Miga v. City of Holyoke: The Need For Statutory Protection For Persons Held in Protective Custody in Massachusetts

I. INTRODUCTION

What rights does a person who has not been arrested but is held in protective custody have? Are detainees protected by the eighth

1. BLACK'S LAW DICTIONARY 1101 (5th ed. 1979) defines protective custody as:
   [t]he condition of one who is held under force of law for his own protection as in the case of a material witness whose safety is in jeopardy, or one who is drunk in public though public drunkenness may not be a criminal offense, or of a person who because of mental illness may harm himself or others.

   Id.
   MASS. GEN. LAWS ANN. ch. 111B, § 3 (West 1986) provides “[d]efinitions” for the terms used throughout all sections of the same chapter. A notable omission is a definition of ‘protective custody,’ a term specifically used in MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1986) which provides in part:
   [a]ny person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test. Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility.

   Id.
   CAL. WELF. & INST. CODE § 5300.5 (West 1983), by contrast, does define custody, providing: “(a) Custody shall be construed to mean involuntary detainment under provisions of this part uninterrupted by any period of unconditioned release from a licensed health facility providing involuntary care and treatment. (b) Conviction of a crime is not necessary for commitment under this article . . . .”

   Id.

While custody used in the California statute is defining custody in a mental health facility and the Massachusetts statute is using protective custody mostly for detaining persons for public drunkenness, the deprivation of freedom to the individual is analogous. It is always useful for a statute to define its key terms.

   MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1986) also provides for the transport of a person held in protective custody to a facility other than a police station:
   If suitable treatment facilities are available at a facility, the department shall thereupon arrange for the transportation of the person to the facility in accordance with the provisions of section seven.

   No person assisted to a police station pursuant to this section shall be held in protective custody against his will; provided, however, that if suitable treatment at a facility is not available, an incapacitated person may be
amendment² or is the eighth amendment inapplicable to detainees? What statutory basis do the police have for detaining an individual in the first place?³ This case comment will address these questions through an analysis of the Miga v. City of Holyoke⁴ decision as well as discuss various rights which non-arrested people in protective custody should be given. The interplay of detainees’ federal statutory rights and constitutional rights with Massachusetts statutory law is presented. Both substantive and procedural rights of detainees are analyzed. The argument presented is that while Massachusetts case and statutory law supplemented by the U.S. Constitution as well as federal case and statutory law do provide substantive due process rights for protective custody detainees,⁵ as a practical matter this protection is

held in protective custody at a police station until he is no longer incapacitated or for a period of not longer than twelve hours, whichever is shorter.

Id.

M A S S . G E N . L A W S A N N . ch. 111B, § 7 (West 1986) then increases the amount of time a person can be held in protective custody, and depending on the circumstances, may lead to commitment in a mental facility:

[a]ny person who at the time of admission is intoxicated and is incapacitated, shall remain at the facility until he is no longer incapacitated, but in no event shall he be required to remain for a period greater than forty-eight hours, or if any such person is committed for rehabilitative purposes to the Massachusetts Correctional Institution, Bridgewater, or to the Massachusetts Correctional Institution, Framingham, he shall be required to remain for a period of not less than ten days.

Id.

Consequently, the lack of definition of “protective custody” in Massachusetts leads to a broad application of the power which the state may exercise in confining non-convicted persons to a jail or an institution.

2. U.S. Const. amend. VIII provides: “[e]xcessive bail shall not be required, . . . nor cruel and unusual punishments inflicted.” Id.


Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility . . . . If any person who is administered a breathalyzer test, under this section, and evidence from said test indicates that the percentage of alcohol in his blood is more than five one hundredths and is less than ten one hundredths there shall be no presumption made based solely on the breathalyzer test. In such instance a reasonable test of coordination or speech coherency must be administered to determine if said person is intoxicated. Only when such test of coordination or speech coherency indicates said person is intoxicated shall he be placed in protective custody at a police station or transferred to a facility.

Id.


5. Id. ("Persons in police custody who have not been convicted of any crimes retain at
insufficient in the protective custody setting.\textsuperscript{6}

The analysis first focuses on \textit{Miga v. City of Holyoke}, a case involving a detainee whose substantive due process rights were held to have been violated by the Massachusetts Supreme Judicial Court.\textsuperscript{7} In \textit{Miga}, least those constitutional rights that are enjoyed by convicted prisoners."\textsuperscript{3} \textit{Id.} at 350, 497 N.E.2d at 5; \textit{Parratt v. Taylor}, 451 U.S. 527 (1981)(availability of a postdeprivation remedy, although relevant to the issue of procedural due process, would not be relevant to the alleged violation of substantive constitutional rights); Ingraham v. Wright, 430 U.S. 651 (1977)(where the state seeks to impose punishment without a constitutional adjudication of guilt, the pertinent constitutional guarantee is the due process clause of the fourteenth amendment); U.S. \textsc{Const.} amend. XIV provides:

\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws . . . .
\end{quote}

\textit{Id.}


\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
\end{quote}

\textit{Id.}

\textsc{Mass. Gen. Laws Ann.} ch. 12, § 11H (West 1986) provides:

\begin{quote}
Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the Commonwealth and shall be instituted in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principle place of business.
\end{quote}

\textit{Id.}

6. \textit{Miga}, 398 Mass. at 343, 497 N.E.2d at 1 (plaintiff's daughter, Sandra Smigiel, was found hanging from the bars of her cell while in the protective custody of the police of Holyoke, Mass.; although this detainee's substantive due process rights were acknowledged at trial and upheld on appeal, Sandra herself was dead before any such determination was ever considered). \textit{Id.} at 348, 356, 497 N.E.2d at 4.

7. \textit{Id.} at 356, 497 N.E.2d at 8.

"Thus, there was evidence of reprehensible conduct . . . which clearly rises to the threshold level of 'callous disregard' for the decedent's substantive due process rights."
a young woman, Sandra Smigiel, was found intoxicated by the police.\textsuperscript{8} The police made a perfunctory but inadequate attempt to comply with the Massachusetts statute authorizing protective custody.\textsuperscript{9} A correct reading of the statute should have led the police to the conclusion that Sandra, in a state of intoxication, should have been placed in a detoxification center, or at a minimum, examined by a doctor or medic before being placed in a cell.\textsuperscript{10} The police merely placed Sandra in a cell without taking the precautions that the situation warranted.\textsuperscript{11} Moreover, the police later failed to investigate shouts from other detainees that Sandra was trying to kill herself.\textsuperscript{12} Sandra succeeded in committing suicide.\textsuperscript{13}

Although the \textit{Miga} court found that Sandra Smigiel's constitutional substantive due process rights were violated,\textsuperscript{14} such retrospective justice is of little help to Sandra Smigiel, who died as a result of that

\begin{itemize}
  \item \textbf{Id.}\textsuperscript{8} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.

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  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.
  \item \textbf{Id.}\textsuperscript{9} at 346, 497 N.E.2d at 3; Brief for Appellants at 3, \textit{Id.} at 343, 497 N.E.2d at 1.

