

The Doctrine of Abatement *Ab Initio* in *Commonwealth v. Hernandez*

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INTRODUCTION

The doctrine of abatement *ab initio* (hereinafter “the doctrine” or “abatement doctrine”) erases a defendant’s conviction if the defendant dies while an appeal is pending.¹ Most federal courts, as well as several states, have adhered to this doctrine for decades.² Over time, some states have modified the doctrine, and others have abolished it entirely.³ The doctrine was recently called into question in Massachusetts when former football star Aaron Hernandez died in prison after his murder conviction but before the appeal of his conviction could be heard by the court.

This Comment will argue that the Massachusetts Supreme Judicial Court (hereinafter “SJC”) engaged in improper judicial activism when it abolished the abatement doctrine in *Commonwealth v. Hernandez*. The Court should have put more consideration into adopting the Commonwealth’s substitution approach, which allows a third party to voluntarily stand in for the deceased defendant to carry out the appeal. The Court erred by not abiding by either one of the parties’ requests—Hernandez wanted the doctrine to stand while the Commonwealth sought modification of the doctrine so that a substitute for the defendant could complete the appeal.

Part I of this Comment details the history of the abatement doctrine. Part II lays out the facts of the *Hernandez* case and the Court’s decision. Part III details why the Court went awry in deciding to abolish the abatement doctrine, and Part IV offers a potential modification to the doctrine that the

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¹ United States v. Pauline, 625 F.2d 684, 684 (5th Cir. 1980).

² See *Commonwealth v. Hernandez*, 118 N.E.3d 107, 113 (Mass. 2019); Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused’s Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4th 189, § 3 (Westlaw through Oct. 25, 2021).

³ Thomas, *supra* note 2, § 1.

Court should have considered more seriously.

I. Background

A. History of the Abatement Doctrine in the United States

The common law abatement doctrine provides that a criminal conviction is vacated and the indictment dismissed if the defendant dies while the appeal of that conviction is pending.⁴ In essence, the case is extinguished as if the defendant was never indicted or convicted.⁵ The doctrine's origin is unclear, but the doctrine is well-established and followed to varying degrees by many state and federal courts.⁶

The U.S. Supreme Court upheld the doctrine in 1971 and narrowed it in 1974 to apply only when a convicted defendant dies pending a direct appeal as of right, not when there is a petition for certiorari.⁷ All except one of the U.S. Courts of Appeals applies the doctrine.⁸ Eighteen states and the District of Columbia apply the doctrine; some states have narrowed or modified the doctrine, and other states have abolished the doctrine altogether.⁹

Less than a month before Massachusetts abolished the doctrine, the Missouri Court of Appeals reaffirmed its application of the doctrine when it abated Daniel Mott's conviction for possession of a controlled substance after Mott died while serving his twelve-year sentence and before the Court of Appeals could issue a mandate on his appeal.¹⁰ Mere days after Massachusetts abolished the doctrine, the Supreme Court of Mississippi narrowed the doctrine when ruling on a case where the defendant died in prison awaiting appeal for his convictions of kidnapping and raping a female college student.¹¹ The Court stated that the policies underlying stare decisis would not be served by continuing to apply the doctrine and cited the increased recognition of victim's rights as another reason for its departure from precedent.¹² The Mississippi Rules of Appellate Procedure allow for substitution of the deceased party; however, in this case, the

⁴ *Pauline*, 625 F.2d at 684.

⁵ *United States v. Libous*, 858 F.3d 64, 66 (2d Cir. 2017).

⁶ *Hernandez*, 118 N.E.3d at 112–15.

⁷ *See id.* at 112–13 (citing *Durham v. United States*, 401 U.S. 481, 483 (1971); *Dove v. United States*, 423 U.S. 325 (1976)).

⁸ *Id.* (indicating the one Court of Appeals that has not applied the doctrine has never taken a case on this issue).

⁹ *Id.* at 114.

¹⁰ *State v. Mott*, 569 S.W.3d 555, 556 (Mo. Ct. App. 2019).

¹¹ *Payton v. State*, 266 So. 3d 630, 631–33 (Miss. 2019).

