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A PRACTICAL OVERVIEW OF MASSACHUSETTS GENERAL LAWS CHAPTER 123A: CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

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INTRODUCTION

At times, concepts of criminal law spill over into its civil counterpart, thereby affecting the liberty interests of one of the parties involved in a civil proceeding.[1] There is no clearer example of this merger of criminal and civil law than under chapter 123A of the Massachusetts General Laws ("chapter 123A").[2] Under this statute, a civil process can become the vehicle for the Commonwealth of Massachusetts ("Commonwealth") to indefinitely commit a person who is found by a jury or a court to be a sexually dangerous

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1. Throughout this article, the authors will refer to a person against whom a chapter 123A proceeding has been brought as "defendant," "inmate," "person," "prisoner," and other titles in accordance with the applicable sections of the Massachusetts General Laws. MASS. GEN. LAWS ch. 123A (2000).

2. Care, Treatment and Rehabilitation of Sexually Dangerous Persons, MASS. GEN. LAWS ch. 123A (2000).

person.[3] Such a commitment has the potential to restrain a person's freedom, to force him or her to undergo treatment to correct the alleged disorder, and create a social stigma that can last throughout a person's lifetime.[4]

The current version of chapter 123A may have serious consequences for persons subjected to its provisions. Because it is relatively new, the appellate courts have only begun to give the law ample legal analysis. Moreover, the statute contains numerous convoluted procedural requirements and time restraints.[5] It follows, therefore, that the statute deserves a great deal of scrutiny and careful review by any counsel, court, or defendant involved in chapter 123A proceedings.[6] This is also an area of law that will undoubtedly evolve as the courts and legislature monitor the statute's shortcomings as well as its successes.[7]

The purpose of this article is threefold. First, it is designed to provide a brief history of chapter 123A of the Massachusetts General Laws. Second, this article will offer an overview of the Massachusetts Supreme Judicial Court decision in *Commonwealth v. Bruno*.[8] Third, it will present a detailed road map of chapter 123A. Where appropriate, this article will highlight important areas of law and procedural requirements, as well as note relevant decisions of the Massachusetts Superior Court, the court before which chapter 123A proceedings are brought. Finally, this article will conduct a brief analysis of certain complications arising under this statute, most of which the Massachusetts courts have not yet fully addressed, and which should be of particular significance to any party involved in a 123A proceeding. This final discussion is in no way intended to be an exhaustive account of all of the potential issues that may arise under the statute. Instead, its purpose is to highlight selected issues most likely to develop as this area of law continues to evolve.

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3. 1999 Mass. Acts 74, § 14(d).

4. *See id.*

5. *See* discussion *infra* Part II (providing a discussion of *Commonwealth v. Bruno*, 735 N.E.2d 1222 (Mass. 2000)); *infra* Part III (providing a discussion of MASS. GEN. LAWS ch. 123A (2000)).

6. *See generally* MCLE, INC., SDP HEARINGS: LEARN THE LAW, MEDICINE AND PRACTICE INVOLVED IN COMMITMENT OF SEXUALLY DANGEROUS PERSONS (2001).

7. Additional information on this evolving statute can be found at the web site of the Committee for Public Counsel Services ("CPCS"), Mental Health Litigation Unit, *available at* http://www.state.ma.us/cpcs/mhp/mhpSDP.html. CPCS's web site provides an overview of chapter 123A and provides updates and practical information for attorneys who represent, or are interested in representing, persons subjected to this statute.

8. 735 N.E.2d 1222 (Mass. 2000).

I. A BRIEF HISTORY AND BACKGROUND OF CHAPTER 123A OF THE MASSACHUSETTS GENERAL LAWS

Massachusetts is not alone in enacting a statute that subjects people classified as "sexually dangerous persons" to civil commitment for an indeterminate and possibly indefinite period of time.[9] Partly in response to increased pressure from the public and the media, many state legislatures have enacted similar statutes to prevent recidivism in persons who have previously been convicted of crimes of a sexual nature and have been released back into society.[10] Additionally, states have passed laws requiring persons convicted of certain sexual crimes to register with local police departments in order to allow members of the public to request and obtain information on any registered person.[11]

While the current incarnation of the Massachusetts sexually dangerous persons statute may have been the result of recent pressure and a desire to follow the national trend, chapter 123A itself is not new. The original version of the statute was first enacted in 1947.[12] Subsequently, the statute underwent several amendments

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9. While the term "sexually dangerous person" is sometimes replaced with "sexually violent predator," or "convicted sex offender," other states have statutes that are similar to chapter 123A. ARIZ. REV. STAT. ANN. §§ 36-3701 to 36-3707 (West 2001); CAL. WELF. & INST. CODE §§ 6600-02 (West 2001); COLO. REV. STAT. ANN. §§ 16-13-201 to 16-13-216 (West 1998); CONN. GEN. STAT. §§ 17a-566 to 17a-570 (2001); 725 ILL. COMP. STAT. ANN., 205/.01 to 205/.12 (West 1992); IOWA CODE ANN. § 229A.1 (West 2000); KAN. STAT. ANN. §§ 59-29a01 to 59-29a15 (Supp. 2001); MINN. STAT. ANN. § 253B (West Supp. 2001-2002); NEB. REV. STAT. §§ 29-2922 to 29-2936 (Supp. 2001); N.J. STAT. ANN. §§ 2C:47-1 to 2C:47-10, 2C:7-1 to 2C:7-11 (West Supp. 2001); N.M. STAT. ANN. § 43-1-1 (West 2000); OR. REV. STAT. §§ 426.510 to 426.680 (2001); TENN. CODE ANN. §§ 33-6-301 to 33-6-306 (2001); UTAH CODE ANN. §§ 77-16-1 to 77-16-5 (1999); VA. CODE ANN. §§ 19.2-300 to 19.2-311 (Michie 2000); WASH. REV. CODE ANN. § 71.09.020 (West Supp. 2001-2002); WIS. STAT. ANN. §§ 980.01 to 980.06 (West 2000).

10. For a detailed discussion of public and media influences on courts and legislatures to pass laws that deal harshly with convicted sex offenders, see Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39 (1998). For a detailed history of sex offender laws and their predecessors including the sexual psychopath statutes that were passed between 1930-1960, see Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998).

The Ohio legislature recently amended its sexual offender laws to cover minors. *See Taft Signs Bill Subjecting Teens to Megan's Law*, CINCINNATI ENQUIRER, July 28, 2001, *available at* http://enquirer.com/editions/2001/07/28/; Andrew Welsh-Huggins, *Plan Seeks to Lower "Sexual Predator" Age*, CINCINNATI ENQUIRER, Apr. 10, 2001, *available at* http://enquirer.com/editions/2001/04/10/.

11. *See, e.g.*, MASS. GEN. LAWS ch. 178C (2000); MASS. REGS. CODE tit. 803, § 1.40 (2001).

12. 1947 Mass. Acts 683.

over the intervening years until its repeal in 1990.[13]

Prior to its repeal in 1990, chapter 123A, section 4 of the Massachusetts General Laws provided that once a defendant was found guilty of a sexual offense in the superior court, the court or the Commonwealth could initiate an examination of the defendant by a qualified examiner. The examination would determine whether the defendant was a sexually dangerous person[14] and should be subjected to further observation and diagnosis.[15] In such instances, this examination would occur after the defendant was found guilty but prior to sentencing.[16] Under the old version of chapter 123A, if the examiners' reports did not clearly indicate that the defendant was sexually dangerous, then the court would proceed to impose a sentence on the original offense.[17] If the qualified examiners filed re-

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13. MASS. GEN. LAWS ch. 123A (1947), *amended by* 1954 Mass. Acts 686, 1958 Mass. Acts 646, and 1985 Mass. Acts 752; 1990 Mass. Acts 150, § 304 (repealing the provisions of chapter 123A that provided for the commitment of sexually dangerous persons); *id.* § 104 (requiring those defendants committed under the statute prior to the repeal to remain subject to its provisions, including treatment).

14. Under the previous version of chapter 123A of the Massachusetts General Laws, a "sexually dangerous person" was defined as:

> [A]ny person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of sixteen years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

MASS. GEN. LAWS ch. 123A, § 1 (1989) (repealed 1990).

15. Prior to its repeal, chapter 123A, section 4 of the Massachusetts General Laws read in pertinent part:

> Upon the determination of guilt of a person in the superior court of a sexual offense . . . the court may, on its own motion or upon motion of the commonwealth, prior to imposing sentence, cause the person to be examined by a qualified examiner at the court or jail in which the person is held, or at any other place if the person is not in custody. The examiner shall conduct a screening examination for sexual dangerousness, and shall report within ten days to the court in writing on a form provided by the commonwealth. Such report shall include the examiner's recommendation as to whether or not the person examined should be committed to the center for further observation and diagnosis.

Id. § 4.

16. *Id.*

17. Prior to its repeal, chapter 123A, section 5 of the Massachusetts General Laws read in pertinent part:

> If, after a person['s] sixty day period of observation, the report filed with the court by the two qualified examiners clearly indicates that the person is a sexually dangerous person, the court shall give notice to such person that a hearing will be held to determine whether or not he is a sexually dangerous person. If said report does not clearly indicate that the person is a sexually

ports indicating that the defendant was, in their opinion, sexually dangerous, then the court would hold a hearing to determine whether the defendant was to be classified as a "sexually dangerous person."[18] Once the defendant was determined to be a "sexually dangerous person," the court would then order that the defendant be committed and undergo treatment for an "indeterminate period of a minimum of one day and a maximum of such person's natural life."[19] This commitment would run concurrently with a sentence imposed on the underlying sexual offense.[20] Any defendant committed under this statute was entitled to petition the court annually for his or her release.[21]

In chapter 74, sections 3 through 8 of the Massachusetts Acts and Resolves of 1999, the Massachusetts legislature gave new life to the repealed provisions of chapter 123A of Massachusetts General Laws.[22] Under these revisions, the Commonwealth, through a local District Attorney's office or the Office of the Attorney General of the Commonwealth, could petition the Superior Court for the commitment and treatment of sexually dangerous persons.[23] Due to the fact that chapter 123A allows the Commonwealth to compromise a defendant's liberty interests in the attempt to protect society from

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dangerous person, the court shall proceed to impose sentence as provided by law for the original offense.

Upon the motion of a person for whom a hearing is to be held or upon its own motion, the court shall, if necessary to protect the rights of such person, appoint counsel for him. Such person shall be entitled to have process issued from the court to compel the attendance of witnesses in his behalf. Upon such hearing it shall be competent to introduce evidence of the person's juvenile and adult court and probation records, psychiatric and psychological records, and any other evidence that tends to indicate that he is a sexually dangerous person. Any qualified examiner's report filed under this chapter shall be admissible in evidence in such hearing.

If the court finds upon such hearing that the person is not a sexually dangerous person, it shall proceed to impose sentence as provided by law for the original offense. If the court finds upon such hearing that the person is a sexually dangerous person, it shall sentence such person as provided by law for the original offense and may also commit such person to the center, . . . for an indeterminate period of a minimum of one day and a maximum of such person's natural life. A person who is both committed and sentenced under this section shall serve such sentence concurrently with the commitment.

MASS. GEN. LAWS ch. 123A, § 5 (1989) (repealed 1990).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* § 9 (1989) (repealed 1990).

22. 1999 Mass. Acts 74.

23. *See* discussion *infra* Part III.A (discussing the definition of "sexually dangerous persons").

sexual predators, the statute's constitutionality has come into question in the courts of Massachusetts.[24]

The United States Supreme Court resolved many constitutional questions when it found Kansas' sexually violent predator commitment statute to be constitutionally sound in *Kansas v. Hendricks*.[25] Similar to chapter 123A, the Kansas statute allows for the civil commitment of "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."[26] The Supreme Court held that the Kansas statute was constitutional because it satisfied due process requirements, did not violate the defendant's double jeopardy rights, and was not an ex post facto criminal law.[27]

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24. The Massachusetts Supreme Judicial Court found chapter 123A to be constitutionally sound. Commonwealth v. Bruno, 735 N.E.2d 1222, 1240 (Mass. 2000); *see* discussion *infra* Part II. Constitutional challenges to the statute, however, continue to arise. *See, e.g.*, Commonwealth v. Kennedy, 762 N.E.2d 794, 794 (Mass. 2001) (allowing defendant's motion to dismiss upon concluding that there was a "violation of the clear and unambiguous statutory language requiring (a) that the defendant in a G.L. c. 123A case be committed for an initial period not exceeding sixty days, and (b) that the reports of the examination and diagnosis be filed within forty-five days").

25. 521 U.S. 346 (1997).

26. KAN. STAT. ANN. § 59-29a02(a) (2000).

27. *Hendricks*, 521 U.S. at 356-71. Justice Thomas, writing the opinion for the 5-4 majority, first addressed the defendant's argument that the Act's definition of "mental abnormality" did not satisfy substantive due process requirements. *Id.* at 356. The Court stated that "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context." *Id.* The Court then concluded that a defendant's mental illness and a likelihood of future dangerousness can be grounds for civil confinement. *Id.* at 358. "[L]ack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes [a defendant] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. [A defendant's] diagnosis as a pedophile . . . under the [statute], thus plainly suffices for due process purposes." *Id.* at 360.