\end{itemize}
violation. Indeed, while the uncertainty of the rights and protections afforded those held in protective custody are exemplified in the Miga decision, the ruling falls short of resolving that uncertainty. Even the definition of protective custody under Massachusetts law is vague, hence the scope for police discretion in applying the law is broad. The laws of Massachusetts do not statutorily define what protective custody is, rather, the Public Health laws merely permit its practice by granting the police authority to hold certain individuals in protective custody. An additional problem in defining protective custody is semantic. Massachusetts statutes use the terms protective custody, custody and lawful custody, while Massachusetts case law has used the term "pretrial detainee," apparently referring to a person in protective custody. A California statute, by comparison, defines protective custody as "involuntary detainment . . . uninterrupted by any period of unconditional release . . . ." A combination of the above definitions applied to the type of confinement experienced by the detainee, Sandra Smigiel, which resulted in a violation of her rights.

15. Id. at 346, 497 N.E.2d at 3 (Sandra Smigiel died on September 21, 1979).
16. Id. at 350, 497 N.E.2d at 5, stating, "While the Eighth Amendment does not serve as a direct source of rights for a person in protective custody, the Federal courts have applied Eighth Amendment analysis by analogy to determine what protections detainees are afforded pursuant to the principles of substantive due process." Id.
17. Id. at 351 n.9, 497 N.E.2d at 6 n.9 stating, "[t]he substantive protections afforded detainees under the due process clause are equivalent to the protections enjoyed by convicted prisoners pursuant to the Eighth Amendment." Id.
18. See supra note 1.
19. Id.
21. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1986) (uses the term "protective custody"); MASS. GEN. LAWS ANN. ch. 94C, § 36 (West 1986) (uses the terms "protective custody," "custody," "legal custody," and "child detained" all in the same section). "Protective custody" and simply "custody" are used in the same context, apparently meaning the same thing.
22. Miga, states:
   [S]he [Dolores Miga, plaintiff, administratrix and mother of Sandra Smigiel, decedent] alleges that those acts . . . constituted deliberate indifference to serious medical needs of a person in police custody . . . . A pretrial detainee like Sandra, is not protected by the prohibitions against cruel and unusual punishment found in the Eighth Amendment . . . . While the Eighth Amendment does not serve as a direct source of rights for a person in protective custody, the Federal courts have applied Eighth Amendment analysis by analogy to determine what protections detainees are afforded pursuant to the principles of substantive due process.
Miga, 398 Mass. at 349-50, 497 N.E.2d at 5.
23. CAL. WELF. & INST. CODE § 5300.5 (West 1985); See also supra note 1.
24. See supra note 22.
The judicial process has done all it can for Sandra and protective custody detainees in Massachusetts. The responsibility is passed to the Massachusetts legislature to define protective custody and revise the Public Health statute to ensure that substantive due process rights of non-arrested persons are not only recognized, but enforced.

II. FACTS

On the evening of September 10, 1979, Sandra Smigiel, then a twenty-three year old married woman, went to the Holyoke Police Station and told detective Russell Paquette, that her husband, Daniel Smigiel, had put a gun to his head and was threatening to commit suicide. The police accompanied Sandra to her home, and took Daniel Smigiel's gun. Mr. Smigiel then informed Paquette that Sandra had suicidal tendencies and had been hospitalized for them. Additionally, Sandra herself told Paquette that she had been a mental patient and that she had a drinking problem. Paquette's written report contained both these facts about Sandra Smigiel. This report was signed by Lieutenant James Sullivan. On September 21, 1979, only eleven days after the incident, the same lieutenant who signed Paquette's report

26. Miga, was a final adjudication by the Massachusetts Supreme Judicial Court of both state and federal based claims raised by decedent's administratrix. Even if the unsuccessful defendants/appellees were to appeal only the federal issue to the United States Supreme Court, it is likely that certiorari would be denied. These issues have already been addressed by the United States Supreme Court; in fact, the Miga court relied on a United States Supreme Court decision stating: "[W]here the State seeks to impose punishment without [a constitutional] adjudication [of guilt], the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." Miga, 398 Mass. at 350, 497 N.E.2d at 5 (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)). The Miga court then correctly applied the substantive due process rights to the federal and constitutional claims raised by plaintiff. Id.

27. BALLANTINE'S LAW DICTIONARY 723 (3d ed. 1969) defines legislative act as:

"A law or statute enacted by the legislature. An act which predetermines what the law shall be for the regulation of future cases falling under its provision." Id. It is to be distinguished from a judicial act, which is a determination of what the law is in relation to some existing thing done or happened. Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353 (1894)(emphasis added). (It is the author's contention that while the judicial decision in Miga was equitable, it is insufficient to prevent future violations of protective custody detainee's substantive due process rights. Hence, the legislature must act.)

32. Brief for Appellees at 3-4.
33. Id. at 4.
34. Id. at 3-4. The lieutenant was Lieutenant James Sullivan, Officer Paquette's commanding officer. It was Sullivan who read and signed Paquette's report of September 10,
and an officer named Alan Fletcher were on duty, cruising Holyoke in their patrol car. Sometime after 2:00 a.m. they came upon two stopped cars. The driver of one of the cars, Marcel Martel, flagged down the patrol car. Martel, the proprietor of a local bar, had only minutes before refused to serve the driver of the other car, Sandra Smigiel. Martel had witnessed Sandra’s weaving car on Northampton Street. When Sandra pulled her car over to the left hand side of the road, slumped down in the car and left the headlights on, Martel stopped to see if he could help. The two policemen found that the woman in the car, Sandra Smigiel, smelled of alcohol, her speech was slurred and she was unable to walk unassisted; the policemen concluded that the woman was drunk. The police attempted to drive Sandra to the place where she told them she lived. Upon arriving on Morgan Street, the police found that Sandra did not live at the address that she had given them. Sandra lived at 168 Morgan Street. The neighbor, at the address where the police knocked, informed the police that Sandra did not live there. The police did not search Sandra’s pocketbook or other possessions in an attempt to ascertain her true identity and/or address, but decided to take Sandra to the police station to be held in protective custody.

Apparently Sandra lapsed into unconsciousness en route to the po-
lice station. Nonetheless, no officer on duty made any attempt to secure medical help for Sandra. Sandra was placed in protective custody at the Holyoke Police Station and a protective custody report was signed by Officer Fletcher.

The commanding officer at the police station at this time was Officer John McMullan, co-defendant in the suit. "It was his responsibility to call the Detoxification Center or to have such a call made if necessary." The evidence as to whether the detoxification center was contacted, and if there was any space available, was contradictory.

After Sandra was booked, she again fell into unconsciousness. While unconscious she was taken downstairs to a cell. Since she was thrashing about, the officers placed her on the floor of the cell. Sandra's glasses, belt and necklace were removed by Officer King. Sandra was then left alone in the cell. The evidence further showed that no police officer checked on Sandra in her cell as the police regulations required.