¹² *Id.* at 641–42.

deceased defendant's appellate counsel did not move for substitution.¹³

Most recently, the Supreme Court of Tennessee abolished the abatement doctrine when ruling on a case where the defendant was convicted of reckless homicide, sentenced to three years in prison, and then died while his appeal was pending.¹⁴ The Court reasoned that the doctrine was obsolete and contrary to public policy.¹⁵

Several states have adopted a rule that allows for substitution, whereby a representative of the deceased defendant takes the place of the defendant and continues the appeals process.¹⁶ Hawaii gives the appellate court the most discretion in determining how to proceed on an appeal if the convicted defendant dies.¹⁷ The Hawaii Rules of Appellate Procedure give the appellate court discretion to allow substitution.¹⁸ However, absent a motion for substitution, the court is empowered to dismiss the appeal as moot, abate the conviction and all proceedings, or enter any other order as the court deems appropriate.¹⁹

B. *History of the Abatement Doctrine in Massachusetts*

In Massachusetts, the first reported SJC case recognizing the abatement doctrine was in 1975.²⁰ It appears the doctrine was adopted because it was the favored approach in other jurisdictions.²¹ The SJC applied the doctrine to a direct appeal of right in only two other reported cases, both of which resulted in very short opinions that shed little light on the rationale behind the Court's opinion.²²

While there are scant reported cases of the doctrine's application in Massachusetts, there are a few well-known instances where lower courts applied the doctrine.²³ In 1996, John Salvi III was convicted of terrorist attacks on two abortion clinics in Massachusetts, where he killed two people

¹³ See *id.* at 642.

¹⁴ *State of Tennessee v. Al Mutory*, 581 S.W.3d 741, 743–44 (2019).

¹⁵ *Id.* at 750.

¹⁶ Thomas, *supra* note 2, § 2.

¹⁷ See *State v. Weldon*, 445 P.3d 103, 112 (Haw. 2019).

¹⁸ See HAW. R. APP. P. 43(a).

¹⁹ See HAW. R. APP. P. 43(a); *Weldon*, 445 P.3d at 112.

²⁰ *Commonwealth v. Hernandez*, 118 N.E.3d 107, 111 (Mass. 2019).

²¹ See *id.*

²² *Id.* (discussing *Commonwealth v. Harris*, 379 Mass. 917 (1980) and *Commonwealth v. Latour*, 397 Mass. 1007 (1986)).

²³ See Theo Emery, *Court Voids Conviction of Defrocked Priest*, SOUTH COAST TODAY (Sept. 27, 2003, 12:01 AM), <https://perma.cc/SP55-BSFQ>; see also Brendan McCarthy, *Victims Challenge Voiding Geoghan Record*, BOS. GLOBE (Aug. 28, 2003), <https://perma.cc/XGY5-4EFT>.

and wounded several others.²⁴ During his appeal, Salvi committed suicide.²⁵ The appellate court “instructed the trial court to vacate the conviction and dismiss the indictment”²⁶ Former state senator and attorney, William Keating, introduced legislation in 1997 to abolish the doctrine.²⁷ The legislation had the support of then-Governor William Weld and passed the Senate, but the bill did not make it out of the House.²⁸ In 2002, John Geoghan, a priest, was convicted of sexually abusing a child in the wake of the Catholic church child sex abuse scandal.²⁹ Geoghan, who was also accused of molesting almost 150 children, was later murdered in prison while serving his sentence.³⁰ The court applied the abatement doctrine, and Geoghan’s conviction was vacated.³¹ Because Massachusetts courts continued to apply the abatement doctrine, the doctrine was the law in the state when Aaron Hernandez died in 2017.³²

II. The Court’s Opinion

A. *Factual Background of Commonwealth v. Hernandez*

On August 22, 2013, Aaron Hernandez (hereinafter “Hernandez”), a former professional football player for the New England Patriots, was indicted for the murder of Odin Lloyd, who was shot five times and left for dead in a secluded area near Hernandez’s house in July.³³ Hernandez plead “not guilty.”³⁴ In May 2014, Hernandez was charged with two counts of first-degree murder in the 2012 killing of two men in Boston and, again, plead

²⁴ Patrick Johnson, *After Aaron Hernandez Suicide, Murder Conviction in Odin Lloyd Death Legally Considered ‘As If It Never Occurred,’* MASS LIVE (Apr. 19, 2017, 4:53 PM), <https://perma.cc/NS32-H7NS>.

²⁵ *Id.*

²⁶ Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 943 (2002).