The Court then addressed the arguments that the civil commitment was ex post facto lawmaking and subjected defendants to double jeopardy. *Id.* at 361. The Court noted that in order for these two principles to apply, the Kansas Act would have to be classified as criminal and subject a person to punishment. *Id.* at 361. The Court ultimately concluded that the Act was not punishment, as it did not implicate the two primary objectives of criminal punishment: retribution or deterrence. *Id.* at 361-62. Furthermore, the Act did not criminalize conduct that was legal before its enactment. *Id.* at 371. The Court concluded that double jeopardy would not arise in such situations and the defendant would not be punished for the same crime twice, because the original conviction would be used for an evidentiary purpose to show his or her dangerousness. *Id.* at 369-70.

Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy joined Justice Thomas' opinion. Kennedy filed a concurring opinion, and Justice Breyer filed a dissenting opinion in which Justices Stevens and Souter joined, and Justice Ginsburg joined in part.

Given the current trend in the law, it appears that civil statutes impacting the post-incarceration liberties and conduct of convicted sex offenders are on solid ground. In Massachusetts for example, the Supreme Judicial Court ("SJC") determined the Sex Offender Registration Act to be constitutional.[28] Specifically, the SJC ruled that the Act did not violate constitutional principles of due process rights, equal protection rights, protections from invasions of pri-

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Justice Kennedy did not appear to be entirely comfortable with the concept of civil commitment for sexually dangerous persons. *Id.* at 373 (Kennedy, J., concurring). His concurrence seems to suggest that not all civil commitment statutes are constitutional and that the Court should revisit the issue after the true impact of these statutes is known. *Id.* (Kennedy, J., concurring) ("If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.").

Justice Breyer, writing for the dissenting Justices, agreed that the Act's "definition of 'mental abnormality' satisfies the 'substantive' due process requirements," but was not convinced that the Act did not inflict further punishment on defendants. *Id.* at 373-74 (Breyer, J., dissenting). The dissent was especially concerned that the defendant in the case before it was not provided with treatment until after his release from prison, and when he did receive treatment, the treatment was inadequate. *Id.* (Breyer, J., dissenting). This appears to leave open the possibility that at least some of the dissenting Justices would join the majority if better treatment was offered at an earlier stage in a person's incarceration. Justice Breyer also stated that "[t]o find a violation of [the Ex Post Facto Clause] here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes." *Id.* at 395. In the appendix to his opinion, Breyer noted that the Kansas statute is the only one of its kind that specifically: 1) delays treatment, 2) fails to consider less restrictive alternatives, and 3) applies to pre-Act crimes. *Id.* app. at 397 (Breyer, J., dissenting).

In another recent Supreme Court decision, Justice O'Connor's majority opinion relied on *Kansas v. Hendricks* in determining that a defendant charged under a state's sexual predator statute is foreclosed from raising the argument that the statute violates constitutional provisions of double jeopardy and ex post facto punishment as the terms of the statutory commitment are "applied to" him. Seling v. Young, 531 U.S. 250, 250 (2001). The Court concluded that the "as applied to" analysis would never definitively determine whether commitment and confinement prescribed by the statute was punitive and thereby in violation of the aforementioned constitutional provisions. *Id.* at 262. In his discussion, Justice Stevens asserted that the majority had assumed the statute was civil and not criminal, and had not conducted analysis related to the double jeopardy and ex post facto constitutional ramifications. *Id.* at 275-76 (Stevens, J., dissenting). For a detailed discussion of *Seling v. Young*, see Kathleen Dolegowski, *Sexually Violent Predator Act Does Not Offend Double Jeopardy and Ex Post Facto Clauses*, LAW. J., Apr. 6, 2001, at 2.

Finally, it should be noted that the Supreme Court revisited Kansas' sexually violent predator statute. Kansas v. Crane, 122 S.Ct. 867 (2002). In *Kansas v. Crane*, the Court held the statute did not require the state to prove an offender's total or complete lack of control over his dangerous behavior. *Id.* at 870. The Federal Constitution does not, however, allow civil commitment under the statute without any lack of control determination. *Id.*

28. Opinion of the Justices to the Senate, 668 N.E.2d 738 (Mass. 1996).

vacy, or protection from ex post facto laws.[29] More recently, with respect to chapter 123A, the SJC upheld the statute's constitutionality in *Commonwealth v. Bruno*.[30]

II. AN OVERVIEW OF *COMMONWEALTH V. BRUNO*

In *Commonwealth v. Bruno*, the SJC took the opportunity to address several unresolved issues regarding chapter 123A.[31] This section of the article will explore the *Bruno* decision in hopes of achieving a better grasp of how the SJC interprets chapter 123A. Preliminarily, however, it is first important to understand the procedural posture of *Bruno*.

A. *Procedural Posture*

The three defendants in the *Bruno* case, Lawrence A. Bruno, James D. Wilson, and Carlos L. Davila, committed sexual offenses before the effective date of the amendments to chapter 123A.[32] Prior to each defendant's scheduled release, the Commonwealth filed a petition seeking to commit each defendant as a sexually dangerous person.[33] Each defendant filed a successful motion to dismiss the Commonwealth's petition.[34] The Commonwealth then appealed each order to dismiss.[35]

The judge in Mr. Wilson's case ordered Mr. Wilson committed and reported his order to the appeals court along with six questions of law.[36] The appeals court (Laurence, J.) then heard the Commonwealth's motion to stay Mr. Wilson's release from civil commit-

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29. *Id.* at 739.

30. 735 N.E.2d 1222 (Mass. 2000).

31. *Id.* at 1225-26; *see* 1999 Mass. Acts 74, §§ 3-8.

32. September 10, 1999 was the effective date of the Massachusetts Act amending chapter 123A, and the Act has remained unamended since that time. MASS. GEN. LAWS ch. 123A (2000); 1999 Mass. Acts. 74, §§ 3-8. There are a number of offenses that can trigger the civil confinement proceedings. In this case, the defendant Bruno was sentenced to a ten-to-twenty-year sentence for aggravated rape on November 2, 1981. The defendant Davila was sentenced to a two and one-half-year sentence for rape to which he pled guilty on November 10, 1997. The defendant Wilson was sentenced to a six-to-ten-year sentence for indecent assault and battery on a child less than fourteen years, second and subsequent offense, on November 7, 1990. *Bruno*, 735 N.E.2d at 1225 n.2.

33. *Id.* at 1225.

34. *Id.*

35. *Id.*

36. The six questions, as presented by Judge Borenstein, were:

(1) Is the same probable cause to arrest standard, which is required to be reviewed by a judicial officer within twenty-four (24) hours after a person's detention, under *Jenkins v. Chief Justice of the Dist. Court*, 619 N.E.2d 324, 337 (Mass. 1993), also applicable when, pursuant to G.L. c. 123A, § 12(e), a peti-

ment.[37] Justice Ireland, sitting as a single justice of the SJC, ordered all appeals in the three defendants' cases, along with the six questions of law reported by Judge Borenstein, to be consolidated and transferred to the SJC for a full hearing.[38] Mr. Davila and Mr. Wilson remain committed pending the outcome of the appeal to the SJC.[39]

Ultimately, the SJC held that any person who committed a sexual offense predating September 10, 1999 could be civilly confined under chapter 123A.[40] In so doing, the court addressed several legal issues raised both by the defendants and the courts sua sponte.[41] The article will discuss the following matters addressed by the SJC in *Bruno*: 1) retroactivity of chapter 123A,[42] 2) whether the statute

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tion is filed requesting an initial, temporary commitment of an alleged Sexually Dangerous Person (S.D.P.) pending the probable cause hearing?

(2) Is the Commonwealth required to submit forensic evidence in support of the claim that the defendant has a mental abnormality or personality disorder as defined by G.L. c. 123A, § 1, at the time it files a petition under G.L. c. 123A, § 12(e) for the initial, temporary commitment of an S.D.P. pending the probable cause hearing?

(3) If the answer to question two (2) is no, must the Commonwealth provide forensic evidence in support of the claim that the defendant has a mental abnormality or personality disorder as defined by G.L. c. 123A, § 1, at any time before the probable cause hearing, in order to continue to temporarily commit a defendant pursuant to G.L. c. 123A, § 12(e)?

(4) If the answer to question three (3) is no, pursuant to G.L. c. 123A, § 12(e), how long may a person be temporarily committed before a probable cause hearing is held?

(5) Under G.L. c. 123A, § 13(a), must the Commonwealth present forensic evidence at the probable cause hearing in support of the claim that the defendant has a mental abnormality or personality disorder, as defined by G.L. c. 123A, § 1?

(6) Should alleged sexually dangerous persons who are temporarily committed pending their probable cause hearing, and/or after a finding of probable cause, be held separately from persons already adjudicated to be sexually dangerous persons?

Id. at 1226 n.5 (citations omitted).

The *Bruno* court, when addressing these questions, applied its own interpretation. For the purpose of this article, the court's interpretation will be discussed, however, no analysis will be offered to determine whether the court properly answered Judge Borenstein's original questions.

37. *Id.* at 1226.

38. *Id.*

39. *Id.*

40. *Id.* at 1226.

41. The *Bruno* court addressed the six questions posed by Judge Borenstein, none of which were raised by the three defendants. *Id.* at 1226 & n.5; *see supra* note 36 (listing the six questions).

42. *Bruno*, 735 N.E.2d at 1229.

violates ex post facto law,[43] 3) whether the statute violates due process,[44] 4) the defendant Bruno's claim of collateral estoppel,[45] and 5) the six questions of law reported by Judge Borenstein.[46]

B. *Legal Issues Addressed by the SJC in* Bruno

1. Retroactivity

The defendants in *Bruno* claimed that applying chapter 123A to their case was unconstitutional because the statute was triggered by a conviction that occurred prior to the statute's effective date.[47] In essence, the defendants argued that chapter 123A may only apply to persons whose predicate offense occurred after September 10, 1999.[48] The SJC, however, held that the statute was not unconstitutional because it operated prospectively.[49]

The court stated that when "the conduct triggering the statute's application occurs on or after its effective date, the statute's application is deemed prospective, and therefore permissible."[50] The court went on to state that chapter 123A was prospectively applied because "the conduct triggering the statute's application is not the prior conviction of a sexual offense, *but the current mental condition of a defendant.*"[51] As such, the predicate sexual offense simply "limits the class of persons subject to potential commitment under chapter 123A."[52] To support its notion that the predicate sexual offense is nothing more than a classification device, the SJC stated that:

> The legislature may, of course, choose to classify or reclassify a thing, and provided the new definition is applied only to determine status for the purpose of matters arising in the future, the prohibition on retroactive laws is not violated. A law is not made

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43. *Id.* at 1230.
44. *Id.* at 1232.
45. *Id.* at 1233-34.
46. *Id.* at 1235. The six questions reported relate to: i) the standard of proof for a temporary confinement, ii) expert evidence at temporary commitment hearings, iii) the duration of temporary confinement absent expert evidence, iv) the duration of temporary commitment in general, v) expert evidence at probable cause hearings, and vi) segregation of persons committed from persons adjudged sexually dangerous.
47. *Id.* at 1229.
48. *Id.*
49. *Id.*
50. *Id.* (citing McCarthy v. Sheriff of Suffolk County, 322 N.E.2d 758 (Mass. 1975); Merch. Nat'l Bank v. Merch. Nat'l Bank of Boston, 62 N.E.2d 831 (Mass. 1945); McAndrews v. Fleet Bank of Mass., N.A., 989 F.2d 13, 16 (1st Cir. 1993)).
51. *Id.* (emphasis added).
52. *Id.*

> retroactive because it alters the existing classification of a thing. Nor is a law retroactive if it draws upon antecedent facts for its operation.[53]

Further, the court held that finding the statute prospective does not contradict the new consequence formulation of retroactivity as determined in *Landgraf v. USI Film Products*.[54] In support of

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53. *Id.* (quoting EPA v. New Orleans Pub. Serv., Inc., 826 F.2d 361, 365 (5th Cir. 1987)).

54. *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)). In *Landgraf*, the Court engaged in a detailed analysis of retroactive legislation. Beginning with a historical overview, the court stated that:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf, 511 U.S. at 265-66 (citations omitted). The Court then went on to state that it is "not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution . . . [and that] retroactive statutes raise particular concerns . . . [because the] Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266.

Once the Court gave an ample caveat of the dangers of applying legislation retroactively, it then offered a somewhat illusive definition. In so doing, the Court pointed to Justice Story's definition in *Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CC NH 1814), as one that should be viewed as influential. *Landgraf*, 511 U.S. at 268. The *Landgraf* Court pointed out that Justice Story, in interpreting a provision of the New Hampshire Constitution,

> rejected the notion that the provision bars only explicitly retroactive legislation, . . . [and that] [s]uch a construction . . . would be "utterly subversive of all the objects" of the prohibition. Instead, the ban on retrospective legislation embraced "all statutes, which, though operating only from their passage, affect vested rights and past transactions."

Id. at 268-69.

Justice Story elaborated on his definition of retroactive legislation by stating that "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." *Id.* at 269.

Ultimately the *Landgraf* Court, elaborating on Justice Story's definition, concluded that:

> [A] statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of

this conclusion, the court stated:

> [I]nquiry is not simply a determination whether the new statutory provision effects an unanticipated consequence, but "a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." While "[a]ny test of retroactivity will leave room for the disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity," we are satisfied that the statute, with its focus on a person's current mental condition, does not operate retroactively.[55]

2. Whether the Statute Is an Unconstitutional Ex Post Facto Law

The defendants argued that "various features of [chapter] 123A render the statute punitive in both intent and effect and, thus, an unconstitutional ex post facto law under art. 24 of the Massachusetts Declaration of Rights."[56] The defendants pointed to three aspects of chapter 123A as being punitive: "(1) the commitment and treatment occurs after a sexually dangerous person has served his sentence; (2) the statute does not permit less restrictive alternatives to commitment; and (3) the treatment center is operated by the department" of corrections rather than the department of mental health.[57] The court rejected the defendants' contentions, claiming

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> the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.