Soon thereafter, Sandra revived and became noisy. She asked the other women inmates if they knew of a good way that she could hang herself. Sandra informed the others that she would hang herself with her shirt. The other prisoners screamed up the stairs through a barred but not solid door, that Sandra was "trying to kill herself." The police did not come down the stairs to investigate but simply yelled at them either to "shut up" or "F--- you N-gg-r, and go to sleep." "There was evidence . . . that Dudek was the police officer who uttered the response . . . ." At 6 a.m. Sandra's body was dis-
covered hanging from the bars of her cell."

III. PROCEDURAL HISTORY OF THE CASE

Dolores Miga, the mother of the decedent, Sandra Smigiel, brought this action both individually and as administratrix of the estate of Sandra Smigiel against nine police officers of the city of Holyoke, individually, and against the City of Holyoke itself, seeking recovery under a state claim for wrongful death as well as a federal claim for the deprivation of decedent’s civil rights. In addition, Dolores Miga sought recovery under state statutes for violations of Sandra’s civil rights and for intentional infliction of emotional distress. However, directed verdicts were allowed for all defendants on both the state based civil rights violation, and on the state based infliction of emotional distress allegations. Directed and jury verdicts disposed of all claims in favor of seven of the nine police officers. Furthermore, the Massachusetts Superior Court held “that direct recovery against the remaining police officers under G.L.ch. 229, section [sic] 2 (emotional distress claim), is barred by the Massachusetts Torts Claims Act, Mass. Gen. L. ch. 258, section [sic] 2, and that the plaintiff’s action for wrongful death lies

68. Id.
   A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted . . . shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages . . . in such case as the decedent’s death was caused by malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.

   Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth, has been interfered with . . . may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for . . . including the award of compensatory money damages.

73. Miga, 398 Mass. at 344 n.3, 497 N.E.2d at 2 n.3.
74. Id.
75. Id. at 343 n.2, 497 N.E.2d at 1 n.2.
   The remedies provided by this chapter shall be exclusive of any other civil
only against the city of Holyoke.\textsuperscript{77} The jury found the City of Holyoke liable for the death of Sandra Smigiel under the wrongful death claim,\textsuperscript{78} and awarded $20,000 damages and $2,100 for funeral and burial expenses to plaintiff.\textsuperscript{79} Since the jury also found that Sandra Smigiel was forty per cent negligent and the City of Holyoke sixty per cent negligent, the damage awards were reduced by forty per cent to $12,000 and $1,260, respectively.\textsuperscript{80} The jury found both defendants Dudek and McMullan liable under the federal civil rights violation,\textsuperscript{81} and assessed compensatory damages in the sum of $20,000 as well as punitive damages in the sum of $50,000 against each of them.\textsuperscript{82} Then, as stated by the Supreme Judicial Court:

On appeal, the defendants challenge[d] the denial of their motions for directed verdicts and judgments notwithstanding the verdicts, and the damage awards. Specifically, the defendants contend that the evidence was not legally sufficient to establish a constitutional violation under section 1983, that the existence of an adequate state remedy foreclosed the right to sue for violation of civil rights under section 1983, and that the issue of punitive damages should not have been submitted to the jury.\textsuperscript{83}

Defendants' appeal was originally filed with the Appeals Court for the Commonwealth of Massachusetts, Hampden County.\textsuperscript{84} The appeal,
however, was not adjudicated there.\textsuperscript{85} The case was transferred to the Massachusetts Supreme Judicial Court sua sponte.\textsuperscript{86} The judgments of the trial court were affirmed.\textsuperscript{87}

IV. \textbf{Analysis}


1. The Standard of Review

The Supreme Judicial Court first established the standard of review applicable to the evaluation of defendants’ motions for directed verdicts, and for the judgments notwithstanding the verdict of the federal civil rights claims.\textsuperscript{89} The court determined that “we view the evidence in the light most favorable to the plaintiff.”\textsuperscript{90} Citing their previous decisions, the court stated that they must look for any reasonable inference in the evidence that could be drawn in favor of the plaintiff,\textsuperscript{91} but that these inferences must be based on probabilities, not possibilities or conjecture.\textsuperscript{92} Second, the court determined that “[t]o establish a claim based on 42 U.S.C. § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under the color of State law . . . depriv[ing] a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.”\textsuperscript{93} Defendants Dudek and McMullan were both police officers employed by the City of Holyoke, acting in their official capacity at the time Sandra was placed in protective custody.\textsuperscript{94} The court stated, “[t]here is no question that . . . Dudek and McMullan were acting under color of State Law . . . .”\textsuperscript{95} The court next focused on “whether the defendants

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  \item \textsuperscript{85} Brief for Appellants at 1 and Brief for Appellees at 1, \textit{Miga}, 398 Mass. 343, 497 N.E.2d at 1.
  \item \textsuperscript{86} \textit{Miga}, 398 Mass. at 345, 497 N.E.2d at 3.
  \item \textsuperscript{87} \textit{Id.} at 356, 497 N.E.2d at 8.
  \item \textsuperscript{88} See \textit{supra} note 5.
  \item \textsuperscript{89} \textit{Miga}, 398 Mass. at 348 n.6, 497 N.E.2d at 4 n.6.
  \item \textsuperscript{90} \textit{Id.} at 348, 497 N.E.2d at 4.
  \item \textsuperscript{91} \textit{Id.} (citing Poirer v. Plymouth, 374 Mass. 206, 212, 372 N.E.2d 212 (1978)) (quoting Rauenala v. Hertz Corp., 361 Mass. 341, 343, 280 N.E.2d 179 (1972) stating, “[w]e must determine whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.”).
  \item \textsuperscript{92} \textit{Miga}, 398 Mass. at 348, 497 N.E.2d at 4.
  \item \textsuperscript{93} \textit{Id.} at 349, 497 N.E.2d at 5; Brief for Appellees at 6-7, \textit{Miga}, 398 Mass. 343, 497 N.E.2d 1 (1986) (both McMullan and Dudek were policemen who were acting in their official capacity at the time Sandra Smigiel was taken into protective custody, hence there is the sufficient nexus to find state action).
  \item \textsuperscript{94} Brief for Appellees at 6-7, \textit{Miga}, 398 Mass. 343, 497 N.E. 2d 1.
  \item \textsuperscript{95} \textit{Miga}, 398 Mass. at 349, 497 N.E.2d at 5.
\end{itemize}
violated a right secured by the Constitution or laws of the United States." The plaintiff's allegations of deliberate indifference on the part of Officers Dudek and McMullan to attend to the serious medical needs of a person in police custody were found to be supported by sufficient evidence to permit a jury to find a violation of 42 U.S.C. § 1983.

2. The Constitutional Right

The court first described the constitutional rights of convicted prisoners as guaranteed by the eighth amendment. Citing the U.S. Supreme Court case Estelle v. Gamble, the court acknowledged that "deliberate indifference to the serious illness or injury of prisoners constitutes a violation of the Eighth Amendment to the United States Constitution and states a cause of action under section 1983." The court also noted that "the strictures of the Eighth Amendment were made applicable to the States by the Fourteenth Amendment." The court's difficulty then became how to apply these constitutional rights to Sandra, who was a pretrial detainee, but not a convicted prisoner. The court determined that pretrial detainees are not protected by the prohibitions against cruel and unusual punishment found in the eighth amendment. Rather, "where the State seeks to impose punishment without [a constitutional] adjudication [of guilt], the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."