²⁷ McCarthy, *supra* note 23.

²⁸ McCarthy, *supra* note 23.

²⁹ Emery, *supra* note 23.

³⁰ Emery, *supra* note 23.

³¹ Tim E. Staggs, Note, *Legacy of a Scandal: How John Geoghan’s Death May Serve as an Impetus to Bring Abatement Ab Initio in Line with the Victims’ Rights Movement*, 38 IND. L. REV. 507, 507–08 (2005); Emery, *supra* note 23.

³² See generally *Commonwealth v. Hernandez*, 118 N.E.3d 107 (Mass. 2019); Eric Levenson & Evan Simko-Bednarski, *New Details on Aaron Hernandez’s Apparent Suicide in Prison*, CNN, <https://perma.cc/FR6A-9ERV> (last updated May 5, 2017, 6:16 AM EDT).

³³ Tracy Connor, *Aaron Hernandez Indicted for First-Degree Murder in Death of Odin Lloyd*, NBC NEWS (Aug. 22, 2013, 5:17 PM EDT), <https://perma.cc/4LXW-TF9G>.

³⁴ *Id.*

“not guilty.”³⁵ Both legal proceedings were highly publicized and fraught with procedural issues, such as motions to suppress evidence and a motion for change of venue.³⁶ On April 15, 2015, Hernandez was convicted of first-degree murder in the death of Odin Lloyd, unlawful possession of a firearm, and unlawful possession of ammunition;³⁷ he was sentenced to life in prison with no possibility for parole.³⁸ On April 15, 2017, Hernandez was found not guilty of two counts of murder for the 2012 killings.³⁹ Hernandez died in prison, of an apparent suicide, two days later on April 19, 2017.⁴⁰

Before his death, Hernandez’s appeal was still being assembled and had not yet been docketed in the court.⁴¹ After his death, Hernandez’s appellate counsel filed a suggestion of death and motion to abate.⁴² In May 2017, the court vacated the convictions and dismissed the indictments based on the doctrine of abatement *ab initio*.⁴³ The Commonwealth appealed, and the SJC granted the application for direct appellate review.⁴⁴

B. *The SJC Abolished the Abatement Doctrine*

In its analysis, the SJC first explored the doctrine in general, then considered past Massachusetts case law, federal case law, and other states’

³⁵ Kevin Armstrong, *Ex-Patriots TE Aaron Hernandez Pleads Not Guilty to All Charges in 2012 Murders That DA Says Were Sparked by a Spilled Drink*, N.Y. DAILY NEWS (May 28, 2014, 5:26 PM), <https://perma.cc/R8EC-Q8QZ>; Ashley Fantz, *Aaron Hernandez Charged in 2012 Double Homicide*, CNN, <https://perma.cc/RW7X-M9PV> (last updated May 15, 2014, 7:02 PM EDT).

³⁶ See, e.g., Commonwealth v. Hernandez, No. 128590, 2014 Mass. Super. LEXIS 153, at *1 (Nov. 10, 2014) (denying a motion for a change of venue); Commonwealth v. Hernandez, No. 128514, 2014 Mass. Super. LEXIS 149, at *1 (Oct. 10, 2014) (denying a motion to suppress evidence); Commonwealth v. Hernandez, No. 128513, 2014 Mass. Super. LEXIS 145, at *1 (Oct. 10, 2014) (allowing in part and denying in part a motion to suppress evidence); Commonwealth v. Hernandez, No. 128512, 2014 Mass. Super. LEXIS 146, at *1 (Oct. 10, 2014) (denying a separate motion to suppress); Commonwealth v. Hernandez, No. 128852, 2014 Mass. Super. LEXIS 186, at *1 (Oct. 2, 2014) (allowing a motion to suppress); Commonwealth v. Hernandez, No. 128510, 2014 Mass. Super. LEXIS 144, at *1 (Aug. 26, 2014) (allowing a motion to suppress); Commonwealth v. Hernandez, 31 Mass. L. Rptr. 445, 445 (Mass. Super. Ct. 2013).

³⁷ See Commonwealth v. Hernandez, 118 N.E.3d 107, 109 (Mass. 2019).

³⁸ Susan Candiotti, Laura Dolan & Ray Sanchez, *Aaron Hernandez Guilty of Murder in Death of Odin Lloyd*, CNN, <https://perma.cc/M7EU-JFV6> (last updated Apr. 16, 2015, 11:50 AM EDT).

