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Peremptory Challenges in Massachusetts: Guidelines to Enable the Bench and the Bar to Comply with Constitutional Requirements

By Peter W. Agnes Jr.

Peter W. Agnes Jr. is an Associate Justice of the Massachusetts Appeals Court. The views expressed in this article are his own. Justice Agnes wishes to thank Jasper Groner, Esq., Appeals Court Law Clerk, and Ms. Sydney Walker, Northeastern University Law School student, for their assistance in preparing this paper. Also, he wishes to thank Charles E. Walker Jr., Esq. of Boston for reading a draft of this article and for sharing his insights.

“No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room.”

2. Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (quoted in Miller-El v. Dretke, 545 U.S. 231, 237 (2005)).
3. A “peremptory challenge” refers to a party’s right to strike an otherwise, eligible person from serving as a juror without having to assign a cause. The authority for such challenges is entirely statutory. Kabatchnick v. Hanover-Elm Bldg. Corp., 331 Mass. 336, 368 (1954). Initially, the right was limited to the defendant in criminal cases. Id. Today, peremptory challenges are available in criminal cases to both the prosecution and the defense. See Mass. R. Crim. P. 20(c) (1) (specifying the number of peremptory challenges available to each side). The constitutionality of giving the government peremptory challenges in criminal cases was upheld in Commonwealth v. Dorsey, 103 Mass. 412 (1869). The authority to exercise peremptory challenges in civil cases is statutory. Mass. Gen. Laws ch. 234, §29. The procedure for the exercise of peremptory challenges is set forth in Rule 6 of the Superior Court (1989). The default position for selecting a jury under Rule 6 is known as the “Walker Method” of jury selection. “Under the Walker method of peremptory challenges, the parties do not begin to exercise their peremptory challenges until the number of venire persons found indifferent equals the total number of all peremptory challenges that may be exercised in the case plus the number of indifferent jurors needed to serve on the jury.” Commonwealth v. Johnson, 417 Mass. 498, 506 (1997). However, when “individual voir dire is conducted,” a practice followed routinely in both civil and criminal cases by many judges, parties may be required to exercise peremptory challenges after each juror is found by the court to be indifferent. Commonwealth v. Seng, 456 Mass. 490, 493-95 (2010).
4. See, e.g., Commonwealth v. Maldonado, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (observing that due to the difficulty of determining whether peremptory challenges are being used to eliminate members of a protected class from service on the jury, it may be advisable to eliminate them).
5. In response to recent decisions by the Supreme Judicial Court and the Appeals Court which address the constitutional requirements that must be observed in connection with the exercise of peremptory challenges in both civil and criminal cases, which are discussed throughout this article, the Massachusetts Bar Association President Valerie Yarashus established the Task Force on Peremptory Challenges (task force). The task force was chaired by Richard P. Campbell, Esq., and comprised of the following members: Hon. Peter W. Agnes Jr., Superior Court; Hon. David Ricciardone, District Court; Hon. Michael O’Keefe, District Attorney for the Cape and Islands District; Hon. Daniel Conley, District Attorney for Suffolk County; Marianne LeBlanc, Esq., Sugarman & Sugarman; Frank Corso, Esq., Sarrouf & Corso LLP; Robert Curley, Esq., Curley & Curley; Emily Coughlin, Esq., Coughlin & Berke; Hon. Beverly Cannone, Quincy District Court; Edward V. Colbert III, Esq., Looney & Grossman; Michael Hussey, Esq., Committee for Public Counsel Services; Phil Callan, Esq., Doherty, Wallace, Pillsbury & Murphy; and Eric Neyman, Esq., Reporter, McCarter & English. The “Final Report of the Task Force on Peremptory Challenges,” which recommended a series of educational initiatives and strongly recommended retention of peremptory challenges, has been approved by the House of Delegates of the Massachusetts Bar Association. It is presently in the implementation phase.
6. The criteria for service as a juror in Massachusetts and the process of identifying and summoning persons for service as petit or grand jurors are set forth in Mass. Gen. Laws ch. 234A. The Sixth Amendment to the Federal Constitution and Art. 12 of the Declaration of Rights require that a jury be “drawn from a source fairly representative of the community.” Commonwealth v. Bastarache, 382 Mass. 86, 96 (1980) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). In Bastarache, the court decided that a random selection method was the best way to honor this constitutional guarantee. That responsibility (and much more) rests with the office of the Massachusetts Jury Commissioner. See www.mass.gov/courts/jury, last viewed April 5, 2012. The Jury Commissioner’s Web site contains a great deal of useful material for lawyers as well as prospective jurors.

