. The Andover Police Department honor guard raised the flag, and Marine Corp League Detachment #128 provided support as well.

During the ceremony, Professor Thomas Martin, a Navy veteran who served in Vietnam, reflected that when he was growing up, World War II veterans came back to a nation “which believed the war had been worth fighting.” However, no veteran since 1945 has been able to make the same claim. “I am going to start a veterans’ organization open to everyone discharged since 1945 and call it Veterans of Unpopular Wars,” remarked Martin. “I didn’t get a ticker-tape parade when I returned from Vietnam, but I returned knowing I had done my duty by my country but knowing it had changed me.”

After the raising of the flag, Juliet Willoughby (’05), sang the national anthem, and bagpiper and MSLaw student James Carney provided patriotic music at the close of the ceremony.

Deveney said, “The flagpole has brought the MSLaw community closer. From the day we began fundraising, the organization was given an overwhelming amount of support. Without the help of the students, staff, and faculty, we would never have reached our goal. Seeing the whole MSLaw community come together to honor the men and women that have continuously served our country made all of the work worthwhile. Throughout the ceremony, I kept reflecting on how blessed I was to be a part of the MSLaw community, and most of all
to be an American.”

Professor Colby-Clements agreed: “The ceremony itself was very moving. It was a beautiful tribute to all MSLAW alumni and students who have served or are serving in the Military as well as an ongoing tribute to all US Military personnel. Second, it was particularly moving for me because I have worked so closely with the handful of students who worked so hard to make this happen. The group that formed the veterans’ association truly did all of this from the ground up. From recognizing that there was a need for greater recognition on campus, forming and getting the group recognized as a chapter of the National Student Veterans of America, to running the endless bake sales and t-shirt sales, this group worked hard for the simple reason that it wanted to recognize students and alumni who are part of the military. The ceremony was a culmination of their hard work and I am proud of them and the fact that MSLaw is a place where we encourage students to take the lead on important issues, and we support them so they can see their goals reach reality.”

In the future, the Veterans’ Association plans to send packages to the troops overseas and eventually help veterans that are struggling with legal issues.
Despite competing with the first day of good weather after days of rain, Animal Law Day still attracted its usual crowd and even drew some new animal lovers to the event. Thanks to an appearance and book signing by author Tom Ryan (who also received the Humane-itarian Award), avid readers of Ryan’s remarkable story, *Following Atticus*, did just that, following Ryan and his miniature schnauzer to MSLaw to hear him speak. “Tom has been our most popular participant to date,” said Assistant Dean Diane Sullivan. “He charmed us all with his kindness and quick wit.”

Another Humane-itarian Award went to nine-year-old dog lover Nolan Doherty of Hingham, who, for his birthday party last year, asked that in lieu of bringing presents, guests donate to the Shadow Fund. He raised $1,000 at the party, and he is not done: he recently starting selling dog toys, donating all proceeds to the Shadow Fund. Nolan became aware of the Shadow Fund through his father Jack, who learned of its existence in his dealings with WBZ radio personality Dan Rea, a longtime champion of the cause.

The new and returning guests enjoyed another event-filled day of presentations and exhibits, highlighted by the ever-popular police canine demonstration and Curious Creatures. New addition BlueDog Training entertained the crowd with various dog tricks and an introduction to clicker training. The always successful event raised $5,000 for The Shadow Fund.
The Massachusetts School of Law Student Bar Association held its 25th Annual Law Day Gala on May 4th at the Indian Ridge Country Club. The theme was the Great Gatsby, in honor of the release of the remake of the film set in the decadent era of the Roaring 20s, and everyone arrived in the highest fashion. More than 150 students, faculty, and members of MSLaw’s Board of Trustees attended.

The Gala symbolizes the final gathering of the school year and celebrates students and faculty for their contributions to both the MSLaw and Andover communities. Professor Copani, in his usual fine form, was the master of ceremonies, and he left the audience laughing as always. The evening was replete with fine dining and dancing to music provided by a DJ.