³⁹ Eric Levenson, *Aaron Hernandez Found Not Guilty of Double Murder*, CNN, <https://perma.cc/RXM9-L2WD> (last updated Apr. 19, 2017, 8:09 AM EDT).

⁴⁰ Levenson & Simko-Bednarski, *supra* note 32.

⁴¹ See Hernandez, 118 N.E.3d. at 110.

⁴² See *id.*

⁴³ *Id.*

⁴⁴ *Id.*

case law.⁴⁵ The Court next examined the two main reasons underlying the doctrine: the finality principle and the punishment principle.⁴⁶ Finally, the SJC reviewed the substitution approach and the role of the legislature before concluding that the abatement doctrine should be abolished in Massachusetts.⁴⁷

The SJC stated that little is known about why the doctrine was initially used in Massachusetts and concluded that “the justification for adopting the doctrine was the simple fact that it was perceived to be the favored approach elsewhere.”⁴⁸ The SJC called attention to the first reported Massachusetts appellate case acknowledging the doctrine, claiming the written opinion did not declare that the court was adopting the doctrine.⁴⁹ Rather, the opinion stated that “[w]hen a criminal defendant dies pending his appeal, *normally* the judgment should be vacated and the indictment dismissed. This is the general practice elsewhere.”⁵⁰

The Court acknowledged that all except one U.S. Court of Appeals applies the doctrine.⁵¹ The Court also acknowledged that some states apply the traditional doctrine, some states have narrowed it, and other states have abolished it altogether.⁵² The Court concluded that the doctrine may no longer be the majority approach.⁵³

The SJC identified the first reason behind the doctrine to be the finality principle, which contends that a defendant should not only have the right to a trial, but should also have the right to appeal a conviction, because both are critical aspects of our criminal justice system.⁵⁴ When a defendant appeals a conviction, the conviction hangs in limbo and cannot be seen as final until the appeal is resolved.⁵⁵ Also, it may be unjust to use a contested conviction in a civil suit against the deceased’s estate if the deceased did not have the opportunity to see an appeal through.⁵⁶ The SJC reasoned, however, that while a Massachusetts statute does give a defendant the right to appeal,

⁴⁵ See *id.* at 110–17.

⁴⁶ *Id.* at 117.

⁴⁷ See *Hernandez*, 118 N.E.3d at 121–22.

⁴⁸ *Id.* at 117.

⁴⁹ *Id.* at 111 (discussing *Commonwealth v. Eisen*, 368 Mass. 813 (1975)).

⁵⁰ *Id.* (citing *Eisen*, 368 Mass. at 813–14).

⁵¹ *Id.* at 113 (indicating the one Court of Appeals that has not applied the doctrine has never taken a case on this issue).

⁵² See *id.* at 113–14.

⁵³ *Hernandez*, 118 N.E.3d at 116.

⁵⁴ *Id.* at 117.

⁵⁵ See *id.* at 117.

⁵⁶ See *id.* at 119.

one can be deprived of that right, because there is no constitutional right to appeal.⁵⁷ The Court cited other reasons why the finality principle lacks merit: the presumption of innocence is terminated after a defendant is convicted of a crime; “a trial court judgment is final for purposes of res judicata or issue preclusion”; and the punishment ordered takes place immediately (it is not suspended while an appeal is sought).⁵⁸

The second reason for the doctrine is the punishment principle, which asserts that one purpose of the justice system is to punish, and the system cannot realistically punish a dead person.⁵⁹ The purpose is to punish the person who committed the crime, not the person’s heirs or beneficiaries.⁶⁰ The SJC reasoned that “the [s]tate, as the representative of the community, continues to have an interest in maintaining a conviction” and that the justice system should account for the rights of victims.⁶¹ The SJC highlighted the enactment of the Massachusetts victims rights bill and the creation of the Domestic and Sexual Violence Prevention and Victim Assistance Fund, which both signal the importance of restitution.⁶²

Finally, the SJC rejected the substitution approach requested by the Commonwealth, whereby a third party steps into the shoes of the deceased defendant to carry out the appeal.⁶³ The SJC stated that this approach poses practical issues and that the legislature is the appropriate body to adopt that approach.⁶⁴ Unsatisfied with the lack of established precedent within Massachusetts and aware of dwindling support for the doctrine across the country, the SJC retroactively abolished the abatement doctrine and reversed the lower court’s order to abate Hernandez’s conviction.⁶⁵ The SJC created a new common law rule in Massachusetts: if a convicted defendant dies pending appeal, the appeal is dismissed, and the trial court is instructed to place a note in the record that the defendant’s conviction removed the presumption of innocence but the conviction was neither affirmed nor reversed because the defendant died while an appeal was pending.⁶⁶

⁵⁷ *Id.* at 118.