The court next examined what protections a detainee has under the Due Process Clause of the fourteenth amendment, and found that the

96. Id.
97. Id.
98. See supra note 2.
99. Estelle v. Gamble, 429 U.S. 97 (1976) ("deliberate indifference to a prisoner's serious illness constitutes a violation of the Eighth Amendment to the Constitution.") Id. at 97.
100. Miga, 398 Mass. at 349, 497 N.E.2d at 5 (citing Estelle, 429 U.S. at 104-05.).
101. Miga, 398 Mass. at 349 n.8, 497 N.E.2d at 5 n.8.
102. Miga, 398 Mass. at 350, 497 N.E.2d at 5. (Note the court's language, "[a] pretrial detainee, like Sandra . . . " Sandra was being held in protective custody, and no charges against her had been filed. Again, the semantics problem regarding persons in protective custody rears its ugly head. The Massachusetts Supreme Judicial Court acknowledged that "Sandra was taken into protective custody," but slips into a use of language that suggests that she had been arrested); See supra notes 1 and 23.
103. Miga, 398 Mass. at 350, 497 N.E.2d at 5 provides: "[a] pretrial detainee . . . is not protected by the prohibitions against cruel and unusual punishment found in the Eighth Amendment." Id.
substantive protections of the Due Process Clause are those applicable to pretrial detainees. Substantive due process is a source of rights where the conduct complained of shocks the conscience or offends the community’s sense of fair play and decency. Moreover, even though the court found that the eighth amendment protections were inapplicable to pretrial detainees, it nonetheless noted that "the Federal courts have applied Eighth Amendment analysis by analogy to determine what protections detainees are afforded pursuant to the principles of substantive due process." Persons in police custody who have not been convicted of any crimes, therefore, 'retain at least those constitutional rights that [the (United States) Supreme Court has] held are enjoyed by convicted prisoners.' Also, the Supreme Judicial Court noted the proposition that "it would be absurd to hold that a pretrial detainee has less constitutional protection against acts of prison guards than one convicted of a crime.

The trial court had instructed the jury that, for the defendants to be liable under 42 U.S.C. § 1983, plaintiff had to demonstrate that the defendants acted with "deliberate indifference to Sandra’s serious physical and mental medical needs." Thus, the trial court had employed the inapplicable eighth amendment standard to plaintiff’s cause of action. The Supreme Judicial Court noted that the trial judge, when employing the eighth amendment standard to a pretrial detainee’s cause of action should have only done so with a direct reference to the standards under a substantive due process analysis “informed” by the eighth amendment. However, the trial court judge’s “instruction was essentially correct because . . . the substantive protections afforded detainees under the due process clause are equivalent to the protections enjoyed by convicted prisoners pursuant to the Eighth Amendment.”

107. *Id.* at 349-50, 497 N.E.2d at 5.
108. *Id.* at 350, 497 N.E.2d at 5 (emphasis added).
109. *Id.* at 350-51, 497 N.E.2d at 5, 6 (quoting Bell v. Wolfish, 441 U.S. 520, 535 n.16, 545 (1979)).
112. *Id.*
113. *Id.*
114. *Id.*
Having established the substantive due process standard for protective custody detainees, the court applied that principle to the facts of the instant case. The court found sufficient evidence to permit the jury to find that the defendants acted with deliberate indifference to Sandra's medical needs, and that this indifference rose to the level of a constitutional violation. Therefore, the court concluded that Sandra's substantive due process rights were violated, and affirmed the jury verdicts that Dudek and McMullan were liable under 42 U.S.C. § 1983.

B. Availability of State Remedy

The defendants argued that the availability of a remedy for the wrongful death of Sandra Smigiel under state law precludes any action against the police officers under 42 U.S.C. § 1983. The defendants relied on the United States Supreme Court decision in Parratt v. Taylor, to support their position that a state's tort law, which provides for a post-deprivation remedy, satisfies the due process requirements of the fourteenth amendment. The Massachusetts Supreme Judicial Court in this case found defendants' reading of Parratt to be incorrect, stating:

The Supreme Court's ruling in Parratt indicates that an adequate State remedy may satisfy the requirements of procedural due process when the plaintiff alleges a deprivation of liberty or property . . . . In reaching its conclusion in Parratt, however, the Court clearly indicated that the availability of a post-deprivation remedy,

115. Id. at 351, 497 N.E.2d at 6.
116. Id. at 352, 497 N.E.2d at 6; See Estelle v. Gamble, 429 U.S. 97, 101 (1976) (a prisoner has a right to medical care in circumstances when a reasonable person would seek medical care for physical as well as psychological needs).
118. Id.
119. Miga, 398 Mass. at 352 n.10, 497 N.E.2d at 6, 7 n.10:
We note that direct recovery against the police officers under (Mass. Gen. Laws Ann. ch. 229 § 2 (West 1984)), is barred by the Massachusetts Torts Claims Act (Mass. Gen. Laws Ann. ch. 258 § 2 (West 1984)), and that the plaintiff's action for wrongful death lies only against the city of Holyoke . . . .
Id. see supra note 70.
121. Id. Availability of post-deprivation remedy, although relevant to alleged violation of procedural due process, is not relevant to alleged violation of substantive constitutional rights.
although relevant to the issue of procedural due process would not be relevant to the alleged violation of substantive constitutional rights . . . . The Supreme Court limited its holding and discussion in Parratt to procedural due process claims under 42 U.S.C. section [sic] 1983.123

The court also relied on Monroe v. Pape124 which held that the federal remedy provided by 42 U.S.C. § 1983 is supplementary to the state remedy.125 Moreover, "the state remedy . . . need not be first sought and refused before the federal one is invoked."126 Since plaintiff alleged a violation of decedent's substantive due process rights under the fourteenth amendment, "her claim under 42 U.S.C. section [sic] 1983 is not barred by the availability of a remedy for wrongful death under G.L.C. 229 section [sic] 2."127

C. Punitive Damages

Defendants argued that the issue of punitive damages should not have been submitted to the jury.128 Defendants relied on Caperci v. Huntoon,129 in which the First Circuit Court of Appeals for the Federal Circuit held that punitive damages would not be assessed if the police acted in good faith and without evil intent.130 Here, the Massachusetts Supreme Judicial Court noted that the jury found there was reprehensible conduct on the part of the defendants,131 "shocking to the conscience and offensive to all standards of common decency, which clearly rises to the threshold level of 'callous disregard' for the plaintiff's substantive due process right . . . ."132

It is apparent that the court found good faith on the part of the defendants to be lacking.133 Consequently, the court was persuaded by

123. Id. at 353-54, 497 N.E.2d at 7 (emphasis added).
124. Monroe v. Pape, 365 U.S. 167, 183 (1961) "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . . ." Id.
125. Id.
126. Id.
128. Brief for Appellants at 5-6, Miga, 398 Mass. at 343, 497 N.E.2d at 1. "The test for assessing punitive damages should be whether the defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard thereof." Miga, 398 Mass. at 343, 497 N.E.2d at 1.
129. Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968) (punitive damages would not be assessed if the police acted in good faith and without evil intent).
130. Id.
132. Id. at 356, 497 N.E.2d at 8.
133. Id. at 355-56, 497 N.E.2d at 8.