Id. at 269-70 (citation omitted).

55. *Bruno*, 735 N.E.2d at 1229-30 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) (holding that Civil Rights Act of 1999 did not apply retroactively to a case pending appeal when the statute was enacted as it attached new consequences not previously contemplated)) (citations omitted).

56. *Id.* at 1230. Article 24 of the Massachusetts Declaration of Rights states that: "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." MASS. CONST. part 1, art. XXIV. The defendants did not make an ex post facto argument under the Federal Constitution. *Bruno*, 735 N.E.2d at 1230 n.9. They did argue, however, that the Massachusetts Declaration of Rights provided them greater protection against ex post facto legislation than the Federal Constitution. *Id.* The *Bruno* court rejected the defendants' argument, stating that the courts in Massachusetts "'have treated the ex post facto provisions of the State and Federal Constitution in identical fashion.'" *Id.* (quoting Santiago v. Commonwealth, 693 N.E.2d 127, 129 (Mass. 1998)).

57. *Bruno*, 735 N.E.2d at 1230 n.9. Prior to the 1999 amendments, a person ad-

that "the statute is neither punitive in intent or effect," nor is it an unconstitutional ex post facto law.[58]

In rejecting the defendants' ex post facto argument, the *Bruno* court found the analysis in *Kansas v. Hendricks* to be instructive.[59] Under the guidance of *Hendricks*, the *Bruno* court first determined that only a criminal or civil statute with penal intent could constitute an ex post facto law.[60] Chapter 123A, a civil statute, could only be deemed penal if the defendants provided by "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'"[61] The court concluded that the defendants in *Bruno* failed to meet that "high burden."[62]

After concluding that chapter 123A did not have penal intent, the *Bruno* court determined that the Massachusetts Legislature intended the statute to be remedial for several reasons.[63] First, the legislature described the statute as an act establishing civil commitment.[64] Second, the statute's purpose is to civilly commit persons for their "'care, custody, treatment and rehabilitation.'"[65] Third, chapter 123A falls under a chapter of the general laws related to public welfare.[66] Fourth, the legislature left intact the statute's title, "Care, Treatment and Rehabilitation of Sexually Dangerous Persons."[67] Fifth, the statute's dual goals are to "protect the public from sexually dangerous persons, and to provide [civilly confined persons with] treatment, and rehabilitation."[68]

The *Bruno* court next determined that the defendants failed to show the "statute's scheme . . . to be so punitive in purpose or effect

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judged as a sexually dangerous person, sentenced to serve time, served his criminal sentence and his civil commitment concurrently.

58. *Id.*

59. *Id.* at 1230-31. See *supra* note 27 for a detailed discussion of *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997).

60. *Bruno*, 735 N.E.2d at 1230.

61. *Id.* (citing *Hendricks*, 521 U.S. at 361 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980))).

62. *Id.*

63. *See id.* (citing Commonwealth v. Tate, 675 N.E.2d 772, 774 (Mass. 1997); *In re* Hill, 661 N.E.2d 1285, 1290-91 (Mass. 1997); Commonwealth v. Barboza, 438 N.E.2d 1064, 1069 (Mass. 1982)).

64. *Bruno*, 735 N.E.2d at 1231 (citing *Hendricks*, 521 U.S. at 361).

65. *Id.* (quoting MASS. GEN. LAWS ch. 123A, § 2 (2000)).

66. *Id.*

67. *Id.*

68. *Id.*

as to negate the Legislature's remedial intention."[69] The court held that chapter 123A's purpose was not retributive, and that it did not function as a deterrent.[70] The court afforded several justifications for these conclusions. First, the statute is "not retributive because 'it does not affix culpability for prior criminal conduct.'"[71] Second, the statute is not retributive "because commitment is based on a person's current mental condition, and no finding of scienter is required to commit the person."[72] Third, the court concluded that, "by the nature of their current mental condition, those persons committed under the statute are 'unlikely to be deterred by the threat of confinement.'"[73]

Finally, in regard to the court's determination that chapter 123A is not an unconstitutional ex post facto law, the court addressed the three portions of the statute considered by the defendants to be punitive.[74] First, the defendants considered it punitive that the statute required a person to complete his or her criminal sentence prior to civil commitment.[75] The *Bruno* court considered both sides of this issue. On the one hand, as stated in the *Hendricks* dissent, "the requirement of completion of a sentence prior to commitment . . . 'makes [the] legislative scheme . . . look punitive.'"[76] Conversely, however, a "State 'should be permitted to postpone treatment until after punishment in order to make certain that the punishment in fact occurs.'"[77] Ultimately, the *Bruno* court concluded that it would not decide the question because the defendants did not raise the issue at trial.[78] The *Bruno* court also noted that the "Supreme Court [in *Hendricks*] did not decide whether the Fed-

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69. *Id.* at 1231 (citing Doe v. Attorney Gen. (No.2), 680 N.E.2d 97, 99 (Mass. 1997)).

70. *Id.*

71. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)). To back this notion, the court reiterated that the statute's requirement of a "conviction of a sexual offense, is not the basis for commitment, but rather merely identifies and limits the class of persons subject to commitment proceedings under c. 123A." *Id.* (quoting United States v. Usery, 518 U.S. 267, 292 (1996)). Moreover, the court stated that the "fact that the [statute] may be 'tied to criminal activity' is 'insufficient to render [the statute] punitive.'" *Id.* (quoting *Usery*, 518 U.S. at 292).

72. *Id.*

73. *Id.* (quoting *Hendricks*, 521 U.S. at 362-63); *see also In re* Hill, 661 N.E.2d 1285, 1291 (Mass. 1996) (stating that commitment "does not serve as [a] . . . deterrent measure").

74. *See id.*

75. *Id.* at 1231-32.

76. *Id.* at 1231 (quoting *Hendricks*, 521 U.S. at 386 (Breyer, J., dissenting)).

77. *Id.* (quoting *Hendricks*, 521 U.S. at 386 (Breyer, J., dissenting)).

78. *See id.* at 1232.

eral Constitution requires states to offer inmates sex offender treatment while incarcerated for a subsequent civil commitment to be valid as non-punitive."[79] As such, it would appear this unresolved issue could surface in future proceedings.

Second, the defendants considered chapter 123A to be punitive because the statute fails to provide a less restrictive alternative to civil commitment.[80] The court dismissed this argument, stating that persons committed under the statute "are likely to commit future harm," and as such, "confined commitment appears to be the only viable form of commitment."[81]

Finally, the court rejected the defendants' third argument that chapter 123A is punitive because treatment for committed persons is provided at "a treatment center operated under the auspices of the department of correction."[82] The court did not offer details beyond stating that the SJC had rejected the same argument in *Commonwealth v. Tate*.[83]

3. Whether the Statute Violates Due Process

The defendants' due process claim was as follows:

> The defendants argue that temporary commitment of an indeterminate duration pending a probable cause hearing, pursuant to G.L. c. 123A, § 12(*e*), violates their substantive due process rights because the temporary restraint does not occur in narrowly circumscribed situations. They maintain that the temporary restraint is not imposed in narrowly circumscribed situations be-

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* In *Commonwealth v. Tate*, 675 N.E.2d 772, 774 (Mass. 1997), the petitioner raised the argument that:

> [H]is commitment is penal in nature because it has been demonstrated that the treatment purposes of G.L. c. 123A cannot be realized. The defendant further relies on St. 1993, c. 489, which transferred control of the treatment center from the Department of Mental Health to the Department of Correction. He claims that, because his commitment to the treatment center was imposed without all the due process protections applicable to a criminal proceeding, and because his commitment is now solely penal, he has been denied due process of law.

Id. The *Tate* court, in rejecting the petitioner's argument, held that "the commitment statute has a remedial nonpunitive purpose." *Id.* (citing Commonwealth v. Barboza, 438 N.E.2d 1064, 1069 (Mass. 1982)). Moreover, the court held that "[t]he defendant's due process argument fails because he has not shown that the treatment center lacks continued viability as a place where sexually violent offenders can receive nonpunitive psychiatric treatment." *Id.*

> cause the "district attorneys' discretion to initiate proceedings is not informed by meaningful guidelines; a district attorney can file a petition for commitment of any person who has been convicted of a single sex offense." The defendants also claim that this lack of guidelines violates their procedural due process rights.[84]

The court rejected the defendants' contentions for the following reasons.[85]

At the outset, the court determined the defendants' rights to be fundamental because they involved "freedom from physical restraint," and held that, as such, the "statute imposing the restraint may be upheld only if it is 'narrowly tailored to further a legitimate and compelling governmental interest.'"[86] The court next claimed that the "defendants mistakenly argue[d] that under the statute, a district attorney may file a petition to commit anyone who has been convicted of a sexual offense."[87] The court found the defendants' argument erroneous because a district attorney cannot file a petition to commit a person "unless it is 'likely' that the person possesses the requisite mental condition under the statute."[88] The court went on to state that the District Attorney must consider numerous statutory precautions before finding such a mental condition exists.[89]

The court then held that the "lack of guidelines to district attorneys does not deprive the defendants of procedural due process," because the "statute provides ample procedural protections

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84. *Bruno*, 735 N.E.2d at 1232.

85. *See id.* at 1232-33.

86. *Id.* at 1232 (quoting Aime v. Commonwealth, 661 N.E.2d 204, 209 (Mass. 1993)).

87. *Id.*

88. *Id.*

89. *Id.* at 1232-33 (discussing the following statutory provisions: (1) MASS. GEN. LAWS. ch. 123A, § 12(b), stating that the District Attorney's determination must be supported by "sufficient facts," and not merely averred; and (2) MASS. GEN. LAWS. ch. 123A, § 12(e), listing that (a) a person cannot be temporarily committed under the statute merely by filing a petition, but rather the Commonwealth must make a "sufficient showing" based on "evidence before the court," that the person named in the petition is sexually dangerous, and that the person is likely to commit future harm, (b) temporary commitment may only be sought when the person named in the petition is scheduled for release prior to the probable cause hearing, (c) if the court temporarily commits someone, the person is sent to a treatment center; the person does not remain incarcerated, and (d) the "person named in the petition may challenge the 'showing' and resulting temporary commitment. He 'may move the court for relief from such temporary commitment at any time prior to the probable cause determination.'") (citations omitted).

to those subjected to potential commitment."[90] Finally, the court supported the legitimacy of the statute by holding that "preventing danger to the community is a legitimate regulatory goal."[91]

4. Defendant Bruno's Collateral Estoppel Claim

The defendant Bruno asserted that the "Commonwealth violated his due process rights because it initiated commitment proceedings against him after two psychiatrists [in 1985] had previously concluded that he was not sexually dangerous under a former version of chapter 123A."[92] Bruno relied primarily on *Commonwealth v. Travis*, to support his argument.[93] The court in *Travis* held that "'as a matter of fundamental fairness under the due process clause of the Fourteenth Amendment to the United States Constitution, a finding that an individual is no longer sexually dangerous must be as immune from subsequent or collateral attack as is a criminal judgment of acquittal.'"[94] The SJC rejected Bruno's argument, stating that the Commonwealth was committing Bruno not only on his prior criminal history, but also because of his conduct that occurred subsequent to the 1985 psychological evaluations.[95] Because of the prospective assessment of his behavior, the court rejected Bruno's collateral estoppel claim and held that the Commonwealth was not precluded from initiating civil commitment proceedings against him.[96]

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90. *Id.* at 1233 (citing Aime v. Commonwealth, 611 N.E.2d 204, 209 (Mass. 1993), which held that procedural due process "requires that a statute or governmental action that has survived substantive due process scrutiny be implemented in a fair manner").

91. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 747 (1987)).

92. *Id.* at 1233-34.

93. *See id.* at 1234.

94. Commonwealth v. Travis, 361 N.E.2d 394, 401 (Mass. 1977).

95. *Bruno*, 735 N.E.2d at 1234. The subsequent conduct that the court referred to went beyond Bruno's prior criminal history, which included the rape conviction that constituted the predicate offense under chapter 123A. The court noted that, subsequent to the psychologist's reports:

> Bruno had refused to pursue sex offender therapy while incarcerated; Bruno's parole was twice revoked for testing positive for drugs; Bruno tested positive for Hepatitis B; and Bruno's parole was another time revoked for being arrested for allegedly assaulting his girl friend with whom he lived, and for possessing a hypodermic needle.

Id. at 1234-35 (citation omitted). Thus, the court determined that the issue "whether Bruno is currently a sexually dangerous person, is quite different from whether he was sexually dangerous in 1985." *Id.* at 1235.