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I. Introduction

A. Background

The peremptory challenge of potential jurors in Massachusetts has been the subject of debate and discussion in recent years as a result of the suggestion by some present and past members of the Supreme Judicial Court that they should be abolished. This article explores the law and suggests the use of a set of guidelines to assist judges and parties in both civil and criminal cases to ensure that peremptory challenges are exercised in full compliance with the law.

The process of selecting a jury from among the persons summoned to serve as jurors in a civil or criminal trial requires the trial judge, with the assistance of counsel, to determine whether the

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potential jurors are free from interest, bias or prejudice and otherwise eligible to serve as jurors. "Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror" in order to determine "whether a juror stands indifferent in the case." Massachusetts law affords the court wide discretion about what questions to ask, whether to question jurors as a group or individually, and whether to permit counsel to pose questions directly to the prospective jurors.

Under the traditional method of jury selection, once the trial judge completes the process of considering challenges for cause, if any, and declares the potential jurors to be "indifferent" and thus able to sit on the case, the parties are entitled to exercise a certain number of "peremptory" challenges for which they are not required to give a reason. "The scope of the peremptory challenge traditionally has exceeded that of the challenge for cause. To eliminate those jurors perceived as harboring subtle biases with regard to the case, which were not elicited during the voir dire process or which do not establish legal cause for challenge, the parties have been permitted to exercise peremptory challenges on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." The exercise of peremptory challenges is also viewed as the right to reject jurors legally qualified to sit. This sentiment in support of the value of peremptory challenges, which was expressed by the Supreme Judicial Court in Commonwealth v. Soares, in which the court placed restrictions on the free-wheeling use of peremptory challenges (discussed in detail in Section II), springs from an understanding that lawyers or self-represented parties involved in jury selection in Massachusetts are limited in their ability to challenge jurors for cause because in most cases the voir dire process brings very little to the surface about the attitudes and beliefs of potential jurors.

Although not constitutionally mandated, peremptory challenges enjoy a "venerable" status in our legal system. A good illustration of the reason why is supplied by Commonwealth v. Walker, a prosecution for rape and other offenses in which four prospective jurors who appeared to be either African-American or Hispanic were declared by the trial judge to be indifferent and eligible to sit on the jury, even though they had failed to include in the answers to questions on their juror questionnaires that they had family members who had been arrested, and had failed to do so when given the opportunity in court to amend their answers. The prosecutor exercised peremptory challenges as to all four potential jurors. When the defendant objected, the prosecutor volunteered that each of the four jurors might harbor a resentment against the commonwealth because they had family members who had been prosecuted by the district attorney's office. On appeal, the court noted that the trial judge acted within her discretion in finding no pattern of improper challenges, and no prima facie case of unlawful discrimination established by the prosecutor's peremptory challenges. Under other circumstances, it might be defense counsel in a criminal case, or either party in a civil case, who faces the risk of a jury comprised of one or more jurors who was not excluded for cause but who for some concrete reason, relating to the jurors personally and not to the group to which they belong, may hold a bias or prejudice against that party that the trial judge failed to detect or to appreciate and whose only effective remedy is the exercise of a peremptory challenge.

The use of peremptory challenges predates the American constitutional system of trial by jury. There is evidence that peremptory-like challenges to persons selected to serve as trial jurors existed as far back as the Roman Empire. At early common law, the crown was allowed to make an unlimited number of challenges for cause in capital cases that were effectively peremptory because the doctrine of royal infallibility made them indisputably valid. Although there is evidence that the common law developed to provide peremptory challenges both to the government and the defendant in criminal cases, they were never in widespread use in England and were finally abolished by Parliament in 1899. In the United States, the law developed on the basis of the common law, with the result that by the end of the nineteenth century, "most, if not all, states had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half,

The Trial Juror Handbook, prepared by the commissioner, contains a definition of the peremptory challenge: "[T]he parties through their lawyers may challenge a limited number of jurors without giving any reasons. The lawyer simply asks that a certain juror be excused, and the judge will excuse the juror. This type of challenge or excuse is called 'peremptory.' Usually parties or lawyers who exercise peremptory challenges have reasons which seem sound to them for doing so. If you or a fellow juror are challenged peremptorily, you should not be offended or embarrassed. Remember, the peremptory challenge is simply a part of our justice system which gives the parties, through their lawyers, limited control over which jurors are impaneled in the case."