⁵⁸ *Id.* at 118–19.

⁵⁹ *Hernandez*, 118 N.E.3d at 119.

⁶⁰ *Id.* at 120.

⁶¹ *Id.* at 120.

⁶² *Id.*

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 121–22.

⁶⁵ *Hernandez*, 118 N.E.3d at 121.

⁶⁶ *Id.* at 124.

ANALYSIS

III. The SJC Incorrectly Abolished the Abatement Doctrine Against the Requests of Both Parties*A. Judicial Activism and the Soundness of the Abatement Doctrine*

Common law consists primarily of written judicial decisions and is derived from centuries of published case law in the United States and England.⁶⁷ Many courts of the highest authority in the United States have declared that they have the power to “modify, overrule, or change existing common law to conform to the changing conditions of society.”⁶⁸ Judicial activism is a term used to describe a broad set of court actions, including, but not limited to, using reasoning that is inconsistent with history or tradition, issuing an order that blatantly contradicts precedent, and inventing new rights and remedies.⁶⁹ Judicial activism is also sometimes called “legislating from the bench.”⁷⁰

While the SJC has the self-proclaimed right to change common law, it engaged in improper judicial activism when it abolished the abatement doctrine, going against the wishes of both parties in *Hernandez*.⁷¹ When judges stray from precedent, they place their judgment above that of prior courts.⁷² In seeking “to achieve certain policy results regardless of doctrine, they put their judgment about what is ‘right’ above what various other actors believe the law to be.”⁷³ Unelected judges steal the function of the legislative branch “when they [use] legal principles to effectuate their own preferred policy aims.”⁷⁴

In *Hernandez*, the SJC referred to its own recent reaffirmation in *Shiel v. Rowell* that its preferred course is to adhere to precedent.⁷⁵ Yet, the Court strayed from precedent, possibly because this was a high-profile case, one in which the public generally believed Hernandez was guilty, and the SJC did

⁶⁷ See J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL’Y 351, 362 (2019).

⁶⁸ Tory A. Weigand, *Lost Chances, Felt Necessities, and the Tale of Two Cities*, 43 SUFFOLK U. L. REV. 327, 330 (2010).

⁶⁹ Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 10 (2011).

⁷⁰ See Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 217.

⁷¹ See Weigand, *supra* note 68, at 333.

⁷² Yung, *supra* note 69, at 12.

⁷³ Yung, *supra* note 69, at 12.

⁷⁴ Schacter, *supra* note 70, at 215.

⁷⁵ Commonwealth v. Hernandez, 118 N.E.3d 107, 116 (Mass. 2019).

not want to reward Hernandez for committing suicide.⁷⁶ The New England Patriots and the NFL were withholding money that they owed Hernandez because of his involvement in the murder, which they might have been compelled to pay to his estate if his conviction was erased.⁷⁷

Indeed, the crime Hernandez was convicted of is appalling, but the courts did not attempt to abolish the doctrine when Salvi or Geoghan's convictions for equally, if not more, horrendous crimes were abated.⁷⁸ While courts of last resort have declared their power and duty to change or overrule existing common law to conform to the changing conditions of society, it is difficult to see what changing condition of society prompted the Court to take action here.⁷⁹ The Court cites the victims' rights movement as one reason for abolishing the doctrine, but that movement began decades ago, and the federal government and several states still have not modified or abolished the doctrine in response to the movement.⁸⁰

Furthermore, the victims' rights movement may not be the appropriate concept to justify abolishing the doctrine because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."⁸¹ Nonparties offended by the criminal justice process can seek relief through a civil or administrative suit.⁸² The government's representative, here the Massachusetts District Attorney, represents the interests of the people in a criminal case.⁸³ A victim of a crime lacks standing to challenge a sentence imposed on a criminal defendant.⁸⁴ A victim lacks standing to move to vacate a lengthy stay of the convicted defendant's