96. *Id.*

5. The Six Questions of Law Reported by Judge Borenstein

The court next addressed the six questions of law reported by Judge Borenstein.

a. Standard of Proof for a Temporary Commitment

The first reported question addresses the standard of proof required to temporarily commit a person under chapter 123A, section 12(e) of the Massachusetts General Laws.[97] Section 12(e) instructs the court in what to do when a person, against whom the Commonwealth previously filed a petition under section 12(b), is scheduled to be released from incarceration prior to the court's probable cause determination under section 12(c).[98] The statute simply states that the Commonwealth has to make a "sufficient showing," and the *Bruno* court had to determine the language's legislative meaning.[99] The Commonwealth wanted the court to adopt the reasonable suspicion standard,[100] or, in the alternative, a "special needs exception" to the probable cause standard.[101] The court rejected the Commonwealth's request to adopt the reasonable suspicion standard because "[t]hat standard justifies only a very brief detention quite different from the temporary, though vastly intrusive, detention permitted under G.L. c. 123A, § 12(e)."[102] The court also rejected the Commonwealth's request to consider a "special needs" exception to the probable cause requirement, as was done in *McCabe v. Life-Line Ambulance Service, Inc.*[103] Rather,

97. *Id.* See *infra* Part III.E for a discussion of chapter 123A, section 12 of the Massachusetts General Laws.

98. MASS. GEN. LAWS ch. 123A, § 12(e) (2000).

99. *See Bruno*, 735 N.E.2d at 1237.

100. *Id.* at 1235.

101. *Id.* at 1236.

102. *Id.* at 1235. The court cited the following cases to show when the reasonable suspicion standard is appropriate. *See* Commonwealth v. Blais, 701 N.E.2d 314, 317 (Mass. 1998) (officer with reasonable suspicion that person is operating vehicle while under influence may briefly detain person to administer field sobriety tests); Commonwealth v. Barros, 682 N.E.2d 849, 858 (Mass. 1997) (officer who detains person on reasonable suspicion may detain for short period, fifteen minutes, to transport person for identification purposes); Commonwealth v. Salerno, 255 N.E.2d 318, 320-21 (Mass. 1970) (officer who detains persons on reasonable suspicion may hold them for "expeditious collateral inquiry which might result in the suspects' arrest or prompt release").

103. *Bruno*, 735 N.E.2d at 1236 (citing McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 552 (1st Cir. 1996)). The *Bruno* court found the *McCabe* case to be distinguishable. In *McCabe*,

> a "special needs" exception permitted officers to enter without a warrant the home of a person for the purpose of detaining her pursuant to G.L. c. 123, § 12(a), [chapter 123 addresses the hospitalization of mentally ill people who

the court held that probable cause under section 12 (e) is equivalent to the probable cause to arrest standard.[104]

Though not a part of Judge Borenstein's reported questions, the *Bruno* court briefly addressed the probable cause standard under section 12(c) that the Commonwealth must meet in order to commit a person temporarily, up to sixty days for the purpose of evaluation under section 13.[105] The court ultimately concluded that the section 12(c) hearing is similar to a bind-over hearing, which requires a directed verdict standard.[106] The court made this determination because the section 12(c) hearing and the bind-over hearing are both adversarial in nature, the defendant has a right to counsel, the defendant has the right to confront and cross-examine adverse witnesses, and the defendant may present witnesses on his or her own behalf.[107] A more detailed discussion of the distinction between these two probable cause standards will be addressed later in this article.[108]

b. Expert Evidence at Temporary Commitment Hearings

The second question involved whether expert evidence is necessary to temporarily commit a person under chapter 123A, section 12(e) of the Massachusetts General Laws. The defendants argued that expert evidence is required, while the Commonwealth contended that it could meet its burden without such an offering.[109]

> are likely to harm themselves or others] after an impartial qualified physician determined her to be dangerous and mentally ill. The issue before the court was not the quantum of proof needed to justify depriving the woman of her liberty, but to justify the warrantless entry onto premises to attend to an emergency situation.

McCabe, 77 F.3d at 552. The *Bruno* court held that no such emergency or exigency existed in the instant case. 735 N.E.2d at 1236.

104. *Bruno*, 735 N.E.2d at 1237.

105. *Id.* at 1236.

106. *Id.* at 1237. The bind-over hearing that the *Bruno* court is referring to is held pursuant to chapter 276, section 38 of the Massachusetts General Laws, and is used to determine probable cause in lieu of an indictment. *See* MASS. GEN. LAWS ch. 276, § 38 (2000); MASS. R. CRIM. P. 3. The standard of proof required in a bind-over hearing (the directed verdict standard) "is more than that for probable cause to arrest but less than would 'prove the defendant's guilt beyond a reasonable doubt.'" *Bruno*, 735 N.E.2d. at 1236 (quoting People v. Bieber, 100 N.Y.S. 2d 821, 823 (N.Y.C. Magis. Ct. 1950)).

107. *Bruno*, 735 N.E.2d at 1237; MASS. GEN. LAWS ch. 123A, § 12(c) (2000).

108. See *infra* Part III.E for a discussion of section 12 of the Massachusetts General Laws.

109. *Bruno*, 735 N.E.2d at 1237. The Commonwealth specifically argued that in a 123A proceeding, the burden on the defendant is similar to that in a criminal trial where the defendant is raising the insanity defense. In that situation, the Common-

The court resolved this issue by examining the relevant probable cause standards in analogous legal situations.[110] Ultimately, the court stated that:

> Because a temporary commitment will be sought in circumstances akin to an emergency to hold a person for a short period until a probable cause hearing is held, the expert evidence required for a temporary commitment need not be in the form of live testimony, and need not be extensive, but it must establish probable cause as to those elements of proof.[111]

c. *Duration of Temporary Commitment Without Expert Evidence*

After deciding that expert testimony is crucial to any section 12(e) temporary commitment proceeding, the court discussed one caveat. The court stated that if the Commonwealth failed to produce expert evidence, it could still hold the defendant for twenty-four hours, so long as it could make an equivalent showing of probable cause without the expert testimony.[112] The court also held that in such a situation the Commonwealth must represent to the presiding judge that expert evidence existed and would be made available in short order.[113]

d. *Duration of Temporary Commitment in General*

In deciding the issue of the duration of temporary commitment under section 12(e) when expert evidence was available, the court looked to general principles of due process and fairness.[114] In addition, the court noted that given the nature of the proceedings, counsel on both sides will need adequate time in order to obtain relevant

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wealth can challenge the defendant's claims without the use of expert testimony. *See* Commonwealth v. Keita, 712 N.E.2d 65, 69 (Mass. 1999). The *Bruno* court rejected the Commonwealth's argument stating that in all criminal cases there is a presumption of sanity, and it is the defendant's burden to overcome the presumption and prove he or she is insane. In 123A proceedings, however, there is no presumption that the defendant is sexually dangerous, thus, it stands to reason that the Commonwealth needs additional evidence to prove its case. *Bruno*, 735 N.E.2d at 1237-38

110. *Bruno*, 735 N.E.2d at 1237-38. For example, the court looked at Commonwealth v. Kirkpatrick, 668 N.E.2d 790, 797-98 (Mass. 1996), where the SJC reviewed the Commonwealth's need for expert testimony when attempting to explain to the jury the likelihood of a defendant transmitting a sexually communicable disease to the victim.

111. *Bruno*, 735 N.E.2d. at 1238-39.

112. *Id.*

113. *Id.* See *infra* notes 135-38, 243-49 and accompanying text for a definition and discussion of "qualified examiner."

114. *Bruno*, 735 N.E.2d at 1238-39.

records and other material evidence not readily at hand.[115] The court also noted that the court, and not an officer of the law, makes the determination whether to temporarily commit a person.[116]

Ultimately, the court followed the example established by the temporary commitment procedures employed under Massachusetts General Laws, chapter 123A, and cases decided by other jurisdictions.[117] The court determined that "absent unusual circumstances, a probable cause hearing should commence no later than ten business days after a temporary commitment order is made under § 12(e)".[118] The court went on to state that "[w]e again note that the 'Commonwealth generally expects to be able to complete a probable cause hearing before an inmate's discharge date in future cases where it will have received the six-month advance notice of discharge . . . .'"[119]

e. Expert Evidence at Probable Cause Hearings

Addressing the same concerns as it did in its discussion of the requirement of expert evidence at temporary commitment hearings under section 12(c), the court stated that the Commonwealth must present expert evidence at the defendant's probable cause hearing.[120]

f. Segregation of Persons Temporarily Committed

The court addressed whether persons held pursuant to temporary commitment orders, and other temporary confinements under chapter 123A, have the right to be segregated from persons adjudged and committed as sexually dangerous.[121] The court held that segregation is not necessary for a number of reasons. First, chapter 123A does not require this type of segregation.[122] Second,

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115. *Id.*

116. *Id.* at 1239.

117. *Id.*; *see also* Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997) (ten day commitment period); Luna v. Van Zandt, 554 F. Supp. 68, 71 (S.D. Tex. 1982) (fourteen day commitment period); Bension v. Meredith, 455 F. Supp. 662, 669 (D.D.C. 1978) (commitment period not to exceed thirty days); Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975) (commitment period not to exceed sixty days).

118. *Bruno*, 735 N.E.2d at 1239; *see infra* note 183 and accompanying text (discussing section 12).

119. *Bruno*, 735 N.E.2d at 1239.

120. *Id.* See *supra* Part II.B.5.b for a discussion of the second question reported by Judge Borenstein.

121. *Bruno*, 735 N.E.2d at 1239.

122. The *Bruno* court noted that in *Wilson*, one of the consolidated cases in *Bruno*, Judge Borenstein determined that persons civilly confined under 123A, sections

there is already a plan in place in which "the superintendent of the treatment center has promulgated rules and regulations regarding persons temporarily committed consistent with a management plan for the facility as a whole that comports with constitutional requirements as determined by the United States District Court."[123] Third, management of the treatment center is under the discretion of the Commissioner of Correction, and "[t]here has been no showing that he has abused that discretion in holding those temporarily committed [under chapter 123A] in accordance with rules and regulations."[124] Finally, the *Bruno* court stated, the defendants did not make a "showing that the manner and conditions under which those temporarily committed or held are unconstitutional."[125]

III. Road Map of Massachusetts General Laws Chapter 123A

A. *Section 1-Definitions*

As a first step in examining chapter 123A of the Massachusetts General Laws, this article will review the definitions found in section 1 of the statute.[126] A "sexually dangerous person" is defined in section 1 as:

> [A]ny person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand

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12(e) and 13(a), must be held separately from those adjudged sexually dangerous. *Id.* Wilson was to be "held apart from persons adjudged sexually dangerous." *Id.* The *Bruno* court, however, concluded that the "judge found no facts to support his segregation order, and the record is sparse on the matter." *Id.* The court went on to state that it appears that Judge Borenstein's order was based on requirements in chapter 123A, section 35 "that an alcoholic who is committed thereunder must be 'housed and treated separately from convicted criminals.'" *Id.* at 1240. Judge Borenstein also relied on "a requirement that pretrial detainees at the Suffolk County Jail be housed in conditions 'superior' to those of inmates under sentence." *Id.*; *see* Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir. 1974). Ultimately, the *Bruno* court held that the record Judge Borenstein based his segregation order on was "inadequate" and did not permit the court "to give a reasoned and intelligent answer to the question reported." *Bruno*, 735 N.E.2d at 1240.

123. *Bruno*, 735 N.E.2d at 1240 (citing King v. Greenblatt, 53 F. Supp. 2d 117, 134-37 (D. Mass. 1999)).

124. *Id.*

125. *Id.*

126. Mass. Gen. Laws ch. 123A, § 1 (2000).

> trial and who suffers from a *mental abnormality* or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses.[127]

"Mental abnormality" is defined as "a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."[128] The statute's definition of mental abnormality does not include all mental conditions or tendencies but, rather, only those that manifest themselves in some way that enables or contributes to a person's commission of dangerous sexual offenses. Similarly, the section's definition of "personality disorder" only includes "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."[129] Neither definition lists any specific disorders or abnormalities and could be interpreted to include any broad range of conditions whether or not they are currently recognized in the appropriate scientific field.[130]

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127. *Id.* (emphasis added).

128. *Id.*

129. *Id.*

130. In *Hubbart v. Superior Court*, 58 Cal. Rptr. 2d 268 (Cal. Ct. App. 1996), the California Superior Court held that in order to commit a person for being sexually dangerous, the state must prove that he or she suffers from a "mental disorder" supported by a diagnosis conforming to the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. *Id.* at 290. The court stated that the "term 'mental disorder' is not an amorphous concept [but rather] . . . [d]iagnoses of 'mental disorders' are made pursuant to the [DSM-IV] . . . [and have] a demonstrably established technical meaning." *Id.* Subsequently, the California Supreme Court, in reviewing the Superior Court's decision, noted that "commitment as a SVP [sexually violent predator] cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder." Hubbart v. Superior Court, 969 P.2d 584, 593 n.20 (Cal. 1999).

In contrast, an Illinois court defined the term mental disorder broadly, holding that a defendant could be diagnosed by several means, including by an evaluation of the defendant's criminal history. People v. Cole, 701 N.E.2d 821, 824 (Ill. App. Ct. 1998). The court stated:

> [The] "mental disorder" requirement is not rendered superfluous because a pattern of criminal behavior is the sole support for the diagnosis . . . . The "mental disorder" requirement may be satisfied by a number of means . . . . A qualified psychiatrist could diagnose a "mental disorder" based on an interview, standardized testing, a physical test . . . or some combination of these indicators. In short, because the "mental disorder" element may be established by means other than criminal conduct, the fact that it is established by a

Section 1 also defines what constitutes a "sexual offense" and lists a number of crimes that subject a defendant to chapter 123A proceedings.[131] The crimes listed are all sexual crimes against persons, and crimes that are defined as attempts to commit those sexual crimes.[132]

Another important definition is that of "qualified examiner."[133] As this article will discuss later, the qualified examiner

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pattern of criminal conduct in this case does not render the requirement a nullity.