The keynote speaker and Thurgood Marshall Award honoree was Beverly Chorbajian (’94). An attorney in Worcester, Beverly has had an extensive and distinguished career representing defendants in criminal cases and those whose civil rights have been infringed upon by state and federal governments. She gave an inspiring speech about her personal experiences and success achieved in spite of incredible hardships. The Thurgood Marshall Award is given to someone who champions civil rights causes.

In addition, the school honored alumni involved in law enforcement, including the following Chiefs of Police: Kenny A. Howell (Millbury, MA), Ernest Horn (Mendon, MA), Michael E. Reilly (Newbury, MA), Ronald Sellon, Jr. (Mansfield, MA), Roy E. Melnick (Los Lunas, NM), Eric M. Shears (Merrimack, MA), Lisa A. Holmes (W. Newbury, MA), Terrance M. Delehanty (Winthrop, MA), Ronald C. Weeks (Ret. Groveland, MA), and Paul F. Tucker (Salem, MA).

Among the faculty recipients was Professor Diane Sullivan, who received the Bell Appreciation award. The Bell Award goes to an outstanding faculty member whose efforts to MSLaw and its students are endless and selfless. Arvi Schott won the Community Spirit Award, which recognizes someone in the MSLaw community who has shown outstanding spirit and generosity. Professor Carmen Corsaro received the Outstanding Adjunct Award, for his time and commitment to the education and success in the legal profession of MSLaw students. Students Rosa Colon and Lindsay Egan won the Dean’s awards.

After the awards were given out, outgoing Student Bar Association President Alicia Brenes turned the reins over to the new SBA officers, who were sworn in to take on their duties. The new officers are President Andrew Boulanger, Vice President Amy Babcock, Treasurer Sandra Caldas, and Secretary Jakob Hamm.

Students and guests get into the spirit of the evening.

Professor Phil Coppola and his wife Donna don their best ‘20s attire.
Was “Whopper Winter” Really Rare?

by Professor Kurt Olson, Esq.

I tell my environmental law students how I get so frustrated when I hear TV meteorologists talk about what a whopper of a storm we’re having or how “impressive” a particular storm is. I understand that TV news is really all about entertainment these days, that weather prediction is an inexact science, and that these guys are lucky if they’re right half the time. What worries me is that these so-called experts never connect the dots between the cause of these “impressive” storms and the increasing frequency and intensity with which they’re occurring.

At least until Joe Joyce stood in three feet of storm surge in Marshfield (Massachusetts) [last February].

As the water cascaded into a residential neighborhood behind him, Joyce, the WBZ-TV meteorologist, said we should expect to see more water in coastal communities as sea levels rise an additional one or two feet in the next century. Now, while Joe never mentioned the cause that shall not be named—global warming—at least he injected some much-needed reality into the discussion. Unfortunately, according to the more realistic estimates provided by the most well-respected climate scientists, Joyce is likely a little short in his estimates.

Even conservative estimates by those in the know put global sea level increases at three to five feet this century, given the amount of carbon dioxide and other global warming gases already in the atmosphere. These are what climate scientists like to call the gases already in the pipeline because carbon dioxide and other gases persist in the atmosphere. CO2 dumped by industry and individuals 100 years ago are driving the temperature increases and the storms, droughts, and other climate anomalies that are affecting us today. Today, we continue to pump massive quantities of these gases into the atmosphere simply because we can’t muster the political will to overcome the enormous power of the fossil fuel industries.

Regrettably, continuing on our business-as-usual path translates into globally averaged temperature increases of between 10 and 12 degrees Fahrenheit in this century. This would mean temperatures not measured on Earth for millions of years, and this would put the ice sheets on both Greenland and Antarctica at dire risk. Should those two sheets disintegrate, we would likely see global sea level rise between 20 and 30 feet. Wave goodbye to the coastlines as you know them today.

Thus, the calculated ignorance of TV meteorologists strains credulity and causes understandable frustration among those who know what’s happening. WBZ’s chief meteorologist Todd Gutner, trying to offer excuses for his and his colleagues’ abject failure to predict the snow totals for the early March storm, offered the following: “It was very unpredictable and unprecedented for a weather pattern 600 miles away from us to funnel so much moisture into the storm.”