See Mass. Gen. Laws ch. 234, §28; Mass. R. Crim. P. 20(b) (criminal cases) and Reporter's Notes; Mass. R. Civ. P. 47(a) (civil cases), Mass. Gen. Laws ch. 234, §28 contains a nonexclusive list of the considerations extraneous to the case that may lead the court to determine that a prospective juror should be excused for cause as follows: "community attitudes, possible exposure to potentially prejudicial material or possibly preconceived opinions toward the credibility of certain classes of persons . . . ." The trial judge has wide latitude to go beyond the scope of §28 in questioning prospective jurors at this stage. See Mass. R. Crim. P. 28(b), Reporter's Notes, and cases cited.


4 W. Blackstone, Commentaries 353 (1807).

but often equal to, the number had by the defendant.”

In Massachusetts, peremptory challenges have been part of the law since before the adoption of the Massachusetts Constitution. The number of peremptory challenges was limited as time passed. In Commonwealth v. Dorsey, the defendant argued that the Massachusetts law providing that the Attorney General had up to five peremptory challenges in capital cases was unconstitutional as an infringement on the right to trial by jury. The Supreme Judicial Court rejected this argument and observed that the matter was for the legislature to determine: “If the framers of the constitution intended to prohibit the legislature from conferring a right of peremptory challenge on the government, their knowledge of the institution of trial by jury would have induced them to express that intent.”

Although there is neither a federal nor state constitutional right to the exercise of a peremptory challenge, it has been described as “one of the most important of the rights secured to the accused.” The basis for this view is as valid today as it was in the nineteenth century —

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory challenge satisfies the rule that to perform its high function in the best way justice must satisfy the appearance of justice. Indeed the very availability of peremptory challenges allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause. Although historically the incidence of the prosecutor’s challenge has differed from that of the accused, the view in this country has been that the system should guarantee not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.

B. Manner of Exercising Peremptory Challenges

Until 1989, with limited exceptions, the method for the exercise of peremptory challenges was fixed by Rule 6 of the Rules of the Superior Court and required the court to seat the prospective jurors found to be indifferent before the parties exercised peremptory challenges. The 1989 amendment to Superior Court Rule 6 provides that when individual voir dire is used as a jury selection method in a civil or criminal case, it is within the discretion of the trial judge to require either party to exercise peremptory challenges one juror at a time, after each juror is declared by the court to be indifferent. In such cases, the court also may require the parties to exercise peremptory challenges in rotating order.

The number of peremptory challenges available to a party is fixed by law. In a civil case, each party is entitled to four peremptory challenges. In a criminal case, each defendant is entitled to four peremptory challenges (juries of 12) or two peremptory challenges (juries of six) provided that in a prosecution for a crime punishable by life imprisonment, each defendant is entitled to a number of peremptory challenges equal to the number of jurors seated (e.g., sometimes up to 16). The commonwealth is entitled to a total number of peremptory challenges equal to that of all the defendants. Peremptory challenges must be exercised before the juror is sworn to try the case.

There is a rebuttable presumption that the exercise of a peremptory challenge is valid. A party who wishes to challenge the exercise of a peremptory challenge must raise an objection as soon as the improper challenge is made, or as soon as it becomes evident omitted; Georgia v. McCollum, 505 U.S. 42, 57 (1992) (peremptory challenges are “one state-created means to the constitutional end of an impartial jury and a fair trial”); Frazier v. United States, 355 U.S. 497, 505 (1948) (“the right [to peremptory challenges] is given in aid of the party’s interest to secure a fair and impartial jury”).

29. Swain, 380 U.S. at 219-20 (citations and quotations omitted). Based on my twenty-one years as a trial judge in both the district and superior court departments, it is my opinion that it is impossible for trial judges to be correct in ruling on each and every challenge of a juror for cause made by counsel or a self-represented litigant during the jury selection process. Without the peremptory challenge, it is inevitable that jurors will be seated who actually are biased for or against a party in civil and criminal cases. Apart from such cases, it is also important to consider the value of the appearance of justice. The peremptory challenge satisfies a party’s belief for reasons that often cannot be articulated that one or more jurors are in fact biased.