Id.

The approach in Cole, appears to be both circular and an ex post facto violation, as the criminal convictions can be used as evidence of the sexual offense, the mental disorder, and the likelihood of recidivism. In other words a criminal conviction could be the only evidence that the state needs to commit a defendant charged as a sexually dangerous person.

131. MASS. GEN. LAWS ch. 123A, § 1 (2000).

132. The pertinent part of section 1 reads:

"Sexual offense" includes any of the following crimes: indecent assault and battery on a child under fourteen . . . ; indecent assault and battery on a mentally retarded person . . . ; indecent assault and battery on a person who has obtained the age of fourteen . . . ; rape . . . ; rape of a child under sixteen with force . . . ; rape and abuse of a child under sixteen . . . ; assault with intent to commit rape . . . ; assault on a child with intent to commit rape . . . ; drugging persons for sexual intercourse . . . ; unnatural and lascivious acts with a child under the age of sixteen . . . ; and any attempt to commit any of the above listed crimes .

Id.

133. Section 1 defines qualified examiner as:

[A] physician who is licensed . . . [and] who is either certified in psychiatry by the American Board of Psychiatry and Neurology or eligible to be so certified, or a psychologist who is licensed . . . ; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction. A "qualified examiner" need not be an employee of the department of correction or of any facility or institution of the department.

Id.; CPCS, *supra* note 7. CPCS's web site lists the following additional criteria established by the Department of Correction:

- Be a member of the Association for the Treatment of Sexual Abusers (ATSA) and/or the Massachusetts Association for the Treatment of Sexual Abusers (MATSA) or other organization that promotes research and the study of the treatment and assessment of sex offenders;
- Attend ten hours per year of sex offender training four hours of which are in assessment of sexual offenders;
- Any qualified examiner who is appointed by the vendor to conduct an evaluation of a person's present sexual dangerousness, and who renders an opinion that the person is presently an SDP is prohibited from subsequently being retained by that person or that person's attorney to conduct a future evaluation of that same person's sexual dangerousness; and
- If a qualified examiner was previously retained by a person or that person's attorney to render an opinion on that person's sexual dangerousness, the

plays an integral part in the process of determining whether a defendant is to be considered a sexually dangerous person.[134] Because the defendant's liberty depends on the jury or court's finding of dangerousness, which is based largely on the defendant's state of mind, the opinion of the examiner is crucial. Any licensed or certified psychiatrist or psychologist is permitted to be a qualified examiner.[135] However, an examiner must have a minimum of two years of experience treating or diagnosing sexually aggressive offenders, and the Commissioner of Correction must designate him or her as a qualified examiner.[136] While the qualified examiner need not be an employee of the Department of Correction, the Commissioner of Correction must still designate him or her as an examiner.[137] This restriction is significant. In situations where the defendant is granted the opportunity to obtain an independent examination for use at a hearing, his or her examiner must also be qualified under this definition.[138] This requirement appears to limit the ability of a defendant to obtain a truly independent examiner, or one that advances a novel theory on the issue of mental disorders and defining what the term sexually dangerous person means.[139] Section 1 also defines "agency with jurisdiction,"[140] "community access board,"[141]

> vendor may not appoint that same qualified examiner to conduct future evaluation of that same person.

Id. CPCS's web site also lists qualified examiners who have been approved by the Department of Correction as of December 19, 2000. It is interesting to note that as of that date, the department had only approved of twenty-one qualified examiners. This could possibly explain some of the delays that are discussed throughout this article.

134. *See infra* Part III.F.

135. MASS. GEN. LAWS ch. 123A, § 1 (2000).

136. *Id.*

137. *Id.*

138. MASS. GEN. LAWS ch. 123A, § 13(d) (2000). "Any person subject to examination pursuant to the provisions of this section may retain a psychologist or psychiatrist who meets the requirements of a qualified examiner, as defined in section 1, to perform an examination on his behalf." *Id.*

139. *See infra* notes 243-49 and accompanying text.

140. MASS. GEN. LAWS ch. 123A, § 1 (2000). Section 1 defines "agency with jurisdiction" as:

> the agency with the authority to direct the release of a person presently incarcerated, confined or committed to the department of youth services including, but not limited to a sheriff, keeper, master or superintendent of a jail, house of correction or prison, the director of a custodial facility in the department of youth services, the parole board and, where a person has been found incompetent to stand trial, a district attorney.

Id.

141. *Id.* (defining "community access board" as "a board consisting of five members appointed by the commissioner of correction, whose function shall be to consider a

and "community access program."[142]

B. *Section 2-Nemansket Correctional Center*

Section 2[143] establishes that the Department of Correction and the Commissioner of Correction shall maintain jurisdiction over the "Nemansket Correctional Center,"[144] a correctional institution for the care, custody, treatment, and rehabilitation of persons adjudicated as sexually dangerous.[145] The Commissioner of Correction has the authority to appoint the chief administrative officer at the Nemansket Correctional Center[146] and to promulgate regulations for the management of the Center.[147]

Under section 2A,[148] a civilly committed individual sentenced for a criminal offense whose sentence has not yet expired may, at the Commissioner of Correction's discretion, be transferred from the treatment center to another correctional institution designated by the commissioner.[149] In making his or her determination, the Commissioner of Correction must consider several factors, in order to provide the individual with due process.[150]

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person's placement within a community access program and conduct an annual review of a person's sexual dangerousness").

142. *Id.* (defining "community access program" as "a program established pursuant to section six A that provides for a person's reintegration into the community").

143. MASS. GEN. LAWS ch. 123A, § 2 (2000).

144. The Nemansket Correctional Center, also known as the treatment center, is actually associated with the state psychiatric facility in Bridgewater. There is a recent push to have the name of this center changed. *See* H.R. 136, 182d Gen. Ct., Reg. Sess. (Mass. 2001); H.R. 137, 182d Gen. Ct., Reg. Sess. (Mass. 2001).

145. MASS. GEN. LAWS ch. 123A, § 2 (2000).

146. *Id.*

147. *Id. See generally* King v. Greenblatt, 127 F.3d 190 (1st Cir. 1997). The Department of Correction's regulations are found in title 103 of the Code of Massachusetts Regulations. Some of these regulations include the governance of inmate wages and stipends, MASS. REGS. CODE tit. 103, § 405.07 (1999), disciplinary process for sanctioned reimbursements from inmate funds, MASS. REGS. CODE tit. 103, § 405.17 (1999), court assessments and other authorized assessments of inmate funds, MASS. REGS. CODE tit. 103, § 405.18 (1999), rules regarding the transfer of sexually dangerous persons, MASS. REGS. CODE tit. 103, § 460.01 (1997), and furlough eligibility, MASS. REGS. CODE tit. 103, § 463.07 (1997). Other agencies have promulgated regulations that impact sexually dangerous persons. For example, the Parole Board has regulated eligibility for parole, MASS. REGS. CODE tit. 120, § 301.01 (1997), and the Criminal History Systems Board has regulated the registration of certain sexual offenders, MASS. REGS. CODE tit. 803, § 1.40 (2001).

148. MASS. GEN. LAWS ch. 123A, § 2A (2000).

149. *Id.*

150. *Id.* The commissioner of corrections may consider the following factors:

> (1) the person's unamenability to treatment; (2) the person's unwillingness or failure to follow treatment recommendations; (3) the person's lack of progress

C. *Section 6A-Commitment Security and Community Access*

Section 6A[151] gives the Department of Correction the duty of determining and applying the most appropriate level of security when it comes to housing and treating persons adjudicated as sexually dangerous.[152] The department, when making this determination, must consider the safety of the public and correctional staff, as well as the safety of the inmates themselves.[153] Most notably, this section mandates that all juvenile inmates be separated from adult inmates.[154]

Section 6A also establishes a community access program by which persons adjudicated as sexually dangerous may have limited interactions with the rest of society as part of his or her treatment.[155] An inmate may apply once a year to be considered for this program as long as he or she is not currently subject to any criminal sentence.[156] The community access board, consisting of both employees of the Department of Correction and non-employees, makes eligibility determinations.[157] If an inmate is released to this

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> in treatment at the center or branch thereof; (4) the danger posed by the person to other residents or staff at the Treatment Center or branch thereof; (5) the degree of security necessary to protect the public.
>
> The department of correction shall promulgate regulations establishing a transfer board and procedures governing transfer, including notification of hearing, opportunity to be heard, written decision notification of decision, opportunity for appeal, and periodic review of placement.

Id.

151. MASS. GEN. LAWS ch. 123A, § 6A (2000).

152. *Id.*

153. *Id.* It should be again noted that in Commonwealth v. Bruno, 735 N.E.2d 1232 (Mass. 2000), the SJC held that there is no requirement that temporarily committed persons, under sections 12(e) and 13, be segregated from formally committed sexually dangerous persons. The court reasoned that the Department of Correction's management of the treatment center "as a whole comports with constitutional requirements as determined by the United States District Court." *Id.*; *see* King v. Greenblatt, 53 F. Supp. 2d 117, 134-37 (D. Mass. 1999).

154. MASS. GEN. LAWS ch. 123A, § 6A (2000).

155. *Id.*

156. *Id.* Section 6A states that "[o]nly a person whose criminal sentence has expired or upon whom a criminal sentence was never imposed shall be entitled to apply for participation in a community access program." *Id.* This is most likely a moot point since a civil commitment under chapter 123A usually takes place after an inmate completes his or her sentence.

157. *Id.* (allowing the board to consist of "five members appointed by the commissioner of correction . . . . Membership shall include three department of correction employees and two persons who are not department of correction employees, but who may be independent contractors or consultants. The non-employee members shall consist of psychiatrists or psychologists licensed by the commonwealth"). This statute appears to limit the true independence of a licensed, non-department of correction

program, he or she is subjected to daily evaluations to determine whether he or she is a danger to the community. Additionally, he or she must continue to reside within the confines of the treatment center, and the board must provide notice to the state police and to the Attorney General's office, as well as to the victim and the victim's family.[158] The board must also notify the police and the District Attorney's office in both the district where the crime occurred, and the district where the inmate will be employed under the community access program.[159]

D. *Section 9-Petitions for Examination and Discharge*

Section 9 affords a person committed as a sexually dangerous person the right to petition for his or her discharge once every year.[160] A spouse, child, next of kin, or any friend may also file a petition on behalf of the committed person.[161] Upon the filing of the petition, the committed person is entitled to a hearing in the superior court to determine whether he or she is still sexually dangerous.[162]

It is difficult to classify the section 9 hearing as either a criminal or civil proceeding. The person appears to be entitled to have the issue determined by a jury at a hearing held "according to the practice of trial in civil cases in the superior court."[163] Additionally, section 9 does not expressly provide for a unanimous jury decision as does section 14, which provides that a jury must make a unanimous decision as to whether a person is sexually dangerous.[164] On

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employee appointed to the board. The concern is that the department of corrections may employ psychiatrists and psychologists as consultants and independent contractors, and retain some influence over these doctors. At the very least, it may have some effect on the number of non-department of corrections qualified examiners available to a defendant faced with a sexually dangerous person hearing.

158. *Id.*

159. *Id.* The board must also notify the police department of the town of Bridgewater as participants in this program must continue to reside at the Bridgewater treatment facility. *Id.*

160. MASS. GEN. LAWS ch. 123A, § 9 (2000).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* Prior to 1993, section 9 did not include language that granted a defendant the right to a jury trial. This right was added when the statute was amended by 1993 Mass. Acts ch. 489, § 7, approved January 14, 1994. This was also the rule established by *In re* Gagnon, 625 N.E.2d 555, 557 (Mass. 1994), a case decided on the earlier version of section 9. More recent case law, which interprets the revised section 9, still limits the defendant's right to a jury trial. For example, the SJC held that there is no constitutional right to a jury trial in proceedings governing sexually dangerous persons,

the other hand, at a trial under section 9, the Commonwealth must prove beyond a reasonable doubt that the inmate continues to remain sexually dangerous.[165]

E. *Section 12-Judicial Classification As Sexually Dangerous*

Although one of the later sections of chapter 123A, section 12 is really the starting point in determining whether a person is first subjected to any court or jury's determination that he or she may be considered sexually dangerous.[166] Under the authority of section 12, an agency that has jurisdiction or control over a person convicted of an offense that falls under chapter 123A must give six months notice to the Attorney General and District Attorney of the county in which the offense occurred that the person is to be released from custody.[167] Section 12 also gives the agency the responsibility of identifying certain inmates that have a "particularly high likelihood of meeting the criteria for a sexually dangerous person."[168] Once the Attorney General and District Attorney receive notice from the appropriate agency, he or she can determine whether the prisoner is likely to be a sexually dangerous person.[169] If either the Attorney General or the District Attorney believes that the person is sexually dangerous, he or she may file a commitment petition with the superior court of the county in which the offense occurred.[170]

After the petition is filed, the court must determine whether there is probable cause to believe the person is, in fact, sexually dangerous.[171] It is only after the court finds that probable cause

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and that an agreement of five-sixths of jurors did not violate due process given the language of the statute. *In re* Sheridan, 665 N.E.2d 978, 981 (Mass. 1996).