Sadly, it has now been almost 25 years since Dr. James Hansen of the NASA Goddard Institute for Space Studies predicted exactly such “unprecedented” events. Hansen addressed a congressional committee, telling legislators that as the Earth’s climate continued to warm, more moisture would rise from the planet’s major water bodies, essentially making water vapor the most plentiful global warming gas. In turn, this would cause huge accumulations or troughs of water in the atmosphere which would eventually spill out of the sky in monster storms.

Gutner should go back to his special weather truck, plug in some more numbers, and recognize that weather patterns half as big as continents will continue to impose their destructive effects on cities hundreds, and eventually thousands, of miles away.

At the end of a recent storm story, a newsman told viewers, “We’re starting to see the light at the end of the tunnel with this storm.” Just a warning: It may be a light at the end of this storm’s pipe, but it’s a deluge at the end of the climate tunnel.

This article appeared in the Concord Monitor on April 3, 2013.
Anyone even briefly perusing Bob Mabardy’s résumé would be likely to ask why this accomplished engineer-businessman would be attending law school well into his 60s. And it’s a reasonable question! Since graduating from Wentworth in 1965 with an associate’s degree, Bob has received a BS in Industrial Engineering from Northeastern, an MBA from Babson, and participated in a program for senior executives in state and local governments at the Kennedy School. His J.D. from MSLaw will be his fourth higher education degree. Not bad for someone who was told in high school he would probably not get into a bachelor’s degree program.

And Bob’s career path has been even more impressive. He has been with the Middlesex Company in a variety of capacities since 1995. Currently he is the President of Northeast operations of this nationally known construction and engineering company, specializing in the construction of bridges, highways, and mass transit systems. Before going to Middlesex, he was the Interim General Manager of the MBTA (yes, that MBTA), and the Associate Commissioner of the Massachusetts Highway Department. Prior to entering state service, he managed or worked for a variety of contracting and engineering firms in the Commonwealth, and lectured at Northeastern in the undergraduate business program for 13 years. Oh yes, in between receiving his associate’s and bachelor’s degrees, he served in the Navy during the Vietnam War.

Bob first thought about going to law school in 1991, when his son graduated from college. Ultimately, his son opted to follow his father’s footsteps and attend business school, but going to law school remained on Bob’s mind. He says personal and professional obstacles kept getting in his way. Finally in 2010, at age 64, he decided the time was right.

Bob was first drawn to MSLaw because he was concerned about how well he would do on the LSAT after being out of school for so long. He came to MSLaw twice in “informal” situations, and just wandered around the building. He was impressed with the apparent age range of the students, and, after reviewing the curriculum and catalogue, he decided to apply.

Bob readily admits that the greatest obstacle to succeeding in law school is his age. That, and balancing school and his demanding job as head of the Northeast Division of the Middlesex Company and General Manager of the entire 500-person company. In that capacity, he is not only responsible for overseeing all the construction projects in the Northeast, but he is also in charge of numerous departments, including Human Resources and Safety. The fact that he has also had a succession of medical issues probably has not helped. After successfully undergoing quadruple bypass surgery before attending MSLaw, and surviving complications from the venous transplant, his doctors discovered he had aggressive prostate and kidney cancer. It was in remission until recently, and he has been undergoing treatment intermittently for the disease while at MSLaw. No matter how debilitating the procedure, his friends and professors would say that Bob never misses a class, is always prepared, and never asks for special treatment because of his illness.

His family thought he was crazy to go to law school. Thankfully, he sees the end in sight, as he is taking Comparison this fall and hopes to graduate in December.

When asked about his experience thus far at MSLaw, Bob thoughtfully answered, “Most stu-
Students (at any college) complain throughout their attendance about the school, the professors, the workload, and any other thing they can think of. However, the reality is that when you complete your education, if you use it properly, it can have a significant effect on your future career and your life in general. I have been extremely fortunate to have attended excellent schools, and I have used that education to my advantage and worked very hard to excel in my career and earn the respect of many. MSLaw has been a great experience—even at my age. It reminded me of Wentworth [Institute of Technology], which was a “working school” at the time. We attended classes five days a week, all day long, unlike other colleges where students attended three or four days per week taking only a couple of courses each day. But when we graduated, many of us were welcomed into the working world and did exceedingly well. I believe the same will happen to many of the students at MSLaw, who are expected to work hard while attending and will reap the rewards when completed. I will be proud to say I am a graduate and alumnus of Massachusetts School of Law.”