There was evidence that defendant McMullan, the officer who placed San-
Smith v. Wade,134 which held that punitive damages are available in a 42 U.S.C. § 1983 action where a defendant's conduct involves "reckless or callous indifference" to the plaintiff's federally protected rights.135 The court concluded that the trial "judge did not err in submitting the issue of punitive damages to the jury."136 Therefore, the award of punitive damages in favor of the plaintiff was affirmed.137

V. DISCUSSION: PROTECTIVE CUSTODY IN MASSACHUSETTS - THE NEED FOR STATUTORY PROTECTION

The court in Miga found that protective custody detainees had substantive due process rights that are equivalent to the protection enjoyed by convicted prisoners pursuant to the eighth amendment.138 Unfortunately, the police in Holyoke were either unable or unwilling to comprehend that a person in protective custody retains "at least those constitutional rights that [the United States Supreme Court has] held are enjoyed by convicted prisoners."139

It is logical to argue that a person in protective custody should actually retain more rights than a convicted prisoner.140 The person held in protective custody has not been arrested, as has a pretrial detainee; nor has one in protective custody been convicted, as has the prisoner.141

Dra Smigiel in protective custody, violated department regulations clearly promulgated for safety and protection of detainees: first, by failing to attempt to transfer an intoxicated person to a treatment facility; and then, by placing an unconscious person in a cell. There was also evidence that defendant Dudek, the house officer on duty the night of Sandra Smigiel's detention, ignored the other prisoners' cries for help, and replied with profanity and a racial epithet. The police officers in their testimony denied these contentions, but the jury were [sic], of course, free to disbelieve the police.142

Id.

134. Smith v. Wade, 461 U.S. 30, 50-51 (1983) (Punitive damages are recoverable in a § 1983 suit where the defendant's conduct is motivated by an evil motive or intent, or where it involves reckless or callous indifference to the plaintiff's federally protected rights.).
135. Id.
137. Id.
139. Miga, 398 Mass. at 350-51, 497 N.E.2d at 6 (quoting Bell v. Wolfish, 441 U.S. 520, 535 n.16 545 (1979)).
140. Bell v. Wolfish, 441 U.S. 520, 583 (1979) (Stevens, J., dissenting). "An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to [the same] restraints designed to regulate others who have." Id.
141. MASS. GEN. LAWS ANN. ch. 111B § 8 (West 1986), the statute authorizing protective custody states, "[a] person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been
Since pretrial detainees (arrested persons) enjoy the presumption of innocence,\(^4\) it follows that persons held in protective custody are ir-rebuttably innocent, since the condition of their confinement is not based on arrest and no criminal charges have been brought.\(^1\) Some other states, notably Alabama\(^4\) and Michigan,\(^4\) have resolved the problem of defining the rights of a person in protective custody by enacting statutes which provide for their arrest.\(^4\) While this approach does help the police define the status, and thus the protection to be afforded persons in protective custody,\(^4\) it is clearly not the least re-strictive means by which the state can protect dangerous persons from themselves and others.\(^4\) Holding such persons without arrest in a pro-

arrested or to have been charged with any crime." *Id.* \((\text{emphasis added})\)

142. See Coffin v. United States, 156 U.S. 432, 453 (1895). ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law \ldots its en-forcement lies at the foundation of the administration of our criminal law.") *Id.* \((\text{emphasis added})\).

(a) A person commits a crime of public intoxication if he appears in a pub-lic place under the influence of alcohol, narcotics or other drugs to the de-gree that he endangers himself or another person or property, or by boister-ous and offensive conduct annoys another person in his vicinity.
(b) Public intoxication is a violation \ldots § 13A-11-10 Commentary pro-vides: The defendant must be in a public place and be under the influence of alcohol, narcotics or other drugs to such a degree that he may endanger himself or other persons or property, or annoy persons around him \ldots The idea is to get them off the streets and out of the public. There is no present nonpenal solution for drunks and addicts, and the police who encounter them must have some means of getting them off the street. It is unfortunate that the sanction has to be criminal. The state does have the power to treat such conduct criminally. Powell v. Texas, 392 U.S. 514 (1968) *Id.* \((\text{emphasis added})\).

He [the city marshall] shall suppress all riots, disturbances, and breaches of the peace, and for that purpose may command the aid of the citizens in the performance of such duty. It shall be his duty to arrest \ldots upon view, and with or without process, any person found in the act of committing any offense against the laws of the state or the ordinances of the city amounting to a breach of the peace, and forthwith take such person before the proper magistrate or court for examination or trial, and may also without process arrest and imprison persons found drunk in the streets. *Id.* \((\text{emphasis added})\).

146. See supra notes 144, 145.
147. Rhem v. Malcolm, 507 F.2d 333, 342 (2d Cir. 1974). "[P]retrial detainees are peo-ple, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all." *Id.*
148. See 28 Ark. L. Rev. 133 (1974) (pretrial detainees are usually indigent persons to whom bail is excessive, thus calling into question the legitimacy of their incarceration).
tective custody situation which recognizes and protects their rights of substantive due process is the least restrictive means available.\textsuperscript{149} Massachusetts has partially solved this problem by enacting a statute which allows for protective custody without arrest.\textsuperscript{150} However, this statute fails to protect the substantive due process rights of persons so detained.\textsuperscript{151}

Our U.S. Constitution specifically carves out the rights retained by convicted prisoners in the eighth amendment\textsuperscript{152} as well as those accused of a crime in the fifth amendment.\textsuperscript{153} Persons held in protective custody, through case law, are held to be protected by substantive due process, a judge-made concept now embodied in the Due Process Clause of the fourteenth amendment.\textsuperscript{154} Yet the Due Process Clause of the U.S. Constitution does not specifically mention "protective custody" nor "substantive due process" but is a general prescription providing "Due Process" for all citizens.\textsuperscript{155} The Massachusetts statute which authorizes protective custody\textsuperscript{156} needs to be more specific in defining the concomitant rights retained by those so held. In addition, the statute should provide a check-list of the procedures to be followed by police when placing an individual in protective custody, as well as