31. Id. at 744 (quoting Commonwealth v. Sires, 413 Mass. 292, 308 n.19 (1992)).


34. See Mass. R. Crim. P. 20(c).


that a pattern of unlawful challenges exists. As discussed further below, it is critical that the trial judge make an explicit "prima facie finding of impropriety ... before requiring counsel to state a reason for the challenge." Otherwise, the court may incorrectly disallow a peremptory challenge. In both civil and criminal cases, when a party is unlawfully deprived of the right to exercise a peremptory challenge, and the deprivation results in the party's being forced to accept one or more jurors it did not wish to have seated on the jury, and one or more of those jurors participates in the deliberations, it is automatic reversible error.

C. The Constitutionalization of Peremptory Challenges

In *Strauder v. West Virginia*, the Supreme Court laid the foundation for the constitutionalization of peremptory challenges by holding that the then recently adopted Fourteenth Amendment to the U.S. Constitution forbade state action that denied "a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." However, as the history of the 20th century reveals in so many other areas of life, the elimination of racial bias in government action at the state and federal level is a painstakingly slow process. For example, despite the lofty rhetoric of equal protection in the *Strauder* case, 85 years later the Supreme Court noted in *Swain v. Alabama*, that in Taledega County, Alabama, no negro had served on a petit jury since 1950.

Initially, the eradication of race-based, purposeful discrimination in the selection of persons eligible to serve on a jury was viewed as an undertaking that simply did not encompass peremptory challenges, which were regarded as outside the framework of the equal protection model established in *Strauder*. "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the state's challenges to obtain a fair and impartial jury to try the case before the court." Eventually, the Supreme Court obliterated the distinction between the state's impermissible use of race and gender to exclude citizens from eligibility for jury service, and the use of such factors by prosecutors to strike jurors otherwise eligible to sit on a jury through the use of peremptory challenges.

In the wake of *Swain v. Alabama*, our appellate courts adhered to the strong presumption of regularity even when the prosecutor used peremptory challenges to exclude all black persons from the jury. For example, in *Commonwealth v. Anderson*, when during a bench conference defense counsel complained that the prosecution was using its peremptory challenges to exclude blacks, the prosecutor remarked: "These guys (referring to defense counsel) wouldn't give me an Irishman all morning. They have been kicking them off." On appeal, the court's response was that "it was an inconsequential, though perhaps tasteless, quip — hardly sufficient to indicate a manipulation of the commonwealth's right to peremptory challenges and a perversion of their purpose." The strength of the *Swain* presumption of regularity also was in evidence in *Commonwealth v. Crambou*, where the Appeals Court rejected the defendant's claim of a constitutional violation based on the prosecutor's use of three of his peremptory challenges to exclude the only three black persons in the venire because in the absence of other evidence "it did not constitute part of a systematic plan of exclusions based on race."

In 1979, however, after enforcing the strong presumption of regularity established in *Swain* for nearly 20 years, the Supreme Judicial Court abruptly changed course and held that the exercise of peremptory challenges to exclude members of discrete groups based on sex, race, color, creed or national origin, solely on the basis of bias presumed to derive from their membership in those groups, violates the prosecutor's right to select a fair and impartial jury.

37. See id.
40. 100 U.S. 303 (1880).
42. 380 U.S. 202 (1965).
43. In *Swain*, the data before the court was that although "Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, there having been only one case in which the percentage was as high as 23%" 380 U.S. at 205. Additionally, "no Negro has actually served on a petit jury since about 1950. In this case there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury." *Id.* at 205. However, the Supreme Court concluded that this data did not establish "a prima facie case of invidious discrimination under the Fourteenth Amendment." *Id.* at 206.
44. *Swain*, 380 U.S. at 222. The presumption was described as rebuttable, but it was virtually insurmountable. "The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case." *Id.* at 223-24.
48. *Id.* at 465 (parentheses in original)
49. *Id.*
51. *Id.* at 632.
Article 12’s requirement that a jury of one’s peers be drawn from a representative cross section of the community.\(^{52}\) “If the constitutional mandate of a jury which fairly reflects a cross section of the community is to signify more than hollow words in this commonwealth, we cannot permit the peremptory challenge to be exercised with absolute and unbridled discretion.”\(^{53}\)