Bob also speaks highly of faculty and other students. “I have had the pleasure of meeting some great educators who were always willing to meet with you and discuss any issues you may have,” he added. “I now consider several of these professors friends and know they will be there in the future should any questions or problems arise. In addition, I have met many students who I am certain will become lifelong friends. I am fortunate to be part of a study group, which included Tina Reynolds, Mike Simeola, Matt Shea, and John Ventura. The members of this group, which was formed within a couple of weeks of the very first semester and stayed together throughout, have assisted each other in many ways, and because of the team we formed, was one of the reasons we all have done well in school. I cannot thank these individuals enough for their support.”

When he first entered law school, Bob had no intention of taking the bar exam. However, after nearing the completion of law school, he has changed his mind.

“[At the Middlesex Company], [w]e are often hiring law firms to handle various legal tasks required,” Bob explained. “One of my duties has been to manage the legal work within our company, and now with some legal background, it has made that portion of my work much more understandable and somewhat easier to comprehend. The owners have been extremely generous allowing me the time to attend MSLaw and contributing financially to the costs of attending. The owner told me that once I graduate, he was going to pay me a retainer of $4.00/year for my legal services! I think that is fair!”

In whatever spare time he has, Bob enjoys boating and golf. But most of all, he enjoys being with his seven grandchildren, ages 1-14. They should be very proud of what their grandfather has accomplished and of what lies ahead. ■

Alison Gorbatov

Alison Shedlock Gorbatov is a third-year law student who manages the regulatory affairs department at Massachusetts General Hospital’s Cancer Center clinical trials office.

Before law school, Alison began her career as a social worker, working with individuals recovering from mental illness and people with disabilities. She had aspirations of pursuing a graduate degree, and for a while considered following in her mother’s footsteps by becoming a nurse practitioner. But before she could enroll in nursing school, Alison was offered an opportunity to work in the clinical trials office at Beth Israel Deaconess Medical Center (“BIDMC”) as a clinical research assistant. While working at BIDMC, Alison realized that although she wanted to continue her education, nursing would not be the right fit for her. Eventually, Alison secured her current position as the manager of the Regulatory Affairs department at MGH’s Cancer Center’s Protocol...
Office. In this position, she manages a team that oversees the highly-federally-regulated start-up process for clinical trials, specifically those involving investigational cancer-treatment drugs that are seeking FDA approval. Her office shepherds the study through the start-up process with the local Dana Farber Harvard Cancer Center's Institutional Review Board ("IRB") as well as insuring regulatory compliance with the FDA's multitude of rules and regulations. Her team drafts the necessary documents for a project's activation including the creation of informed consent documents, that help the subject to analyze the risk/benefit ratio of specific drugs and/or treatment plans with their study doctor. Another part of her role is acting as the "lead CRA" for all of the National Cancer Institute's (NCI) research at MGH. In that role, she is responsible for the oversight of data submission quality and data manager's response rates to data queries, as well as being the point person for all cooperative group audits, and is responsible for the drafting and implementation of corrective action plans as a result of the audits.

Alison says she was interested in law from the time she was very young. “I always was very interested in the law, specifically, in criminal law. Growing up, I idolized several family members that have had successful careers in law enforcement. Since I was young, I had planned to have a career in law enforcement. As a teenager, I held a leadership role with the law enforcement exploring program at my local police department and received several awards and scholarships related to my involvement with the program. I was a criminal justice major in college, and planned to apply to local departments after graduation.”

However, she decided that law enforcement was not compatible with having a family, so she ultimately switched her major from criminal justice to psychology, and she took a number of biology, statistics, and research methods courses, and began her series of jobs in health care.

After seeing a commercial for MSLaw on TV, Alison decided to apply to law school. “I hadn't considered law school prior to seeing the commercial because I lacked the self-confidence to believe I could be successful due to my dyslexia. Then I saw the commercial with Dean Coyne interviewing alumni. I listened to their stories about how they had overcome tremendous adversity, and I thought to myself, ‘Hey, if people that don't speak English as their first language can come to this country, and do this, maybe I could try too.’"