⁷⁶ See, e.g., Lynn Johnston Splitek, Note, *State v. McDonald: Death of a Criminal Defendant Pending Appeal in Wisconsin—the Appeal Survives*, 1989 WIS. L. REV. 811, 831 (arguing the Wisconsin Supreme Court in *State v. McDonald* did not abate McDonald's conviction after he killed himself because the Court was worried that abatement may appear to reward suicide); Brian Fraga, *Judge Denies Defense Request to Move Aaron Hernandez Trial*, THE PATRIOT LEDGER (Oct. 30, 2014, 3:24 PM), <https://perma.cc/K53F-A83V>.

⁷⁷ Des Bieler, *'You're Rich': Aaron Hernandez Suicide Note Points to Effort to Provide for His Family*, WASH. POST (May 5, 2017), <https://perma.cc/QJ29-4Y9A>.

⁷⁸ See *supra* Part I(B).

⁷⁹ See Weigand, *supra* note 68, at 330–32.

⁸⁰ See *Hernandez*, 118 N.E.3d 107 at 120; Alexander F. Mindlin, Note, "Abatement Means What It Says": *The Quiet Recasting of Abatement*, 67 N.Y.U. ANN. SURV. AM. L. 195, 197 (2011).

⁸¹ See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

⁸² Br. and App. for Appellee Aaron J. Hernandez at 43, *Commonwealth v. Hernandez*, 118 N.E.3d 107 (2019) (No. SJC-12501) [hereinafter *Hernandez Brief*].

⁸³ *Id.* at 45.

⁸⁴ *H.T. v. Commonwealth*, 989 N.E.2d 424, 424–25 (Mass. 2013).

sentence.⁸⁵ A victim lacks standing to obtain judicial review of any aspect of another's prosecution.⁸⁶ Relying on the victims' rights movement as a justification for abolishing the abatement doctrine undermines this line of authority that limits the interests and rights of individuals who are not parties to a criminal case.⁸⁷

One major function of the criminal justice system is to punish the guilty defendant.⁸⁸ Criminal law has evolved to also be protective in nature, to ensure members of society feel and are protected.⁸⁹ However, the defendant's rights are just as important as the victim's rights, especially in a legal atmosphere where trial court convictions are often reversed.⁹⁰ Here, abrogation of the abatement doctrine creates an injustice to Hernandez.⁹¹ A defendant's death does not automatically foreclose the need for justice; the defendant's family and friends, as well as members of the general public, still want to know the truth about whether the defendant was innocent or not.⁹² The "surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation."⁹³ This interest is significant enough to warrant abating a conviction when the conviction's validity or correctness has not been tested or determined.⁹⁴

Additionally, "appellate review of a conviction is so integral to the array of procedural safeguards due a criminal defendant that incapacity to obtain such review nullifies the jury verdict."⁹⁵ A conviction is unreliable when it cannot be subjected to the rigors of appellate review.⁹⁶ Appeal is a statutory right in Massachusetts as well as most other states and the federal system.⁹⁷

⁸⁵ Hagen v. Commonwealth, 772 N.E.2d 32, 37–38 (Mass. 2002).

⁸⁶ Manning v. Mun. Court of Roxbury Dist., 361 N.E.2d 1274, 1276 (Mass. 1977).

⁸⁷ See Hernandez Brief, *supra* note 82, at 44.

⁸⁸ See Sabrina Margret Bierer, Note, *The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large*, 78 BROOK. L. REV. 1699, 1724–25 (2013).

⁸⁹ See *id.* at 1725.

⁹⁰ See Criminal Appeals in State Courts, NJC No. 248874, at 6 (DOJ Bureau of Justice Statistics Sept. 2015), <https://perma.cc/W32R-ZE8Q>; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2053–54 (2000). See generally Wendy Kaminer, *Victims Versus Suspects*, AM. PROSPECT (Dec. 19, 2001), <https://perma.cc/BL82-V2UB> (examining how giving rights to victims creates tension with the rights of defendants).

⁹¹ See generally Hernandez Brief, *supra* note 82.

⁹² See Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 703 (2010).

⁹³ State v. Morris, 328 So. 2d 65, 67 (La. 1976).