\begin{itemize}
\item \textsuperscript{149} Ingraham v. Wright, 430 U.S. 651 (1977); Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983).
\item \textsuperscript{150} See Mass. Gen. Laws Ann. ch. 111B, §§ 7, 8 (West 1986); See supra note 1.
\item \textsuperscript{151} Mass. Gen. Laws Ann. ch. 111B, § 8 (West 1986) (the statute omits any discussion of substantive due process).
\item \textsuperscript{152} See supra note 2.
\item \textsuperscript{153} U.S. Const. amend. V provides:
\begin{quote}
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
\end{quote}
\item \textsuperscript{154} Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977); Miga, 398 Mass. at 350, 497 N.E.2d at 5 (quoting Ingraham, 430 U.S. at 671) ("Where the State seeks to impose punishment without a constitutional adjudication [of guilt], the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").
\item \textsuperscript{155} U.S. Const. amend. XIV states:
\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .
\end{quote}
\item \textsuperscript{156} See Mass. Gen. Laws Ann. ch. 111B, §§ 7-8 (West 1986); See supra note 1.
\end{itemize}
sanctions to ensure police compliance. First, the status of the individual must be acknowledged when the decision to hold the individual in protective custody is made. The police must inform the detainee that he or she has not been arrested, but is being held in protective custody for their own and/or others' protection. Second, the police must identify the detainee and notify his immediate relations that he is being held in protective custody. Third, the police must administer a breathalyzer test to any detainee appearing intoxicated. Fourth, in all cases, the police must call a state health facility to collaborate on the decision where best to hold the detainee. Fifth, the police must remove all dangerous objects from the detainee and monitor the cell every fifteen minutes. Lastly, a written report documenting that all the above precautions have been complied with must be prepared and signed both by the officer who places the detainee in protective custody as well as another officer who will attest to the compliance. In bold print, the signature line on the protective custody report shall clearly state: ALL REQUIRED STEPS HAVE BEEN COMPLIED WITH IN PLACING THIS PERSON IN PROTECTIVE CUSTODY; I AM AWARE THAT I AM PERSONALLY LIABLE


The defendants' argument . . . is based upon an incorrect reading of Parratt v. Taylor, 451 U.S. 527 (1981) . . . . The Supreme Court's ruling in Parratt . . . [clearly] indicated that the availability of a postdeprivation remedy, although relevant to the issue of procedural due process, would not be relevant to the alleged violation of substantive constitutional rights. Id. (emphasis added).

Since defendants' counsel had difficulty distinguishing procedural due process from substantive due process, one can safely theorize that in the absence of statutory guidance which provides a specific check-list of police responsibilities and duties vis-a-vis a person the police are holding in protective custody, the police will likewise fail to distinguish between procedural and substantive rights of the detainee. Indeed, the only way substantive due process rights are likely to be recognized under the current law is in a court-room challenge to an alleged violation. Hence, there remains the need for redrafting Mass. Gen. Laws Ann. ch. 111B, §§ 7-8 (West 1986).

158. The author's proposed revision of Mass. Gen. Laws Ann. ch. 111B, § 8 (1986) would entail the creation of a non-legal check-list. This check-list would mandate the precautionary steps to be undertaken by the police in compliance with the revised statute. Without requiring the police to be thinking like lawyers, these precautionary steps would facilitate and ensure the recognition of protective custody detainees constitutionally guaranteed substantive due process rights. See infra note 168.

159. See infra note 168.

160. Id.

161. Id.

162. Id.

163. Id.

164. Id.
FOR LEGAL DAMAGES FOR FAILURE TO COMPLY WITH ANY OF THE REQUIRED STEPS OF PROTECTIVE CUSTODY DETAINMENT.\textsuperscript{165}

In re-drafting the protective custody statute, the Massachusetts Legislature may find some direction in the United States Supreme Court's landmark decision of \textit{Miranda v. Arizona},\textsuperscript{166} which provides a specific checklist to be followed by the police in order to protect the fifth amendment rights of an arrested person.\textsuperscript{167} In this way, police, unfamiliar with notions of substantive due process, could be compelled to protect a protective custody detainee's constitutional rights to substantive due process.\textsuperscript{168} Assuming good faith on the part of the police, the

\footnotesize

165. \textit{Id.}

166. \textit{Id.} \textsuperscript{165} \textit{Id.}

167. \textit{Id.}

168. The author's proposed revision of \textit{Mass. Gen. Laws Ann.} \textit{ch. 111B, \textsection{} 8} (West 1986) which would protect the substantive due process rights of a person held in protective custody would read as follows:

Persons held in protective custody have not been arrested. Since they have not been arrested, they retain all the rights any citizen commonly expects, except that their freedom to move is being restricted for their own and/or others safety. All persons held in protective custody must be told of their status, i.e., that they are being held in protective custody for their own and/or the protection of others. Persons thus held have the right to make phone calls as necessary to inform their immediate relations that they are being held in protective custody, and the location where they are being held. It is the duty of the police to see that an attempt is made to notify the immediate relations of the person held if detainee is unable to do so. Reasonable means shall be employed in carrying out this duty, for example, by looking at a driver's license or checking a registration number with the Registry of Motor Vehicles.

It shall be the duty of the police, in all cases of protective custody, to call a state health facility to receive an opinion, based on the facts, whether the person is to be detained at the police station or at the nearest state facility or hospital. A written report shall be made describing in detail who was contacted and what decision was reached on how best to detain the individual.

It shall be the duty of the police to administer a breathalyzer test to any detainee appearing intoxicated. If the results of the breathalyzer indicate an alcohol level greater than .2, a medical technician must make a physical examination before placing the de-
common tragedy of detainee suicide would be ameliorated. While a
tainee in a cell or institution. Written records of the test and results must be filed with
the protective custody report.

It is the duty of the police to remove all dangerous objects from detainees before plac-
ing them in a cell. It is the duty of the police to monitor the cell of detainee every fifteen
minutes and a written record of such monitoring must be filed in the protective custody
report.

The police are on notice that the person held in protective custody has not been ar-
rested. Failure by the police to comply with their duties regarding detainees are there-
fore subject to all civil claims that an aggrieved detainee may later bring against the
police officer. The police will be personally liable and will not be exempted from suit due
to their agency relationship with any city, town or the state itself. Repeated non-compli-
ance with these statutory procedures shall be cause for dismissal from the police force.

This statute herein prescribes and mandates that all police officers placing a person in
protective custody follow the procedure of the protective custody check-list provided be-
low. The purpose of this check-list is to ensure the well-being and substantive due pro-
cess rights of the detainee. The check-list's goal is to provide police with a reasonable
means whereby they can comply with this statute's requirements and to present this
statute's requirements in clear and precise language:

Protective Custody Check-List

FIRST, the status of the individual must be acknowledged when the decision to hold
the individual in protective custody is made. The police must inform the detainee that
he or she has not been arrested, but is being held in protective custody for their own
and/or other's protection.

SECOND, the police must identify the detainee and notify his immediate relations
that he is being held in protective custody.

THIRD, the police must administer a breathalyzer test to any detainee appearing
intoxicated.

FOURTH, in all cases, the police must call a state health facility to collaborate on the
decision where best to hold the detainee.

FIFTH, the police must remove all dangerous objects from the detainee and monitor
the cell every fifteen minutes.

LAST, a written report documenting that all the above precautions have been com-
plied with must be prepared and signed both by the officer who places the detainee in
protective custody as well as another officer who will attest to the compliance.

ALL REQUIRED STEPS HAVE BEEN COMPLIED WITH IN PLACING THIS
PERSON IN PROTECTIVE CUSTODY; I AM AWARE THAT I AM PERSONALLY
LIABLE FOR LEGAL DAMAGES FOR FAILURE TO COMPLY WITH ANY OF
THE REQUIRED STEPS OF PROTECTIVE CUSTODY DETAINMENT.