Alison thought she would like law school, but she never thought she would "love it." She admits that the work is hard, but worth it.

In her position at MGH, she sees that more individuals with J.D.s are applying for positions in compliance, auditing, and clinical trials. As someone involved in the hiring process, she recognizes the benefit of a degree in law. She has seen how her law school experience has helped to improve her writing and communication skills, especially in drafting informed consent documents, and her ability to analyze relevant regulations. By combining her experience in regulatory affairs and compliance with a law degree, she hopes this will not only allow her to excel at her current position, but also open many doors in the future. Alison plans to use her law degree to advance in her current field.

Aside from how a law degree may help in her career, MSLaw has changed Alison's life on a more personal level as well. She met her husband, Kenneth Gorbatov, her first year at MSLaw. Ken graduated in June. The two were married this spring, and are now expecting their first child.

Join the Justices!
As it has in years past, MSLaw welcomes the Court of Appeals for a live sitting in our historic courtroom. All are invited. If you would like to have lunch with the justices following the oral arguments, contact Professor Paula Colby-Clements at pcolby@mslaw.edu to reserve a spot.

Thursday, November 7
9:30 a.m. to 1:30 p.m.
Courtroom
In Karla King, we meet another accomplished MSLaw student/engineer. Karla started her career with Worcester engineering and environmental consulting firm Tighe & Bond in 2011, where she is an Environmental Project Engineer/Manager. Karla’s specialty is water quality—making sure drinking water is safe to consume, and that the water that goes down the drains of our homes or office buildings, or runs off outdoor surfaces does not contaminate fields, streams, rivers, oceans, or what we eat and drink. In her current job as an environmental engineer, she works with governments and private entities to ensure that they comply with federal and state laws and regulations relating to water quality. Simply put, she manages all kinds of construction projects, shepherding them from the design and permitting phase through construction and up to operation of the facility. For example, she has worked on construction and upgrade of water treatment facilities, and municipal sewer installations and replacements. She graduated from Northeastern University and received a Masters in Science in Engineering Management from Tufts University’s Gordon Institute.

As an environmental engineer, Karla says she has always been interested in policy and how laws and regulations that govern the industry in which she works are formulated and apply in the real world. She sees law school as a way that she can impact the regulatory nature of the industry from both creation and implementation points of view. She also looks forward to giving legal advice to her company and addressing regulatory issues on projects once she passes the bar.

She came to MSLaw because it offered flexibility in scheduling, was located reasonably near her home and work, and was attractive financially—less expensive with tuition payment plans. Of her choice to come to MSLaw she says: “MSLaw, in my mind, is unequivocally the professional’s law school of choice in Massachusetts. The specific program that caters to professionals includes an incredible night-time, part-time program that allows me to continue my current career while still pursuing a law degree. Without this tailored program to the working professional, my dream of going to a law school that fit into my work/life balance could not have been achieved. The values that MSLaw presents to it students highly resonate with my values and priorities. I have been continually impressed by the professors, the comprehensive material, the class size, the priority that the school puts for accessible tuition, and an extremely accessible campus location, all while accommodating to my career. MSLaw is the premier choice in my mind.” Karla is so impressed with her MSLaw education that she recently encouraged one of her good friends to enroll.

Karla was not unfamiliar with MSLaw’s “real life” approach to higher education. At Northeastern, she participated in its co-op program, getting hands-on experience as an engineer-in-training by working at other engineering firms while still in school. “MSLaw has impressed me with its real-world approach to education. MSLaw has on its faculty incredible professors who are practicing attorneys and passionate about what they bring to the classroom. The school’s self-proclaimed mission is to provide high-quality, legal education to capable persons and its approach to philosophy has exceeded many previous programs I’ve had the privilege to participate in.”

One of the areas in which engineering and the law intersect, and which Karla would like to explore more as an attorney/engineer, is hydraulic fracturing or “fracking.” She had the opportunity to do an independent study with

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Most people would tell you that they value their privacy. However, these days we all rush to publish the most intimate details of our private lives on Facebook, Twitter, and other social media outlets. Whether desiring to ascend a bigger stage, make more friends without the burden of face-to-face contact, or reach a bigger audience for their viewpoints, most remain blissfully ignorant of the potentially devastating consequences of thoughtless posts.