⁹⁴ United States v. Pauline, 625 F.2d 684, 684–85 (5th Cir. 1980).

⁹⁵ Cavallaro, *supra* note 26, at 945.

⁹⁶ Cavallaro, *supra* note 26, at 954.

⁹⁷ See Commonwealth v. Hernandez, 118 N.E.3d 107, 118 (Mass. 2019); Cavallaro, *supra* note

Enforcement of the abatement doctrine may not have attractive results, but justice demands protection of such procedural rights.⁹⁸ For example, the exclusionary rule suppresses unconstitutionally obtained evidence, even if the evidence clearly proves the defendant's guilt.⁹⁹ The world will never know, but had Hernandez seen his appeal through, his conviction may have been overturned.¹⁰⁰

B. *It Is the Legislature's Job to Make Laws*

The separation of powers doctrine is a longstanding limitation on the judiciary.¹⁰¹ The legislature is generally in the best position to make public policy decisions because the legislative law-making process encompasses a broad range of information gathering with input from many parties.¹⁰² If the Court felt strongly that the abatement doctrine should be abolished based on public policy, it should have made a call to the legislature to address this issue.¹⁰³ "Where a long-standing common-law rule is the subject of challenge, the notions underlying separation of powers require refraining from judicial alteration absent a history of inconsistent application and 'Herculean need.'"¹⁰⁴ Here, the Court abolished the doctrine because it felt that the legislature was not doing its job.¹⁰⁵ However, a recent Second Circuit case said it best: "Abatement *ab initio* is a common law doctrine: If Congress deems it an undesirable one, it can act accordingly."¹⁰⁶

The Massachusetts legislature attempted to abolish the doctrine in 1997, but was unsuccessful in getting a bill passed.¹⁰⁷ The only other known attempt by the legislature to modify the doctrine was a 2017 House bill (named after Odin Lloyd) stating that "the death of a defendant due to suicide who is convicted of a criminal offense shall automatically forfeit any and all rights to appeal that conviction."¹⁰⁸ A request for a study on the

26, at 946.

⁹⁸ See Mindlin, *supra* note 80, at 228.

⁹⁹ See Mindlin, *supra* note 80, at 228–29.

¹⁰⁰ See Cavallaro, *supra* note 26, at 977–81.

¹⁰¹ See Weigand, *supra* note 68, at 332.

¹⁰² See Weigand, *supra* note 68, at 332–33.

¹⁰³ See Weigand, *supra* note 68, at 332.

¹⁰⁴ Weigand, *supra* note 68, at 335.

¹⁰⁵ See Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 17 (2014); Weigand, *supra* note 68, at 330.

¹⁰⁶ *United States v. Libous*, 858 F.3d 64, 69 (2d Cir. 2017).

¹⁰⁷ McCarthy, *supra* note 23.

¹⁰⁸ An Act Relative to Odin Lloyd, H.R. 3835, 190th Gen. Court (Mass. 2017), <https://perma.cc/6C3J-WH2K>.

amendment, along with other proposed and unrelated amendments, was ordered, but the bill never made it out of the House.¹⁰⁹ The legislature's inability or unwillingness to modify or abolish the doctrine is strong evidence of a legislative intent to preserve the abatement doctrine.¹¹⁰

C. *Reliance on the Law*

The reliance principle is prevalent in criminal law—people must be on notice about what the laws are in order to understand what conduct constitutes a crime.¹¹¹ The same principle can be applied outside of criminal law.¹¹² Let us assume Hernandez was fully aware of the abatement doctrine before he committed suicide.¹¹³ This means Hernandez may have relied on the law as it currently stood in Massachusetts in making his decision to commit suicide.¹¹⁴ There is value in the certainty of law, as “it protects the individual’s right to rely on existing law in managing his affairs.”¹¹⁵ While the general rule has been to give retroactive effect to an overruling decision, this rule is subject to exceptions, such as if “there has been justifiable reliance on decisions which are subsequently overruled and those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision.”¹¹⁶ The SJC retroactively abolishing the abatement doctrine so that the doctrine is inapplicable to Hernandez undermines the reliance principle and results in substantial harm to Hernandez.¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ See Andrew White, Comment, *Perpetuating Injustice: Analyzing the Maryland Court of Appeals’s Refusal to Change the Common Law Doctrine of Contributory Negligence*, 78 MD. L. REV. 1042, 1044 (2019).

