

**WITH LIBERTY AND JUSTICE FOR SOME:  
MASSACHUSETTS'SUPREME COURT ON LIFE AND DEATH  
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When it comes to persons at either end of the continuum of life, unborn human beings and people in persistent vegetative states, the Supreme Judicial Court (SJC) of Massachusetts has been less than solicitous in ensuring that everyone enjoys a full measure of life.

The SJC's power of judicial review stems from the Constitution of the Commonwealth of Massachusetts, in effect since 1780 and amended over one hundred times. Its case law regarding life issues represents an interplay between federal constitutional provisions and federal statutes, as interpreted authoritatively by the United States Supreme Court (USSC) and the United States Court of Appeals for the First Circuit, legislation duly enacted by the General Court (Massachusetts' term for its two-house legislature), common law, some administrative regulations, and most importantly for our purposes, the SJC's interpretation of state constitutional provisions and state law.

This paper focuses on the SJC's interpretation of state constitutional law, as the sources of its jurisprudence on life issues pertain more properly to other departments of government, either state or federal. Furthermore, its authority to interpret statutes and develop the common law is subject to legislative correction through the ordinary political process in a way its state constitutional interpretation is not. On the meaning of the Massachusetts Constitution, the SJC is the ultimate authority.

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## I. LIFE ISSUES

Human life runs along a continuum from conception until death, but the SJC has shown that it is only selectively willing to vindicate the right to life, particularly at life's beginning and ending stages.

### Abortion

In *Moe v. Secretary of Administration and Finance*,<sup>2</sup> the SJC found a state constitutional right to government funding for “medically necessary” abortions for indigent women. This decision, which the SJC rooted in the constitutional guarantee of due process, mandated government neutrality in funding between abortion and childbirth.<sup>3</sup> It stands in sharp contrast to the twice-affirmed decision of the United States Supreme Court refusing to find a similar right to federal or state funding for abortions under the U.S. Constitution.<sup>4</sup>

This case makes it clear that, in Massachusetts, the abortion right has been held to extend farther than *Roe v. Wade*<sup>5</sup>: “[W]e deal in this case with the application of principles to which this court is no stranger, and in an area in which our constitutional guarantee of due process has sometimes impelled us to go farther than the United States Supreme Court.”<sup>6</sup> *A fortiori*, there is a state constitutional right to an abortion. Even were the USSC to overturn *Roe v. Wade*, there would most likely be a state constitutional impediment to the statutory prohibition of abortion.

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<sup>2</sup>382 Mass. 629 (1981). Of the justices who heard this case, none remain on the bench of the SJC.

<sup>3</sup> Daniel Avila, *The Right to Choose, Neutrality, and Abortion Consent in Massachusetts*, 38 SUFFOLK U. L. REV. 511, 527 (2005).

<sup>4</sup> *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> *Moe*, 382 Mass. at 649.

More recently, in the case of *Planned Parenthood League of Massachusetts v. Attorney General*,<sup>7</sup> the SJC declared it unconstitutional under the state constitution for the law to require the consent of both parents to an abortion by a minor child. This was even with the existence of a judicial bypass mechanism established by the SJC for such cases (as required by USSC precedent). The judicial bypass in Massachusetts functions in practice as an automatic rubber stamp for abortions for minors in the event they do not want to tell their parents.<sup>8</sup>

Once again, the SJC abortion caselaw goes farther than that of the USSC, where two-parent consent laws have been upheld when an adequate judicial bypass is present. The SJC, however, decided effectively to rewrite the statute and simply require one parent, rather than two, to approve (of course, with judicial bypass always possible in any case). Then-SJC Justices Lynch and O'Connor, since retired, wrote notable dissents, commenting that the judicial rewriting of the statute was an unwarranted instance of judicial activism.

The legal status of the state law regarding informed consent and 24-hour waiting period for abortions<sup>9</sup> is noteworthy. These provisions were declared unconstitutional by the U.S. Court of Appeals for the First Circuit in the early 1980s,<sup>10</sup> before the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>11</sup> *Casey* made it clear these provisions were facially constitutional under the federal constitution. But a succession of state attorneys general has refused to re-open the case and seek relief from the now-superseded declaratory judgment. Of course, if the federal judgment declaring the informed-consent/24-hour-waiting period

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<sup>7</sup> 424 Mass. 586 (1997); *see infra* pp.9-10.