165. *See In re* Wyatt, 701 N.E.2d 337, 346 (Mass. 1998). With respect to jury instructions, the *Wyatt* court held that while the court properly instructed that the defendant who brought a section 9 hearing was presumed not to be a sexually dangerous person, such an instruction is not constitutionally required under this section. *Id.* The court also held that instructions for section 9 hearings could ask the jury to consider either whether the defendant "is" sexually dangerous or whether the defendant "remains" sexually dangerous because the jury could not conclude that the defendant "remains" sexually dangerous unless he or she "is" sexually dangerous. *Id.* at 342-43.

166. MASS. GEN. LAWS ch. 123A, § 12 (2000); *see also* MASS. GEN. LAWS ch. 123A, §§ 3-4 (repealed 1990) (replaced by section 12).

167. MASS. GEN. LAWS ch. 123A, § 12(a) (2000). Under the statute, in the event that a person is sentenced to a term of no more than six months incarceration as a result of a parole revocation, the agency shall give notice as soon as practicable. *Id.*

168. *Id.*

169. MASS. GEN. LAWS ch. 123A, § 12(b) (2000).

170. *Id.* For a sample petition, see MCLE, INC., *supra* note 6.

171. MASS. GEN. LAWS ch. 123A, § 12(c) (2000).

exists under section 12(c) that it can hold the defendant for up to sixty days for an evaluation.[172] In order to make this determination, the court must hold a hearing in accordance with section 12(c), which entitles the person to notice and the right to appear.[173] At this hearing, the defendant is also afforded the right to: (1) be represented by counsel; (2) present evidence on his or her behalf; (3) cross-examine witnesses who testify against them; and (4) view and copy all petitions and reports in the court file.[174] If the person is scheduled to be released while the petition is pending and prior to the section 12(c) probable cause hearing, the court may temporarily commit the person to the treatment center, absent any unusual circumstances, for a period of ten business days.[175]

This section of the statute raises an important question; what amounts to probable cause to hold a defendant under section 12(c) for the purpose of evaluation. The SJC ruled that "the Commonwealth's burden of proof at the probable cause hearing under § 12(c) is the same as that required for a probable cause, or bind-over, hearing held pursuant to [chapter 276, section 38 of the General Laws of Massachusetts]."[176] This standard is also referred to as the directed verdict standard, as the defendant has been afforded several statutory rights, including the right to counsel and to present evidence.[177] It is only after the court has determined that the

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172. *Id.* § 13(a).

173. *Id.* § 12(c).

174. *Id.* § 12(d).

175. *Id.* § 12(e); *see* Commonwealth v. Bruno, 735 N.E.2d 1222, 1237 (Mass. 2000) (holding a person may be temporarily committed as a sexually dangerous person absent unusual circumstances for no more than ten business days pending commencement of the probable cause hearing). This extension of time for unusual circumstances is different from the strict time requirements of section 13. MASS. GEN. LAWS ch. 123A, § 13 (2000) (setting express time limits on temporary commitment for the purposes of examinations). Section 12 does not contain any express time limits, and the ten-day period is prescribed by the *Bruno* case. *See* MASS. GEN. LAWS ch. 123A, § 12 (2000); *Bruno*, 735 N.E.2d at 1239. *But see* Commonwealth v. Kennedy, 762 N.E.2d 794, 796-97 (Mass. 2001) (concluding that the time requirements of section 13 must be strictly enforced by the courts, despite anything to the contrary in section 12 and the court's holding in *Bruno*).

176. *Bruno*, 735 N.E.2d at 1236. See *supra* Part II.B.5.a for a discussion of the first question posed by Judge Borenstein, "[t]he standard of proof needed for temporary confinement."

177. *Bruno*, 735 N.E.2d at 1237. In *Bruno*, the court rejected the Commonwealth's argument that the probable cause to arrest standard should apply because the hearing was merely a preliminary proceeding. *Id.* The Commonwealth also attempted to analogize the section 12(c) hearing to a parole hearing, at which the probable cause to arrest standard is used. The court stated that the two hearings were "vastly different." *Id.*

Commonwealth has met its probable cause burden that it can order that a defendant be temporarily committed for up to sixty days for evaluation.[178]

The above probable cause standard must be distinguished from a second and distinct probable cause standard that might come into play in the application of section 12(c).[179] In certain situations, the Commonwealth may seek to temporarily commit the defendant while awaiting the probable cause determination that results from a section 12(c) hearing.[180] Under section 12(e), the Commonwealth must demonstrate that there is probable cause to arrest in order to have a person temporarily committed pending a section 12(c) hearing.[181] In order to meet this burden and temporarily commit a person for up to ten days, the Commonwealth must present some expert evidence, although this evidence need not be extensive or in the form of live testimony, and needs to establish probable cause to arrest.[182] In a situation where the Commonwealth has not

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The directed verdict standard, as defined in *Myers v. Commonwealth*, requires: (1) more evidence than probable cause for arrest but less than proof beyond a reasonable doubt; (2) the fact finder to evaluate the credibility of witnesses and the quality of the evidence introduced; (3) "the examining magistrate [to] view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send the case to the jury." (298 N.E.2d 819, 822-25 (Mass. 1973)).

178. MASS. GEN. LAWS ch. 123A, § 13 (2000).

179. *See Bruno*, 735 N.E.2d at 1237-38. The following cases are examples of situations where a superior court judge, upon an examination of the evidence at a section 12(c) hearing, found no probable cause that a person was sexually dangerous. In these examples, the judges go into detail about the relevant scientific data and literature that is used in determining whether a person is classified as sexually dangerous. *See* Commonwealth v. Reese, No. 00-0181-B, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. Apr. 5, 2001); Commonwealth v. Rodriguez, No. 00-0122-A, 2001 Mass. Super. LEXIS 133 (Mass. Super. Ct. Mar. 27, 2001); Commonwealth v. Toland, No. A. 00-0331-B, 2000 Mass. Super. LEXIS 137 (Mass. Super. Ct. Apr. 24, 2000).

In *Commonwealth v. Breland*, the court denied the Commonwealth's motion for temporary commitment under section 12(e), pending the defendant's probable cause hearing. The court required the Commonwealth to meet a burden of "sufficient showing" that was "less than a showing of probable cause;" however, the court stated that, regardless of the standard that needed to be applied, the Commonwealth failed to present any evidence that the defendant had a mental abnormality or personality disorder. No. 00-1222, 2000 Mass. Super. LEXIS 363 (Mass. Super. Ct. Aug. 11, 2000).

180. MASS. GEN. LAWS ch. 123A, § 12(e) (2000). Such a situation could arise if, for whatever reason, the defendant is released from Department of Correction custody before the court can hold the section 12(c) probable cause hearing. Similarly, a person could be released from the department's custody during a lengthy section 12(c) probable cause hearing.

181. *Bruno*, 735 N.E.2d at 1237. Again, this is a different probable cause standard from the one to be applied by the court at the actual section 12(c) hearing. *See* MASS. GEN. LAWS ch. 123A, § 12 (e) (2000).

182. *Bruno*, 735 N.E.2d at 1238. A superior court judge denied the Common-

presented any expert evidence, a person may still be held for twenty-four hours, provided there is evidence that satisfies the burden and the required expert evidence is forthcoming.[183] Again, the two probable cause standards should not be confused; the Commonwealth has a greater burden in showing probable cause to temporarily commit a person for the sixty day evaluation than it does with respect to showing probable cause to temporarily commit a person for ten days pending the more important probable cause hearing.[184]

F. *Section 13-Temporary Commitment*

If the court determines that probable cause exists to believe that a person is sexually dangerous, the court shall then commit the person to the treatment center for the purpose of being evaluated by qualified medical examiners.[185] Section 13(a) sets forth the statute's strict time requirements, mandating that the period of commitment shall not exceed sixty days, and the actual examination must occur no later than fifteen days prior to the expiration of the commitment period.[186] Two examiners must then file a report based on the examination and other relevant evidence that offers a diagnosis of the defendant, as well as the examiners' recommendation as to the defendant's status, as a sexually dangerous person.[187]

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wealth's use of expert testimony where the expert interviewed the defendant without the knowledge or approval of the defendant's counsel in violation of Rule 4.2 of the Massachusetts Rules of Professional Conduct. *See* Commonwealth v. Louhisdon, No. A 01-201-B, 2001 Mass. Super. LEXIS 111 (Mass. Super. Ct. Mar. 29, 2001).

183. *Bruno*, 735 N.E.2d at 1238. The court appeared to explain this distinction by pointing out that, in other situations, a police office could make a decision to hold a person for a brief period of time such as twenty-four hours if the office believed there was probable cause, but a longer period of confinement would require a neutral magistrate's, or judge's, finding of probable cause. *Id.* at 1239; *see also supra* Part II (discussing *Bruno* at length).

184. Another way of putting it could be that the Commonwealth, if it is attempting to temporarily commit a person pending a 12(c) hearing, must show that sufficient probable cause exists such that a court will find, after a hearing, that there is probable cause that the person is sexually dangerous and should be temporarily committed for evaluation. Because the first finding of probable cause is a further step removed from the second and ultimate finding of probable cause, the first finding imposes a lesser burden on the Commonwealth, that of probable cause to arrest, as opposed to the second finding's greater directed verdict burden.

185. MASS. GEN. LAWS ch. 123A, § 13 (2000). Again, it should be noted that persons temporarily committed to the treatment center under this statute are not entitled to segregation from those already found to be sexually dangerous.

186. *Id.* § 13(a).

187. *Id.* As a practical matter, the defendant may choose not to cooperate with a proper examination. The statute does not require that the written report of the examin-

It is important to note that the time requirements found in section 13 do not appear to be flexible. Other sections of chapter 123A provide time frames that may be extended for "good cause shown" or on the court's own motion if "the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby."[188] At least one superior court justice has concluded that courts must strictly enforce the section 13 time requirements because, unlike other provisions of the statute, there is no express authority for an extension of time.[189] The superior court justice further concluded that dismissal of the petition and release of the defendant is the most appropriate remedy in a situation in which section 13 requirements are not followed.[190]

As is the case for a hearing under section 12(e), a defendant is

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ers be based on an examination, and it follows that the examiners could render their opinion on other facts present, noting that the defendant was not amenable to an examination. *Id.* Section 13(b) states:

> The court shall supply to the qualified examiners copies of any juvenile and adult court records which shall contain, if available, a history of previous juvenile and adult offenses, previous psychiatric and psychological examinations and such other information as may be pertinent or helpful to the examiners in making the diagnosis and recommendation. The District Attorney or the Attorney General shall provide a narrative or police reports for each sexual offence[sic] conviction or adjudication as well as any psychiatric, psychological, medical or social worker records of the person named in the petition in the District Attorney's or the Attorney General's possession. The agency with jurisdiction over the person named in the petition shall provide such examiners with copies of any incident reports arising out of the person's incarceration or custody.

MASS. GEN. LAWS ch. 123A, § 13(b) (2000).

188. *Id.* § 14(a); *see Bruno*, 735 N.E.2d at 1239 (allowing an extension of ten-day temporary commitment period under section 12(e) for "unusual circumstances").

189. *See* Commonwealth v. Kennedy, Civ. No. 00-171 (Hampden County Super. Ct., June 29, 2001) (Velis, J.) (referring to other provisions of chapter 123A of the Massachusetts General Laws and a defendant's right to a speedy trial under the Massachusetts Rules of Criminal Procedure), *aff'd*, 762 N.E.2d 764 (Mass. 2001).

190. *Id.* In arriving at this conclusion, Judge Velis first looked to *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (analyzing a violation of a defendant's speedy trial rights, the Court held that all relevant factors must be weighed, and "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case").

Judge Velis then followed the Supreme Judicial Court's analysis and remedy in Hashimi v. Kalil, 446 N.E.2d 1387 (Mass. 1983), a case that dealt with a civil commitment under chapter 123 of the Massachusetts General Laws. In *Hashimi*, the court found that the civil commitment statute included express language mandating that a "hearing shall be commenced within fourteen days . . . ." *Id.* at 1389. The court then stated that such language is plain and unambiguous, and that a violation of the statute warranted the dismissal of the commitment petition despite the absence of both specific language requiring dismissal and a showing of prejudice to the defendant. *Id.* at 1388-89.

entitled to counsel under section 13(c), and if he or she cannot afford an attorney, the court shall appoint one.[191] The defendant's counsel, as well as the District Attorney and Attorney General, is entitled to the qualified examiners' reports as well as all written documentation that was provided to the qualified examiners.[192] The defendant also is entitled to retain an independent qualified examiner to perform an examination on his or her behalf, and if the defendant is indigent, the court shall provide funds for such a qualified examiner.[193]

G. *Section 14-Trial by Jury*

Within fourteen days of receipt of the qualified examiners' report, the District Attorney or the Attorney General may petition the court for a jury trial to determine the ultimate question of whether the defendant is a sexually dangerous person.[194] Unlike section 9, section 14 does not expressly state whether civil or criminal trial practice governs.[195] Section 14(b) entitles the defendant to counsel and the ability to retain experts, and provides that the court will allocate funds and assistance in obtaining experts for indigent persons.[196] At the trial, almost all relevant evidence is admissible.[197] The defendant is entitled to have this trial commence within sixty days of the District Attorney or Attorney General's petition for a trial.[198]

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191. MASS. GEN. LAWS ch. 123A, § 13(c) (2000).

192. *Id.*

193. *Id.* § 13(d).