Signatures: Detaining Officer Attesting Officer
1.

169. Miga, 393 Mass. 343, 497 N.E.2d 1 (woman in protective custody found hanged
by suicide) does not stand alone in Massachusetts case law as an example of the tragedy
that may befall a detainee; See also White v. Town of Seekonk, 23 Mass. App. Ct. 138,
499 N.E.2d 842 (1986) (wrongful death action brought against city for damages sustained
when detainee in city lockup committed suicide); Slaven v. City of Salem, 386 Mass. 885,
438 N.E.2d 348 (1982) (City of Salem's liability for suicide of plaintiff's decedent in city
jail did not attach in absence of evidence that defendant city through its officials knew or
revised Massachusetts statute could not solve the problem of bad faith or unconscionable conduct on the part of the police, the proposed check-list would include the warning that it is possible for police to be held personally liable for damages for the violation of the rights of a person held in protective custody. Additionally, suspension from the police force for first time offenders and dismissal from the police force for repeat offenders could be incorporated into the proposed statute.

These sanctions are weighty, but the not uncommon problem of suicide by detained persons warrants strict precaution. The Miga case provides a vivid example of how quickly one protective custody detainee found the means to commit suicide when precaution was not exercised. Unfortunately, the Miga incident is not an isolated occurrence in Massachusetts or elsewhere. Suicide by protective custody detainees and convicted prisoners in American penal institutions is commonplace. For example, from Alaska comes the case of Kanayurak v. North Slope Borough, in which a forty-two year old Eskimo woman was placed in protective custody for public intoxication. Within three hours, the woman hung herself.

had reason to know from observation that plaintiff's decedent was suicidal. Thus, the Slaven court analogized the duty owed by a jailer to his detainee as similar to that owed by an innkeeper to his clientele. See RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

170. See supra note 168.

171. Id.

172. See White v. Town of Seekonk, 23 Mass. App. Ct. 139, 499 N.E.2d 842, 843-44 (1986) (In denying summary judgment to the defendant, and expressing concern for the rights of protective custody detainees and pretrial detainees, the court relied on a report by the Special Commission to Investigate Suicide in Municipal Detention Centers (based on fifty-four suicides in Massachusetts). The final report entitled "Suicide in Massachusetts Lockups 1973-1984" found that 68.6% of the suicides in the study had been committed by detainees who had or have been arrested on alcohol-related charges or taken into protective custody because of intoxication.) See also Davis v. City of Detroit, 149 Mich. App. 249, 386 N.W.2d 169 (1986); Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985); Kanayurak v. North Slope Borough, 677 P.2d 893 (Alaska 1984); Slaven v. City of Salem, 386 Mass. 885, 438 N.E.2d 348 (1982); Overby v. Wille, 411 So.2d 1331 (Fla. Dist. Ct. App. 1982) and Lang v. City of Des Moines, 294 N.W.2d 557 (Iowa 1980). All of these recent cases involved the death of a detainee; some were in protective custody and others had actually been arrested. The problem of detainee suicide is pervasive in the American penal system, hence the recommendation of weighty sanctions for those police officers who intentionally abuse the detainees' constitutional rights is not without merit.

173. Miga, 398 Mass. at 348, 497 N.E.2d at 4 (Within hours after being placed in protective custody, Sandra Smigiel's body was found hanging from the bars of her cell.).


175. Id.


177. Id. at 894.
comes the case of Madden v. City of Meriden,\textsuperscript{178} in which an eighteen year old Brian Madden, who was an inpatient in psychiatric care when he was taken into custody by the police and held as a pretrial detainee, committed suicide. Although the police knew of Madden’s mental condition, the complaint alleged that the police severely beat him, causing a fractured skull, and then placed him, alone, in a cell.\textsuperscript{179} The police knew that Madden had attempted suicide before, yet did not monitor his cell.\textsuperscript{180} Madden hung himself.\textsuperscript{181} From New Jersey comes the case of Hake v. Manchester Township,\textsuperscript{182} in which a seventeen year old was arrested for driving while intoxicated. “The police officers maintained that Robert [Hake] was not a prisoner and that therefore they did not remove Robert’s belt.”\textsuperscript{183} Within a few hours, the young man used his belt to hang himself.\textsuperscript{184} From Michigan comes the case of Davis v. City of Detroit,\textsuperscript{185} where a man arrested for burglary and known by the police to be a “junkie” (drug addict) hung himself. “There was enough evidence from which the jury could have found that, had there been a detoxification cell, decedent would have been put in it.”\textsuperscript{186} From Florida comes the case of Overby v. Willie,\textsuperscript{187} in which a man (Overby) with a history of mental illness (which was not known to police) approached the police and asked to be taken to the mental health center. The policeman instead took Overby to the police station.\textsuperscript{188} Ultimately, Overby was placed in isolated detention as a “probable Signal twenty” (police jargon for mentally incompetent).\textsuperscript{189} Overby hung himself with his own belt.\textsuperscript{190}

Other Massachusetts cases include Slaven v. City of Salem,\textsuperscript{191} in which “a prisoner in the custody of the city’s police department, committed suicide by hanging himself in his cell . . . .”\textsuperscript{192} In White v. Town of Seekonk,\textsuperscript{193} a man (White) was arrested for driving while in-

\begin{itemize}
\item \textsuperscript{178} 602 F.Supp. 1160 (D. Conn. 1985).
\item \textsuperscript{179} Id. at 1163.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} 98 N.J. 302, 486 A.2d 836 (1985).
\item \textsuperscript{183} Id. at 307-08, 486 A.2d at 839.
\item \textsuperscript{184} Id. at 308, 486 A.2d at 840.
\item \textsuperscript{185} 149 Mich. App. 249, 386 N.W.2d 169 (1986).
\item \textsuperscript{186} Id. at 53, 386 N.W.2d at 175.
\item \textsuperscript{187} 411 So.2d 1331 (Fla. Dist. Ct. App. 1982).
\item \textsuperscript{188} Id. at 1332.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} 386 Mass. 885, 438 N.E.2d 348 (1982).
\item \textsuperscript{192} Id. at 886, 438 N.E.2d at 348-49.
\item \textsuperscript{193} 23 Mass. App. Ct. 139, 499 N.E.2d 842 (1986).
\end{itemize}
toxicated and possessing class D substances. White hung himself.\textsuperscript{194} The court in \textit{White} addressed the larger problem of suicide by persons held in protective custody and by persons held in municipal lock-ups after an arrest.\textsuperscript{195} The opinion cited a study conducted by the Special Commission to Investigate Suicide in Municipal Detention Centers which issued a final report entitled "Suicide in Massachusetts Lockups 1973-1984."\textsuperscript{196} The following conclusions of the Commission's report were among those upon which the appellate court relied in reversing the lower court's decision granting summary judgment for the defendant (Town of Seekonk), holding that plaintiff (White) was "entitled to a jury trial on the issue of whether the police knew or should have known that White was a suicide risk."\textsuperscript{197}