¹¹¹ See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 308 (2016).

¹¹² See Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 234–35 (1965).

¹¹³ See Bieler, *supra* note 77 (stating Hernandez may have heard a rumor in prison that if a defendant dies while he has an open appeal, he will be acquitted of the charge and deemed not guilty).

¹¹⁴ See Bieler, *supra* note 77.

¹¹⁵ Currier, *supra* note 112, at 235.

¹¹⁶ S. R. Shapiro, Annotation, *Comment Note.—Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371, § 5(a) (1966).

¹¹⁷ See John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 52–53 (1997); *supra* Part III(A) (detailing how a defendant’s rights are equally as important as the victim’s rights and how appellate review of a conviction is so integral to the range of procedural safeguards due to a criminal defendant that the inability to obtain such review makes a conviction unreliable).

IV. If the SJC Wanted to Change the Doctrine, It Should Have Considered Adopting the Substitution Approach

Instead of abolishing the doctrine altogether, the Court should have put more consideration into implementing the substitution approach.¹¹⁸ In its written opinion, the SJC spent little time considering the substitution approach.¹¹⁹ The Court felt that it was not its place to adopt the substitution approach due to practical considerations.¹²⁰ It stated that the Massachusetts Rules of Appellate Procedure would need to be modified, yet the Court acknowledged this change was within its powers.¹²¹ The Court also grappled with the issue of if and how the system would handle substitution for a deceased indigent defendant.¹²²

The Commonwealth itself argued for application of the substitution approach in this case.¹²³ This approach allows for an eligible third party, such as the defendant's family member, to step into the shoes of the deceased defendant and complete the appeals process.¹²⁴ The substitution approach would solve many of the problems identified by opponents of the abatement doctrine and is an approach already used in several states.¹²⁵ This approach "affords defendants their right to post-trial review, [and] gives defendants' families the opportunity to appeal the conviction and thus the restitution orders . . ."¹²⁶ Further, if the appeal process is eventually carried out by a third party, the general public would benefit from knowing if the defendant

¹¹⁸ See Patrick H. Gallagher, *The Aaron Hernandez Case: The Inconsistencies Plaguing the Application of the Abatement Doctrine*, 53 GONZ. L. REV. 263, 286 (2017).

¹¹⁹ See *Commonwealth v. Hernandez*, 118 N.E.3d 107, 122 (Mass. 2019).

¹²⁰ *Id.*

¹²¹ *Id.* at 122–23.

¹²² *Id.* at 123.

¹²³ Commonwealth's Br. at 14, *Commonwealth v. Hernandez*, 118 N.E.3d 107 (Mass. 2019) (No. SJC-12501).

¹²⁴ See Bierer, *supra* note 88, at 1709.

¹²⁵ See Bierer, *supra* note 88, at 1702, 1731–33 (stating opponents of the abatement doctrine argue that victims' interests, the government's interests, and insurance providers' interests are harmed when the abatement doctrine is applied); see also Barry A. Bostrom, Chad Bungard & Richard J. Seron, *John Salvi III's Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y.C. L. REV. 141, 165 (2002) (arguing that abating Salvi's conviction led to an undesirable and harsh result for the key informant in the case who was ultimately unable to collect the cash award for providing information leading to the conviction of Salvi).

¹²⁶ See Bierer, *supra* note 88, at 1702.

truly committed the crime.¹²⁷ It is in the interest of the defendant, the defendant's estate, and the public that a defendant's challenge to a conviction is fully reviewed.¹²⁸

CONCLUSION

In *Commonwealth v. Hernandez*, the SJC improperly abolished the common law doctrine of abatement *ab initio*. The Court did not side with either the Commonwealth or Hernandez. Instead, it chose to travel its own route. Further, the Court retroactively applied the change in law so that Hernandez's conviction could not be abated. The SJC's departure from precedent amounts to impermissible judicial activism and creates an unjust result for not only Hernandez, but also his family and society. If the Court wanted to change this long-standing doctrine, the Court should have put more consideration into adopting the substitution approach, which allows a third party to voluntarily stand in for a deceased defendant to carry out an appeal.

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¹²⁷ See Gallagher, *supra* note 118, at 286, 288.

¹²⁸ *Commonwealth v. Walker*, 447 Pa. 146, 147 (1972).