194. *Id.* § 14(a).

195. *Id. Compare id.* § 9 *with id.* § 14.

196. *Id.* § 14(b). Any reports of the defendant's experts must be filed with the court and provided to the District Attorney or Attorney General ten days prior to trial. *Id.*

197. *Id.* § 14(c). Section 14(c) reads in pertinent part:

> Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial.

Id.

198. "The trial may be continued upon motion of either party for good cause shown or by the court on its own motion if the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby." *Id.* § 14(a).

After the trial, the defendant may only be committed if the jury finds, unanimously and beyond a reasonable doubt, that the defendant is a sexually dangerous person under the statutory definition.[199] If the jury makes such a determination, the defendant is to be committed "for an indeterminate period of a minimum of one day and a maximum of such person's natural life until discharged pursuant to the provisions of section 9."[200]

H. *Section 15-Hearing Instead of Criminal Trial*

Under section 15, a person charged with a sexual offense, who is found incompetent to stand trial, is subjected to a special procedure in lieu of a typical criminal trial.[201] First, the court must make a determination under section 12 that there is probable cause to believe that the defendant did commit the acts that are the basis of

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This is in contrast to the strict time provisions found in section 13. See *supra* Part III.F for a discussion of § 13. While the defendant is awaiting trial, he or she shall be confined to the treatment center or another secured facility for the duration of the trial. MASS. GEN. LAWS ch. 123A, § 14(a) (2000). If the defendant is confined to the treatment center, he or she is not entitled to segregation from the rest of the facility's population. "If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the final judgment, the court may temporarily commit such person to the treatment center pending disposition of the petition." *Id.* § 14(e).

199. MASS. GEN. LAWS ch. 123A, § 14(d) (2000). Jury instructions in a sexually dangerous person trial should inform the jury that its decision must be unanimous and that the Commonwealth must prove the following three things beyond a reasonable doubt:

> (1) that the defendant is a person who has been convicted of a sex offense within the meaning of chapter 123A (the jury may not revisit the issue of the defendant's guilt on the charged sex offenses if he or she has been convicted of such a crime);
> (2) that he or she suffers from a mental abnormality or personality disorder;
> (3) that makes him or her likely to engage in further sexual offenses if not confined to a secure facility.

The instruction should also include definitions of mental abnormality and personality disorder, and properly instruct the jury as to how it should evaluate and consider the evidence, including expert evidence. *See* Commonwealth v. Guy, Civ. No. B00-287 (Bristol County Super. Ct., December 18, 2000) (court's written instructions to the jury) (on file with author).

200. MASS. GEN. LAWS ch. 123A, § 14(d) (2000). The defendant, of course, may, after the petition against him or her has been filed and prior to trial, file motions to dismiss or to suppress evidence. In this sense, the petition acts as an indictment and any pretrial motions are consistent with ordinary criminal trial practice. While the statute does not expressly provide for a defendant's ability to file such motions, absent the ability of the defendant to move the court for relief prior to a probable cause hearing under section 12, the superior courts have entertained and allowed such motions. *See also* Commonwealth v. Bruno, 735 N.E.2d 1222, 1236-39 (Mass. 2000).

201. MASS. GEN. LAWS ch. 123A, § 15 (2000).

the underlying sexual offense.[202] If the court finds that probable cause exists, it then holds a hearing on the issue of whether the defendant committed the charged acts.[203] This hearing must comply with all of the procedures specified in section 14, except the right to a jury.[204] The rules of evidence and rights of a defendant in a criminal trial shall apply with the exception of the right not to be tried while incompetent.[205] After this hearing, the court must make specific findings, and if it finds beyond a reasonable doubt that the defendant committed the acts charged, the court may then consider whether the person is sexually dangerous by proceeding under sections 13 and 14.[206] A determination of the defendant's guilt on the underlying offense, or a finding that the defendant is a sexually dangerous person under this section, is binding only as to the present chapter 123A proceedings and is not admissible in any subsequent criminal proceeding.[207]

I. *Section 16-Annual Reports Describing Treatments Offered*

This section mandates that "[t]he department of correction and the department of youth services shall annually prepare reports describing the treatment offered to each person who has been com-

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202. *Id.* Section 12 actually deals with hearings designed to determine whether there is probable cause to proceed with civil commitment actions. Under section 15, the section 12 hearing is applied to a criminal matter in order to determine if there is a probable cause to believe that a person committed the underlying crime. In any event, the protections afforded by the probable cause hearing apply an appropriate standard of review for the court to use in evaluating the merits of the charges against the defendant. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* The court must make specific findings as to the cause of the person's incompetence as well as to the effect that the person's incompetence had on his or her ability to consult with counsel and defend him or herself. *Id.*

207. *Id.* This section is rather confusing, as it appears to subject an incompetent person charged with sexual offenses to be tried without the right to a jury. A closer reading, however, reveals that the incompetent defendant is still afforded the right not to be tried while incompetent. Section 15, therefore, is nothing more than a mechanism by which a person can be committed and treated as a sexually dangerous person without having to wait for a formal trial on the underlying offenses. The legislature seems to have enacted this section in order to more quickly treat allegedly dangerous sex offenders, and to prevent defendants from avoiding classification as sexually dangerous persons because of their incompetence or claims of incompetence. It further appears that a court's determination that a defendant is sexually dangerous as a result of section 15 is temporary, and the defendant is allowed a full formal trial on the underlying alleged sexual offenses and new sexually dangerous person proceedings that result from any conviction on the sexual offenses. In other words, this section merely suspends the underlying criminal proceedings.

mitted to the treatment center"[208] The reports are to be sent to the state house of representatives and the senate for review by the committees on ways and means as well as the joint committee on criminal justice.[209] Another report is required that outlines the treatment center's plan for the administration and management of the treatment center.[210]

IV. ADDITIONAL HIGHLIGHTED AREAS OF CONCERN

Some points of interest may warrant consideration and further legal analysis. Chapter 123A appears to have a number of issues that could prove to be pitfalls for the practitioner who is unfamiliar with the nuances of the statute. Some notable inconsistencies include the two probable cause standards under section 12 temporary commitment proceedings,[211] the statute's various procedural time requirements, and the possibility that some, but not all, of these requirements may be extended in the interests of justice,[212] and the issue of jury unanimity under sections 9 and 14.[213]

The three inconsistencies listed above are by no means an exhaustive list of the potential issues raised by the statute. Discussed below are some of the areas left open by the statute that the courts and the legislature have failed to resolve and that warrant some analysis as the law evolves. Before discussing these shortcomings, however, a few of the statute's strengths merit discussion.

A. *Positive Aspects of Massachusetts General Laws Chapter 123A*

Chapter 123A has several strong points. First, the statute meets its legislative intention of protecting the public at large and rendering treatment to persons with mental abnormalities and personality disorders.[214] Second, the statute does not subject every person who comes into contact with it to an indeterminate period of commitment; rather, the statute is only focused on those offenders who suffer from a form of mental illness and are likely to recommit

208. MASS. GEN. LAWS ch. 123A, § 16 (2000).
209. *Id.*
210. *Id.* Sections 2A and 6A also provide that the department of correction conduct annual reviews of the current status of sexually dangerous persons who reside at, or are transferred from, the treatment center.
211. *See* discussion of section 12, *supra* Part III.E.
212. *See* discussion of section 13, *supra* Part III.F.
213. *See* discussion of sections 9 and 14, *supra* Part III.D, III.G.
214. *See generally* MASS. GEN. LAWS ch. 123A (2000).

a sexual offense.[215] To reach these ends, the Department of Correction and/or the District Attorney or the Attorney General will conduct preliminary screenings before any defendant is subjected to chapter 123A proceedings.

Moreover, the statute provides a number of procedural safeguards before subjecting a person to civil confinement. In particular, the court must find probable cause before conducting a hearing,[216] and the prosecuting attorney must convince a unanimous jury[217] that the defendant is, beyond a reasonable doubt,[218] a sexually dangerous person within the meaning of the statute.[219] The statute also sets forth strict procedural time frames[220] and allows the defendant access to funds for attorneys and experts.[221] Finally, the statute provides a person who is found to be sexually dangerous the opportunity annually to petition the court for release, and, upon such petition, that person is entitled to a jury determination as to whether he or she remains sexually dangerous.[222]

B. *Administrative Impact on the Superior Court*

Since chapter 123A, in its current incarnation, is relatively new, it is impossible for one to fully understand its impact on the legal system. It should be noted, however, that the statute places a heavy burden on the judicial resources of the superior court. To civilly confine one person under the statute, the superior court must preside over a probable cause hearing,[223] a trial (most likely a jury trial),[224] and other motions including, but not limited to: motions to dismiss;[225] motions to suppress or exclude evidence;[226] motions to release funds;[227] and motions addressing probable cause to temporarily commit the defendant while the proceedings take place.[228] Furthermore, a person who is civilly confined is entitled to chal-

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215. *Id.* § 12.
216. *Id.*
217. *Id.* § 14(d).
218. *Id.*
219. *See id.*
220. *See* discussion *supra* Part II.B.1-5, Part III.F-G.
221. *See* MASS. GEN. LAWS ch. 123A, §§ 9, 13-14 (2000).
222. *Id.* § 9.
223. *See id.* § 12.
224. *See id.* § 14.
225. *See* discussion of cases *supra* notes 175, 177, 179.
226. *See* discussion *supra* note 182.
227. *See* MASS. GEN. LAWS ch. 123A, §§ 9, 13-14 (2000).
228. *See id.* § 12(e).

lenge his or her status, on an annual basis, by a jury trial.[229] Undeniably, these proceedings greatly tax the court's resources.[230]

229. *See id.* § 9.

230. The Department of Correction's prison statistics show that as of January 1, 2000 there were 1893 persons committed to the department's jurisdiction after being convicted of sexual offenses. Massachusetts Department of Correction, *January 1, 2000 Inmate Statistics*, p.13, table 5, *at* http://www.state.ma.us/doc/pdfs/1100.pdf. This represents approximately 18% of the total number of inmates under the department's control at that time. *Id.* Similarly, in 1999, 1939 persons were convicted of sexual offenses and sentenced to Department of Correction facilities, representing 17% of the total number of persons convicted and turned over to the department. Massachusetts Department of Correction, *January 1, 1999 Inmate Statistics*, p.5, table 5, *at* http://www.state.ma.us/doc/pdfs/1199.pdf. While not all of the persons convicted and incarcerated for sexual offenses will be eventually subjected to chapter 123A of the Massachusetts General Laws, the above statistics reflect the fact that there is a large pool of eligible candidates for confinement and treatment under the statute.

Sexually dangerous persons proceedings continue to burden the Massachusetts trial courts. For example, the following is a review of the number of petitions brought under chapter 123, section 9 of the Massachusetts General Laws:

Pending from prior years:	30
New petitions filed 2000:	31
Total for 2000:	61
Hearings Scheduled:	30
Withdrawals:	8
Continuances:	2
Dismissals:	1
Final Judgment Entered:	19
Cases Carried Over to 2001:	31
Judge Hearings Scheduled:	26
Average Length of Jury Hearings:	5.78 days
Bench Hearings Scheduled:	4
Length of Bench Hearings:	3 days
Average Time Between File Date and Scheduled Hearing Date:	22 months
Average Delay Between Scheduled Hearing Date and Actual Hearing Date:	8.5 months

Massachusetts Judicial Branch, *Superior Court Department, Fiscal Year 2000, Petition for Discharge Hearing-Sexually Dangerous Person-G.L. c. 123A, § 9*, *at* http://www.state.ma.us/courts/courtsandjudges/courts/superiorcourt/dangerouspetitions.html.

In reviewing the above statistics, it must be highlighted that the number of new petitions filed in 2000 is equal to the number of cases carried over to 2001. Additionally, even disregarding the average delay of 8.5 months between the scheduled and actual hearing dates, the average time between the file date of a petition and the hearing date on the petition is approximately 22 months. This statistic is alarming as, under chapter 123A, an inmate committed as a sexually dangerous person is entitled to file a new petition every year. MASS. GEN. LAWS ch. 123A, § 9 (2000). Thus, it appears that an inmate would be annually filing a new petition despite the fact that the court had not yet held a hearing on his or her previous one.

Again, it should be noted that the above statistics are for section 9 petitions and only reflect a small portion of the proceedings under chapter 123A. As the statute has only recently been enacted, the number of persons now subject to its provisions does not even approach the number of persons potentially affected by it in the future. Con-

Additionally, the time restrictions found in the statute may force chapter 123A cases to take priority over other important judicial matters in order to preserve a defendant's statutory and constitutional due process rights.

C. *Duty To Inform About Plea Impact*

Generally, when a person pleads guilty to a crime, the court must make that person aware of the impact of his or her plea.[231] To date, however, the SJC has stated that being subjected to the provisions of chapter 123A "is but one of many contingent consequences of being confined"[232] after conviction and, therefore, the court need not explain the consequences of potential chapter 123A proceedings to a defendant prior to accepting his or her plea of guilty to a sexual offense.[233] This rule differs from the statutory requirement

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finement under chapter 123A is unlike incarceration for other offenses whereby each year a number of inmates are released and new persons are sentenced. Instead, because there is no definite period of commitment under this law, the number of inmates could grow exponentially if the number of released persons is not similar to the number of newly committed persons. The result is both a new round of initial commitment proceedings each year, and a growing number of section 9 release petitions that trigger related proceedings, petitions that can be filed by each inmate once a year.