\begin{itemize}
  \item \textbf{Sixty-eight point six percent} of the suicides reported to the Commission had been committed by detainees who had been arrested on alcohol related charges or taken into protective custody because intoxicated . . .
  \item \textbf{Seventy-three point six percent} of the reported suicide victims had been intoxicated to some extent when brought into the police station . . .
  \item \textbf{The highest percentage} of reported suicides (thirty point four percent) had been in the age group of twenty-eight to thirty-two . . .
  \item \textbf{Ninety-seven point one percent} of the reported suicide victims had records of prior arrests . . .
  \item \textbf{Fifty percent} of the reported suicide victims were known to the police who detained them . . .
  \item \textbf{Sixty-six point seven percent} of the reported suicide victims were natives of the community in which they were arrested . . .
  \item \textbf{Ninety-six point two percent} of the reported suicide victims (hanged themselves) . . .
  \item \textbf{Seventy-seven point four percent} of the reported suicide victims hanged themselves with articles of clothing (other than shoe-laces or belts) which had not been taken away from them . . .
  \item \textbf{Eighty-three point seven percent} of the reported suicides occurred within four hours of the victims' being placed in lockups . . .
\end{itemize}

The court in \textit{White} went on to note that a majority of the Commission's recommendations were incorporated into statutory law in Massachusetts in Mass. Gen. Laws Ann. ch. 40, § 36B,\textsuperscript{199} a statute governing

\begin{itemize}
  \item \textsuperscript{194} \textit{Id.} at 141-42, 499 N.E.2d at 843-44.
  \item \textsuperscript{195} \textit{Id.} at 140, 499 N.E.2d at 843.
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{Id.} at 143, 499 N.E.2d at 844.
  \item \textsuperscript{198} \textit{Id.} at 142, 499 N.E.2d at 843-44.
  \item \textsuperscript{199} Mass. Gen. Laws Ann. ch. 40, § 36B (West Supp. 1988), provides:
    \begin{itemize}
      \item Each cell utilized for the detention of persons within a city, town, or state
    \end{itemize}
\end{itemize}
the physical condition of lockup cells. The statute mandates the provision for at least one cell to be within audible range of the duty desk, either by its proximity or through installation of an electronic audio system. Additionally, each cell is to have an electronic device which records the time of every cell checked by police and requires that each cell be checked every fifteen minutes. Unfortunately, MASS. GEN. LAWS ANN. ch. 40, § 34 takes the clout out of the reforms required by MASS. GEN. LAWS ANN. ch. 40, § 36B by providing: “[i]f a town neglects to provide and maintain a lockup as herein required, it shall forfeit ten dollars for each month during which such neglect continues.” The option to be subject to a monthly fine of ten dollars is obviously a disincentive for municipalities to comply with the safety installations which undoubtedly cost more. Hence, there still exists the need to revise the Public Health law which authorizes protective custody. By mandating compliance with a protective custody check-list, municipali-

lockup facility which is under the jurisdiction of a local police department, the state police, or the metropolitan district commission police shall have a protective covering of high-impact, transparent wall facing. Such protective covering shall cover all bar structures accessible to such detained persons. Adequate ventilation shall be provided to persons detained in the cell.

At least one such cell within such lockup facility shall have installed within it, but beyond the access of any person detained within such cell, an electronic audio system whereby a police officer or other lockup personnel at the duty desk within such lockup facility is brought within audible range of such cell; provided, however, that no such electronic audio system is required to be installed if at least one such cell within such lockup facility is within audible range of the duty desk without electronic assistance.

Each such lockup facility shall have installed within the cell area an electronic security device which will record the times of cell checks by police officers or other lockup personnel. Such device shall be positioned so that a cell check cannot be recorded until the police officer or other lockup personnel has walked past such occupied cell. Each occupied cell within such a lockup facility shall be physically and visibly checked by a police officer or other lockup personnel every fifteen minutes.

202. Id.
203. Id.
205. MASS. GEN. LAWS ANN. ch. 40, § 34 (West 1987).
206. MASS. GEN. LAWS ANN. ch. 40, §§ 34 and 36B (West 1987), when interpreted together give municipalities the option of compliance with certain lockup safeguards. The author's proposed revision of MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1987) offers no such option. Police behavior, not city budgets, will be forced into compliance with a statute which will protect the constitutional rights of protective custody detainees. See supra note 168.
ties and police officers will be compelled to protect the substantive due process rights of those so held, and will not be able to negate the force of this statutory mandate by acceptance of a ten dollar fine.\(^{207}\)

The lack of a specific statutory definition of protective custody exacerbates the problems described above.\(^{208}\) Legal literature\(^{209}\) utilizes the terms “state custody,” “police custody,” “protective custody,” “custodial protection” and “detainment” interchangeably.\(^{210}\) While a statutory definition in Massachusetts will not cure the use of synonyms in the literature, it will enable the police to know the type of situation with which they are dealing.\(^{211}\) Hence the revision of the protective custody statute must also include a definition of protective custody.\(^{212}\) A proposed statutory definition of protective custody might read as follows: Protective custody is the involuntary detainment of an individual for his or her own and/or others’ protection; protective custody is not an arrest. Situations warranting the placement of persons in protective custody are delusional or psychotic behavior, excessive intoxication by drugs or alcohol, and behavior indicative of attempted suicide and/or threatening to the lives and well-being of others. Persons held in protective custody are not convicts and retain all the constitutional protections and privileges of free citizens with the exception of the temporary loss of the right to travel.\(^{213}\)

VI. Conclusion

It is a serious infringement of an individual’s constitutional liberties to be placed in protective custody.\(^{214}\) Protective custody is, nonethe-

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207. See supra note 168.
210. Id.
211. The author’s proposed revision of Mass. Gen. Laws Ann. ch. 111B, § 8 would include a definition of protective custody:

‘Protective custody’ is the involuntary detainment of an individual for his or her own protection and/or the protection of others; protective custody is not an arrest. Situations warranting the placement of persons in protective custody are delusional or psychotic behavior, excessive intoxicification by drugs or alcohol, and behavior indicative of attempted suicide and/or threatening to the lives and well-being of others. Persons held in protective custody are not convicts and retain all the constitutional protections and privileges of free citizens with the exception of the temporary loss of the right to travel.

212. See supra note 168.
213. See supra note 168.
214. U.S. Const. Preamble states:
less, often necessary to protect a person from harming himself or others. While holding a person in protective custody, it is necessary that strict precaution be exercised by the police to ensure that the detainee is not harmed in any way nor his substantive due process rights violated. The police cannot be expected to know what substantive due process is. Therefore, it is necessary for the Massachusetts legislature to statutorily define what protective custody is, what the rights of one so detained are, and what responsibility the police have in ensuring those rights. The revised statute should communicate, in non-legal language analogous to the Miranda rights, what the police must do and what they must not do. Sanctions for non-compliance must be severe, so that in the future, situations like the Miga incident will be avoided.

MICHAEL F.X. REGAN*

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id. 215. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1986); See also supra notes 144, 145 and 168.

* I dedicate this article to my sister, Anne Marie Regan, Esq., a lawyer who has generously devoted her career to providing legal services for the disenfranchised in the state of Kentucky.