<sup>8</sup> Uniform Procedures Regarding Petitions for Abortion Authorization, MASS. GEN. LAWS ch. 112, § 12 (1981) (also referred to as Standing Order 5-81).

<sup>9</sup> Mass. Gen. Laws ch. 112, §12S (1974; amended 1980).

<sup>10</sup> *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981).

<sup>11</sup> 505 U.S. 833 (1992).

unconstitutional were to be lifted, the SJC could easily issue a similar ruling under the state constitution. The legislature could also be pressured to repeal or amend the statute, as the balance of power in the General Court has shifted from pro-life in the 1970s and 1980s, when these laws were enacted, to pro-abortion at present.

### **Protection of the Unborn from Criminal Violence**

In marked contrast to its abortion case law, the SJC has ruled a viable fetus to be a “person” within the meaning of the Massachusetts motor vehicle homicide statute and, thus, is protected by the criminal law against attack by a third party other than the mother.<sup>12</sup> But, consistent with the abortion caselaw, the SJC has refused to find any legal duty of mothers towards their fetuses and has decided a child, born alive, could not “maintain a cause of action in tort against her mother for personal injuries incurred before birth because of the mother's negligence.”<sup>13</sup> In other contexts, the SJC has determined a viable fetus to be a person for purposes of tort recovery under the state’s wrongful death act<sup>14</sup> and later extended recovery to a pre-viable fetus born alive who died within a few hours.<sup>15</sup> In a later case, however, the court refused to extend the recovery to a pre-viable fetus that was not born alive.<sup>16</sup>

### **Assisted Suicide**

In various fields of bioethics, the SJC has been a trailblazer. It has a leading case on the issue of substituted judgment, the standard by which courts decide what an incompetent patient would want:

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<sup>12</sup> *Remy v. MacDonald*, 440 Mass. 675, 681 n. 6 (2004). This case was decided by the current composition of the SJC.

<sup>13</sup> *Id.* at 675, 76.

<sup>14</sup> *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354 (1975).

<sup>15</sup> *Torigian v. Watertown News Co.*, 352 Mass. 446 (1967).

<sup>16</sup> *Thibert v. Milka*, 419 Mass. 693 (1995).

that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetence of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person.<sup>17</sup>

It could be argued taking into account the patient's present and future incompetence tilts the scales in favor of non-treatment. In *Brophy v. New England Sinai Hospital*, the court ruled a feeding tube could be disconnected from a person in a persistent vegetative state by a mere preponderance of the evidence as to what the person would want.<sup>18</sup> Arguably, this opens the door to passive euthanasia. Justice Nolan, joined by Justices O'Connor and Lynch, vigorously dissented. However, all of these justices have since retired from the SJC, along with the judges in the majority.

The SJC has recognized a right to refuse treatment for religious reasons or more generally for personal autonomy. *Norwood Hospital v. Munoz*,<sup>19</sup> and *Matter of Macauley*,<sup>20</sup> involve refusal of blood transfusions by Jehovah's Witnesses. While the SJC upheld the right of competent adults to refuse blood transfusions, parents do not have the right to decide to forego blood transfusions for their children.<sup>21</sup> Interestingly, the court's rationale for the right to refuse life-sustaining blood transfusions is the more extensive one of personal autonomy rather than just religious freedom, as the concurrence of Justice O'Connor, joined by Justices Nolan and Lynch,

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<sup>17</sup> *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977).

<sup>18</sup> *Brophy v. New England Sinai Hospital*, 398 Mass. 417 (1986).

<sup>19</sup> 409 Mass. 116 (1991).

<sup>20</sup> 409 Mass. 134 (1991).

<sup>21</sup> *Norwood Hosp. v. Munoz*, 409 Mass. 116 (1991); *Matter of Macauley*, 409 Mass. 134 (1991). Only Justice Greaney remains on the SJC.

makes clear: “I cannot subscribe to an opinion that endorses, as I believe this opinion does, a right to assisted suicide.”<sup>22</sup>

### **Healthcare Rights of Conscience**

Recently, the Massachusetts Legislature enacted an emergency contraception law which requires all emergency health-care providers to provide “emergency contraception” to those who seek it.<sup>23</sup> The statute has a very limited religious freedom exemption, which is limited to “to any institution operated by and for persons who rely exclusively upon treatment by spiritual means through prayer for healing, in accordance with the creed or tenets of a church or religious denomination, or patients whose religious beliefs limit the forms and qualities of treatment to which they may submit.”<sup>24</sup> Another statute, however, provides protection to health-care employees conscientiously opposed to abortion.<sup>25</sup> The interaction of these provisions has yet to be tested in the local courts, nor have their constitutional limits been determined.