Finally, the delays reflected in the above statistics are not necessarily the fault of the Superior Court or its lack of resources. As discussed throughout this article, other factors can cause delays, such as the limited number of qualified examiners approved by the Department of Correction, or the fact that the Commonwealth or Attorney General's Office does not diligently follow the schedule of events set forth by the statute.

231. MASS. R. CRIM. P. 12(c)(3) (2001).

232. Commonwealth v. Morrow, 296 N.E.2d 468, 474 (Mass. 1973).

233. *Id.* Andrews v. Commonwealth, 282 N.E.2d 376, 378 (Mass. 1972). Since the repeal of some of chapter 123A's sections in 1990, the courts have not established any new definitive rule on this issue. Some courts, however, appear to suggest that, while not constitutionally mandated, informing a defendant of all of the consequences of pleading guilty to a sexual offense may be appropriate. *See* Commonwealth v. Frederico, 666 N.E.2d 1017, 1020 (Mass. App. Ct. 1996) (discussing defendant's possible future status as a sexually dangerous person as appropriate and did not improperly interfere with the defendant's plea agreement or improperly influence him to withdraw his guilty plea); Commonwealth v. Anderson, No. 819495, 1993 WL 818847, at *1 (Mass. Super. Ct. Oct. 1993) (Toomey, J.) (refraining from addressing the court's failure to inform the defendant during a plea colloquy that the plea could result in civil commitment under chapter 123A but stating that the delivery of such information may now be required by rule 12(c)(3)(B) of the Massachusetts Rules of Criminal Procedure, which was not effective until after the defendant entered his plea).

For a recent discussion of plea colloquies with respect to sexual offender registration and notification laws, see Commonwealth v. Albert A., 729 N.E.2d 312 (Mass. App. Ct. 2000). In discussing the adequacy of a plea, the court stated:

> The constitutional adequacy of a plea, however, does not require that a defendant be advised of consequences that are contingent or collateral to the plea. That one adjudged in violation of [a sexual offense] might be subject to the

that a court inform a defendant prior to his or her entering a plea that such a plea could result in deportation or other immigration and naturalization difficulties.[234]

D. *The Potential Malpractice Problem*

Though the court is not, as of yet, required to explain to a defendant the potential consequences of pleading guilty to a crime enumerated in section 1 of chapter 123A,[235] a defense lawyer should offer an explanation to his or her client in order to avoid a future legal malpractice claim. An attorney owes his or her client an obligation to exercise a reasonable degree of care and skill in the performance of his or her legal duties.[236] In order to recover in a malpractice claim against an attorney, the plaintiff must establish that: (1) an attorney client relationship existed; (2) the defendant attorney failed to exercise reasonable care and skill in handling the plaintiff's case; (3) the plaintiff incurred a loss; and (4) the defendant attorney's malpractice was the proximate cause of the loss.[237]

Assume for argument sake that a defense attorney failed to inform his or her client that the crime he or she was pleading guilty to could result in future civil confinement. In such a case, it is clear that an attorney client relationship exists. One could argue that the attorney's omission constituted a failure to exercise reasonable care and skill in handling the client's case. Moreover, one could certainly argue that indefinite civil confinement constitutes a "loss." Whether or not one could prove proximate cause, or whether the malpractice action would ultimately prevail is, of course, a question that most lawyers prefer to avoid. An attorney in this position should inform his or her client of any potential chapter 123A proceedings that may result from the client's guilty plea. One possible

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> registration and notification provisions of the sex offender act is but one of the many contingent or collateral consequences of such an adjudication.

Id. at 314.

234. MASS. GEN. LAWS ch. 278, § 29D (2000).

235. *See Andrews*, 282 N.E.2d at 378.

236. *See* Meyer v. Wagner, 709 N.E.2d 784, 791 (Mass. 1999) ("The law demands that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients.") (quoting Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195 (Conn. 1994)); *see also* David A. Berry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15 (1978); David A. Berry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 MASS. L. REV. 74 (1993).

237. *See* Miller v. Mooney, 725 N.E.2d 545, 549 (Mass. 2000); *Wagner*, 709 N.E.2d at 791; DiPiero v. Goodman, 436 N.E.2d 998, 999 (Mass. App. Ct. 1982).

suggestion is getting an affidavit from the client confirming that he or she understands the potential chapter 123A ramifications.

E. *Extended Period of Probation*

Another concern regarding the present incarnation of chapter 123A of the Massachusetts General Laws is that it allows for some confusion over the status of defendants once they are released from the treatment center. In *Commonwealth v. Sheridan,*[238] the Massachusetts Court of Appeals ruled that where a defendant had been sentenced by the superior court to a period of probation to be served "from and after any sentences [he] is now serving," this probationary period would commence after the defendant was released from the treatment center.[239] The court stated that the purposes of probation would best be served by ordering that the defendant be subjected to its terms after his commitment.[240] The court rejected the defendant's argument that the Commonwealth and the probation department violated his rights to due process and fundamental fairness by failing to make an effort to determine his probationary status at the time he was originally released from prison and prior to his placement in the treatment center.[241]

The concern with *Sheridan* is that it further extends any period of punishment by allowing a court to refuse to permit time in a

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238. 743 N.E.2d 856 (Mass. App. Ct. 2001).

239. *Id.* at 858-60.

240. *Id.* at 859 ("The purpose of a probationary sentence is rehabilitation of the probationer and protection of the public. It is granted with hope that the probationer will be able to rehabilitate himself or herself under the supervision of the probation officer.") (citations omitted).

The court also stated that:

> We are sure that the experienced sentencing judge [Ford, J.] was aware of the purposes of probation. By imposing the probationary sentence to commence after the sentences the defendant was then serving, it is clear the sentencing judge intended the defendant to be supervised by a probation officer at the time he was released from custody and returned to the community. In our view, the fact that the defendant's release to the community was delayed because of an intervening civil commitment did not change the sentencing judge's intent to have the defendant supervised upon his release from custody.
>
> Further, we reject the defendant's argument that his probationary sentence ran concurrently with his commitment at the treatment center. While committed to the treatment center, the defendant was separated from society and in an institutionalized setting that eliminated any need for the supervision of a probation officer. The two goals of probation - rehabilitation under the supervision of a probation officer and the protection of society - are only brought into play when the offender is released into the community.

Id. (citations omitted).

241. *See id.* at 859-61.

treatment center to run concurrently with a probation period. This is significant because it becomes a way in which the defendant is subject to liberty constraints and is faced with the realistic fear that simple probation violations could result in another round of incarcerations.

Alternatively, one could view *Sheridan* as serving valid and logical purposes. First, allowing the court to order probation to be served after a stay at the treatment center appears to be consistent with traditional probationary practice, whereby a rehabilitated inmate is eased back into society. In the case of a sexually dangerous person, it would make sense to allow probation only after he or she underwent the necessary treatment. This would also allow for an additional safeguard of the public because the courts would not release the defendant directly from treatment into society, but would require the agencies of the Commonwealth to keep tabs on such defendants and incarcerate him if he begins to participate in certain detrimental practices. Second, in a strictly logical sense, if the courts were to discover that, as a matter of law, probation and treatment must run concurrently, they would be ruling that inmates in a treatment center are subject to criminal incarceration, thus defeating some of the foundation for upholding the statute in the first place.

The rebuttal to the above arguments is that chapter 123A of the Massachusetts General Laws already has provisions in place for easing sexually dangerous persons back into society. These provisions, along with sex offender registration laws, are sufficient public safeguards. Convicted persons should not be subject to further punishment and repeated threats of incarceration for minor probation violations such as substance abuse or breaking curfew. Additionally, one could contend that placing treatment between two periods of criminal punishment proves that the treatment is also criminal punishment.

In any event, while *Sheridan* does create a unique wrinkle in the punishment and treatment of sex offenders, the extension of probation after the term of treatment appears to be a discretionary measure left to the sentencing court. *Sheridan* did not establish a mandatory rule, rather it only looked to the specific circumstances of that case in determining the judicial intent.

F. *Use of Expert Evidence at Hearings and Trial*

Since a jury or court must make the ultimate determination as

to whether the defendant is sexually dangerous, it is crucial to have expert evidence as to the defendant's likelihood of recidivism and whether he or she suffers from a mental abnormality or personality disorder.[242] As mentioned above, the statute places a great deal of emphasis on reports by qualified examiners.[243] Because the Massachusetts Department of Correction must approve examiners, there is a possibility that a defendant would experience some difficulty in locating a truly independent examiner.[244] This is not to say that an examiner would necessarily be biased in his or her opinion in favor of the Commonwealth. It should simply be noted that the availability of examiners who are able to conduct an independent examination might be limited by this rule.[245] This rule also appears to be somewhat in contrast with the ordinary rules regarding the admission of expert evidence. In general, the court has the discretion to determine whether a witness is an expert in the relevant field.[246]

Under chapter 123A, however, the court's responsibilities are limited in some respects by the requirement that the Department of Correction designate qualified examiners.[247] While section 14 of the statute does not expressly prevent a defendant from using non-qualified examiners as experts, the language is ambiguous and its interplay with the other sections of the statute could be read to establish such an exclusion.[248] Essentially, this removes some of the discretion to qualify an expert from the court and places it back into the hands of the Department of Correction, an agency that works

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242. *See* MASS. GEN. LAWS ch. 123A, § 14(b)-(c) (2000).

243. *See id.* §§ 9, 13; *see also supra* Part IV (discussing the role of qualified examiners).

244. *See supra* notes 135-42 and accompanying text (outlining criteria for qualified examiners).

245. *See supra* notes 135-42 and accompanying text (qualified examiners).

246. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585-88 (1993) (holding that the trial judge must determine that the evidence is both reliable and relevant in order to allow expert evidence to be admitted); Commonwealth v. Lanigan, 641 N.E.2d 1342, 1349 (Mass. 1994) (establishing that a trial judge has a "gatekeeper" role in determining whether the process or theory underlying the expert's opinion lacks reliability); Letch v. Daniels, 514 N.E.2d 675, 677 (Mass. 1987) ("The crucial issue is whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony."). However, the proposed expert need not previously have encountered the exact set of facts now before her. *See* HON. PAUL J. LIACOS ET AL., HANDBOOK OF MASSACHUSETTS EVIDENCE § 7.7.2, at 401 (7th ed. 1999) (citing McLaughlin v. Bd. of Selectmen, 662 N.E.2d 687 (Mass. 1996) (holding that excluding testimony of a real estate expert, because she had not bought, sold, or owned land in the location about which she testified, was error)).

247. *See* MASS. GEN. LAWS ch. 123A, § 2 (2000).

248. *Compare id.* § 13, *with id.* § 14.

closely with the Commonwealth in these situations.[249] Although problematic, the role of the qualified examiner would most likely survive any legal challenge raising the argument that it conflicts with the traditional evidentiary standards. The legislature has the authority to promulgate evidentiary rules, including those regarding witnesses.[250] Thus, the courts would resolve any conflict between chapter 123A and the *Daubert/Lanigan* standard in favor of the statute.[251]

CONCLUSION

The potential problems mentioned in the last portion of this article undoubtedly represent just the beginning of the complications that will arise from chapter 123A. The statute presents so many legal questions partly because it is a civil statute being implemented with a hybrid of criminal and civil procedure. It is impossible to determine how the courts will resolve these problems in the future. It seems logical, however, to conclude that legal precedents such as *Hendricks* and *Bruno* have, to a large degree, precluded any constitutional arguments that a defendant might raise. Any mean-

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249. *See* MASS. GEN. LAWS ch. 123A, § 12(a) (2000) (stating that the Department of Correction or other agencies with control over inmates convicted of sexual offenses is responsible for identifying those inmates who, in their opinion, are likely to meet the criteria for a sexually dangerous person).

250. *See* Meunier's Case, 66 N.E.2d 198, 202 (Mass. 1946) (holding that the legislature is also permitted to enact procedural and evidentiary rules, "provided they do not violate constitutional requirements or deprive any person of his or her constitutional rights").

251. There is some indication, however, that the Massachusetts courts would not totally preclude the *Daubert/Lanigan* analysis in a chapter 123A case. In *Commonwealth v. Two Juveniles*, the SJC noted that "[t]he Supreme Court of the United States has recognized that a criminal defendant's constitutional right to present evidence shown to be relevant and likely to be significant may override a rule of exclusion enforced in the State in which the trial is held." 491 N.E.2d 234, 238 (Mass. 1986) (citing Davis v. Alaska, 415 U.S. 308, 319 (1974)). Additionally, a recent Massachusetts Justice of the Superior Court, in reviewing the use of expert testimony at a sexually dangerous person proceeding, ruled that:

> There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to the *Lanigan* analysis. "That a person qualifies as an expert does not endow his testimony with magic qualities." Observation informed by experience is but one scientific technique that is no less susceptible to *Lanigan* analysis than other types of scientific methodology. The gatekeeping function pursuant to *Lanigan* is the same regardless of the nature of the methodology used: to determine whether "the process or theory underlying a scientific expert's opinion lacks reliability [such] that [the] opinion should not reach the trier of fact."

Commonwealth v. Reese, Civ. No. 00-0181-B, 2001 Mass. Super. LEXIS 112, at *23 (Mass. Super. Ct. Apr. 5, 2001) (memorandum and order on probable cause).

ingful change in chapter 123A's policies, therefore, will have to be made through legislation.