Unfortunately, these consequences can include criminal prosecution and catastrophes in civil suits. A case of mine—one of those cases that robs you of sleep because of what might have been—illustrates this point.

A client (let’s call her Annie) seemed to have a pretty good claim against an employer for constructive wrongful termination; Annie had to resign because of abusive practices in the workplace. Various laws protect workers from having to endure such environments, and these laws include worker’s compensation statutes.

The abusive practices in this case became so severe that Annie’s mental health was at risk, and perhaps her mental health (or lack thereof) helps explain her later behavior. The abusive practices included the employer severely criticizing Annie for failing to appropriately discipline employees under her control, repeatedly calling her at home when she was taking legitimate sick days to tell her that she needed to stop being a slacker, and writing scathing performance reviews which sharply conflicted with others’ reviews of Annie’s actual performance. Because of these practices, Annie brought a claim against the company claiming that it had caused generalized anxiety disorder, post-traumatic stress syndrome and depression. I felt like I’d been kicked in the gut; even though I had a chance to ask Annie whether her therapist had recommended such a trip to help her deal with her anxiety (he did), the damage was done.

More damage ensued. Annie had alleged that she could never return to work at company headquarters, but she would accept reassignment elsewhere. Upon further questioning by the company’s lawyer, Annie repeated what she had said in her complaint. Then, the company’s lawyer pulled out another document: an e-mail from Annie to a manager in which she suggested that she would accept an assignment at some other location or at headquarters under a different supervisor. After bending double from the kick to the gut, I now felt the sting of an uppercut to my chin, sending me reeling into the corner of the hearing room.

When it was over, the hearing officer informed us that she would send out her opinion within 30 days. Over dinner, I gave Annie the bad news: I had seen the hearing officer frown only twice during the process: when she heard about the Facebook posting and when she heard about the e-mail. I told Annie the likelihood of a ruling in our favor was not good, but I didn’t have the

continued on next page
heart to tell her that she should have told me she was a social media chatterbox and liked to share her thoughts in unencrypted emails.

A word to the wise to all your clients is in order: Before posting, texting or e-mailing, resist the urge. The bigger stage you seek is made of cracked, splintered floorboards.

King

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Professors Olson, Martin, and Dickinson studying the effect of this process on what is called the Marcellus Shale—a natural gas rich area that extends from New York’s Finger Lakes Region into Virginia, West Virginia, and Maryland. Hydraulic fracturing is the process of extracting natural gas from shale rock layers deep beneath the earth’s surface, by injecting highly pressurized fluids into the rock bed. Injection causes the gases to migrate into a place where they are accessible from the surface and can be extracted and used for fuel. Fracking is a highly controversial process, generally pitting energy companies against environmentalists, the latter viewing the technology as a danger to ground and drinking water sources, and a contributor to air pollution. Karla summarizes the debate as follows: “As an environmental engineer who deals with water quality, the permitting and regulations surrounding hydraulic fracturing are critical to protection of groundwater and drinking water resources. This technology has significant benefits to the United States in its ability to get independence from foreign fuel providers and to stop spending significant amounts of money offshore transporting and accessing these other fuel sources. A balance needs to be struck between environmental concerns, foreign independence, energy needs, and economic benefits. There need to be some environmental regulations in place to protect our water resources, but there also needs to a system in place to allow hydraulic fracturing to be conducted. Hydraulic fracturing has an opportunity to provide the United States with independence from foreign oil, address its energy needs, as well as a boost in a currently down economy.

However, it can’t be done at the expense of our environment, our water resources, or our citizens.”

Karla has also made it a point to maintain a good work-life balance. She is involved with a number of professional organizations. And she has become an avid runner and marathoner. She has run five Boston Marathons, including the 2013 Marathon. She was at mile 25 when the bombs went off. For the past two years, she has run for the Leukemia and Lymphoma Society, raising money to fight these diseases. She and her husband, Cassidy, with whom she lives in Ayer, will run the 2013 Chicago Marathon together. It is clear that with her ambition, accomplishments, and achievement, there is no slowing Karla down!