### **Bioethics**

The leading case in Massachusetts is *A.Z. v. B.Z.*,<sup>26</sup> in which the SJC decided an agreement between spouses that frozen human embryos would be implanted in the wife was unenforceable. Because the arrangement would have made the husband a parent against his will, in the court’s eyes, the agreement violated public policy. The SJC repeatedly referred to the embryos as “pre-

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<sup>22</sup> 409 Mass. at 131.

<sup>23</sup> Mass. Gen. Laws ch. 111 § 11E (2005).

<sup>24</sup> *Id.*

<sup>25</sup> “Conscientious objection to abortion shall not be grounds for dismissal, suspension, demotion, failure to promote, discrimination in hiring, withholding of pay or refusal to grant financial assistance under any state aided project, or used in any way to the detriment of the individual in any hospital, clinic, medical, premedical, nursing, social work, or psychology school or state aided program or institution which is supported in whole or in part by the commonwealth.” Mass. Gen. Laws ch. 112 § 12I (1981).

<sup>26</sup> 431 Mass. 150 (2000). *supra* pp. 2-3.

embryos.” Of course, someone who has already begotten a frozen embryo is already a parent. State courts that have addressed the question of the disposition of frozen embryos do agree on one thing, despite agreement or not between the spouses. They agree the spouse who does not want the embryos to be implanted, and thus never come to term, wins.<sup>27</sup>

### **Cloning**

Thus far, the SJC has not decided any cases dealing with the subject of human cloning.

### **Destructive embryo research**

Thus far, the SJC has not decided any cases dealing with the subject of destructive embryo research.

## **II. JUDICIAL RESTRAINT**

The clearest example of activism on the part of the court is the 2003 decision in *Goodridge v. Dept. of Public Health*,<sup>28</sup> which declared same-sex marriage to be a right under the Massachusetts Constitution. It did so by the slenderest of majorities, 4-3. Other liberal courts around the country have thus far refused to follow suit, notably Washington State, New York, and New Jersey. The decision prompted a firestorm of controversy, causing public officials to engage in same-sex “weddings” against the law in California, New York, and Oregon. Many states rather promptly enacted state constitutional amendments to prevent such a judicial mandate. The audacity of this decision can only be compared to the decision of the USSC in *Roe v. Wade*.

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<sup>27</sup> In addition to *A.Z. v. B.Z.*, see *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); and *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

<sup>28</sup> 798 N.E. 2d 941 (Mass. 2003).

One of the dissents was written by Justice Martha B. Sosman, who died in March of 2007 from breast cancer. She wrote, “[T]he opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach.”<sup>29</sup>

Another example of activism in the Massachusetts Supreme Court is the parental consent case for minors’ abortions,<sup>30</sup> discussed in greater depth earlier in this article.(*see infra* pp. 2-3) There, a majority of the SJC, including only Justice Greaney of the current court,<sup>31</sup> held the two-parent requirement to be excessive and suggested rewriting the statute to require only one parent’s consent.

There is more discussion of the SJC’s role in the next section, which discusses the views of the Justices in more detail.

### **III. THE COURT**

Members of the Supreme Judicial Court, like all Massachusetts state court judges, are appointed by the Governor, with the consent of the Governor’s Council (an elected body that dates back to colonial times). In practice, nominees are rarely disapproved. They serve until mandatory retirement at age 70. The procedure for removal of judges, called a “bill of address,”

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<sup>29</sup> 798 N.E. 2d at 981 (Sosman, J., concurring).

<sup>30</sup> Planned Parenthood League of Mass. v. Attorney Gen., 424 Mass. 586 (1997).

<sup>31</sup> Margaret Marshall recused herself, presumably because she had been on the board of one of the plaintiff abortion clinics.

is by the Governor and Governor’s Council, with the concurrence of both houses of the legislature. An impeachable offense is not required, though in practice the procedure is rarely used. At present, no public form of judicial evaluation exists. However, *Massachusetts Lawyers Weekly*, the local legal periodical, is instituting a survey that will be published soon.

Most of the abortion case law, and much of the “right to die” case law in Massachusetts was decided before the appointment of the current members of the SJC, who are as follows:

<b>Member</b>	<b>Appointed by/year</b>	<b>Term expires</b>	<b>Miscellaneous</b>
Robert J. Cordy	Governor Cellucci (R)/2001	2019	- Biographical Information: Harvard Law School, 1974; Chief Legal Counsel for Gov. Weld  - Noteworthy Opinions: Dissent in <i>Goodridge</i> same-sex marriage case
Judith A. Cowin	Governor Cellucci (R)/1999	2012	- Biographical Information: Harvard Law School 1970; Former assistant DA  - Articles: Author of a number of technical pieces for Mass. Lawyers Weekly, Boston Bar Journal, and Mass. Law Review
John M. Greaney	Governor Dukakis (D)/1989	2009	- Biographical Information: NYU School of Law 1963
Roderick L. Ireland	Governor Weld (R)/1997	2014	- Biographical Information: Columbia Law School 1969 Faculty at Northeastern Univ. School of Law from 1978  - Articles: Author of “Juvenile Law,” vol. 44 in Mass. Practice Series
Margaret H. Marshall	Governor Weld (R)/1996	2014	- Biographical Information: Chief Justice since 1999; Yale Law School 1976; undergrad in South

			<p>Africa, where she was born; former general counsel of Harvard University; former president of the Boston Bar Association; married to former NY Times columnist and legal author Anthony Lewis</p> <p>- Speeches: Regularly speaks about judicial independence and the rule of law</p> <p>- Noteworthy Opinions: Chief architect and author of <i>Goodridge</i> 4-3 Same-sex marriage decision</p>
Francis X. Spina	Governor Cellucci (R)/1999	2016	<p>- Biographical Information: BC Law School 1971; former Ass't DA and legal aid lawyer</p> <p>- Articles: Author of a couple CLE articles</p>

Note there is a new vacancy on the SJC caused by the untimely death of Justice Sosman in March 2007. The new Governor, Deval Patrick, will choose her successor.

Probably the most salient fact regarding the personal history of the justices of the SJC is that two of them, Chief Justice Margaret Marshall and Justice Martha Sosman, were board-members of abortion clinics prior to their appointment to the court. Marshall sat on the board of Crittenton Hastings House, which at the time performed abortions, and Sosman on the board of Planned Parenthood. Marshall had also been General Counsel of Harvard University prior to her appointment, and in that capacity she reprimanded Professor Mary Ann Glendon of Harvard Law School for use of Harvard Law School stationery to make a pro-life statement. Meanwhile, other faculty routinely used Harvard stationery for causes deemed more politically correct.

Indeed, it seems for that reason that Justice Marshall recused herself from hearing and deciding the parental consent challenge discussed earlier, *Planned Parenthood v. Attorney General*,<sup>32</sup> because one of the plaintiffs in that case was Crittenton Hastings House, where she had been on the board of trustees from 1991 through 1995. However, Justice Margaret Marshall did not continue to recuse herself from decisions in which she could not be impartial. Cases involving Planned Parenthood continued to come before her court. In one such case, *Planned Parenthood v. Barbara Bell*,<sup>33</sup> the court affirmed an injunction establishing a 50-foot buffer zone in front of the Planned Parenthood abortion clinic in Brookline, applicable to an individual named Barbara Bell. This injunction arose from her attempts at dissuading women from obtaining abortions at the clinic. This case arose from another case, *Planned Parenthood v. Operation Rescue*,<sup>34</sup> which involved the Crittenton Hastings House as co-plaintiff with Planned Parenthood and with Barbara Bell as a co-defendant.

The cases shared plaintiffs, defendants, even attorneys for the plaintiff, and yet Justice Marshall did not recuse herself. Despite the fact that she no longer sat on the board, more significantly, she now sat on the bench adjudicating over this matter. The Code of Judicial Conduct requires recusal in the event that “impartiality might reasonably be questioned.”<sup>35</sup> The issue of judicial partiality is crucial as the Massachusetts Declaration of Rights constitutionally guarantees that “the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”

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<sup>32</sup> 424 Mass. 586 (1997).

<sup>33</sup> 424 Mass. 573 (1997),

<sup>34</sup> 1991 WL 214047 (Mass. Super. Oct. 17, 1991), aff’d in part by *Planned Parenthood v. Blake*, 417 Mass. 467 (1994).

<sup>35</sup> Rule 3(C)(1) of the Mass. S.J.C. Rule 3:09, Code of Judicial Conduct

By way of contrast, Justice Martha Sosman, who had been on the board of Planned Parenthood, articulated a judicial philosophy of restraint at her hearing before the Governor's Council. In addition to pledging to recuse herself all cases involving Planned Parenthood, "even if the case involves a leaky roof and not abortion or contraception,"<sup>36</sup> she testified: "No one elected me to anything and no one asked me to run the commonwealth from my courtroom. Making the law...is not in my job description. Nothing in our Constitution, state or federal, gives Martha Sosman or any other judge the power to inflict her own agenda, political or social, on the people of this commonwealth. I not only believe in judicial restraint, I practice what I preach."<sup>37</sup> She seems to have abided by that, most notably in the *Goodridge* gay marriage decision, where she was one of the three dissenters. Upon her death, Chief Justice Margaret Marshall called her a "jurist's jurist."

Two of the other members of the Court, Justices Greaney and Ireland, were in the majority in *Goodridge* and recently signed a rather extraordinary concurrence in a case concerning the certification of a citizen-initiated constitutional amendment regarding marriage by the attorney general. Though they concurred it had been properly certified, they opined that "the *Goodridge* decision may be irreversible because of its holding that no rational basis exists, or can be advanced, to support the definition of marriage proposed by the initiative and the fact that the *Goodridge* holding has become part of the fabric of the equality and liberty guarantees of

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<sup>36</sup> Karen E. Crummy, "Few protest nomination hearing of hopeful to high court," Boston Herald, July 20, 2000, p. 21.

<sup>37</sup> Dwight G. Duncan, "Unelected Judge is Imposing Her Values on Commonwealth," 32 M.L.W. 711, Dec. 1, 2003.

our Constitution.”<sup>38</sup> These judges are saying it may be unconstitutional to amend the Constitution. This has to be a high-water mark of judicial audacity.

The prospects for state judicial appointments under newly-elected liberal Democrat Governor Deval Patrick do not bode well for the pro-life movement in Massachusetts. This echoes the effect of politically liberal U.S. Senators Kennedy and Kerry vetting the appointments for the local federal bench of the United States District Court and the United States Court of Appeals for the First Circuit over the past decades. The results of such appointments have resulted in a pro-abortion slant on those courts, and not much better can be expected from Governor Patrick.

Whatever its merits in deciding technical legal questions that do not implicate socially controversial issues like abortion and gay marriage, the SJC has distinguished itself recently, in spite of its illustrious history, by its politically correct, result-oriented case law. Since the retirement of conservative Justice Joseph Nolan and his relatively conservative colleagues Justices O’Connor and Lynch, the SJC has acquired a liberal reputation that rivals New Jersey’s highest court for its activism. The USSC has reversed rulings by both the SJC and the New Jersey Supreme Court on account of the application of state public accommodation laws that violated the First Amendment in forbidding discrimination on the basis of sexual orientation. The cases involved the St. Patrick’s Day Parade in Boston and the Boy Scouts of America in New Jersey.<sup>39</sup>

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<sup>38</sup> Schulman v. Attorney Gen., 447 Mass. 189, 199 (2006).

<sup>39</sup> Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

## CONCLUSION

The Massachusetts Supreme Judicial Court, the state’s highest court and the oldest sitting court in the country, has interpreted the state constitution, also the oldest in the country, to require state funding of abortion for indigents (unlike the U.S. Supreme Court interpreting the U.S. Constitution, or the N.Y. Court of Appeals interpreting the New York constitution). It has also allowed life support to be disconnected on the basis of a mere preponderance of the evidence, again unlike New York and Missouri’s “clear and convincing evidence” test (as validated under the U.S. Constitution in the *Cruzan* decision).<sup>40</sup> In embryo adoption, it has consistently sided with the biological parent who wanted the destruction of the embryo. It has shown itself to be quite judicially active in invalidating statutes and laws with which it disagreed (e.g., the second-parent consent requirement for minors’ abortions, but most notably the *Goodridge* gay marriage decision). In the emerging fields of biotechnology, cloning, and embryo experimentation, the SJC remains relatively untested. But the combination of a liberal political culture, a largely uncritical liberal media, and the culture of some leading law schools and law firms tend to converge in thinking that judges and lawyers know best how to govern a sometimes unruly populace. This suggests the courts will remain at the center of the fight over issues of life and death for the foreseeable future, and that, consistent with the grand sweep of American history, we still need to guarantee liberty and justice to all human beings, born and unborn, no matter how small or senile—even, or especially, in Massachusetts, the cradle of liberty in the American Revolution and abolition in the nineteenth century.

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<sup>40</sup> *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261 (1990).