As noted above, several justices of the Supreme Judicial Court have expressed the view that it may be advisable to either further restrict the use of peremptory challenges or to eliminate them altogether.\(^{54}\) In Miller-El v. Dretke,\(^{55}\) Justice Breyer observed, in his concurring opinion, that “[p]ractical problems of proof to the side, peremptory challenges seem increasingly anomalous in our judicial system.”\(^{56}\) However, the experience of most trial lawyers is that peremptory challenges should be preserved because they afford parties in both civil and criminal cases an important tool and possibly the only effective remedy to ensure an impartial jury and the appearance of a fair trial.

What follows is: (i) a discussion of the Soares case and its progeny, in which the Massachusetts appellate courts have explained, refined and in some instances, expanded, the doctrinal framework for handling peremptory challenges that raise questions of unlawful discrimination (as well as a brief discussion of federal law), and (ii) a 10-point checklist based on the relevant case law for judges and lawyers to use during the selection of the jury, to insure that the requirements of the law are observed.

II. COMMONWEALTH v. SOARES\(^{77}\)

A. The Selection of the Jury

In order to understand the court’s reasoning in the Soares case, and the insistence placed on strict compliance with the doctrinal framework established by the Supreme Judicial Court in relation to the exercise of peremptory challenges, it is necessary to understand the factual setting in which Soares arose and the events at trial. Race and racism were dominant themes in the case. On Nov. 15, 1976, the Harvard College football team gathered for dinner at the Harvard Club on Commonwealth Ave. in Boston to celebrate the end of training.\(^{58}\) As the court observed, “[a]lcoholic beverages were available before, during and after the meal and formal ceremony.”\(^{59}\)

Following the dinner, about 50 football players went to the “Naked I,” a bar on Washington St. in Boston’s “Combat Zone.”\(^{60}\) The players remained there until the 2 a.m. closing.\(^{61}\) Small groups walked from the strip club to several vehicles for the ride back to Cambridge.\(^{62}\)

A group of departing football players had a discussion about sex with two black women who joined them momentarily at their van.\(^{63}\) One of the players suspected that one of the women had stolen his wallet.\(^{64}\) A short time later, as they were driving in the van, they spotted one of the two black women on the street.\(^{65}\) A confrontation ensued involving two groups of football players and several black men.\(^{66}\) Another black man ran toward the assembly brandishing a knife, followed by a second man.\(^{67}\) There was a shout about a man with a knife and a number of the football players moved away toward the vehicles.

Witnesses saw two of the black men, co-defendants Soares and Allen, among them, following the football players and taunting them ("We’re going to cut you white m____ f____," and “We’re going to get you now.”).\(^{68}\) The pursuing group of black men reached a group of players in and around the van, which was parked in the alley along the side of the Silver Slipper Bar.\(^{69}\) About 15 football players were present.\(^{70}\) There was a melee between the two groups.\(^{71}\)

The victim, Andrew Puopolo, was involved in a fight at the right front of the van.\(^{72}\) Witnesses saw the victim trading blows with co-defendant Soares.\(^{73}\) Another codefendant, Easterling, attacked Puopolo from behind and cut him in several places.\(^{74}\) One of the football players pulled the victim away, and as they were about to move away from the scene, the victim was struck by co-defendant Soares and then stabbed in the chest by co-defendant Easterling.\(^{75}\) Puopolo was taken to the New England Medical Center, but died from his wounds on Dec. 17, 1976.\(^{76}\)

At Soares’s trial, the trial judge followed the traditional method of jury selection in Massachusetts, as set forth in Superior Court Rule 6, by examining members of the venire to eliminate potential jurors who were not indifferent until there was a sufficient number of indifferent jurors to account for the number to be seated. After twelve jurors were seated and declared to be indifferent, the commonwealth exercised peremptory challenges. “The prosecutor exercised a total of 44 peremptory challenges. Through his use of these


\(^{53}\) Soares, 377 Mass. at 484. As the text infra indicates, in Soares, three black defendants were tried for and convicted of murder in the first degree in connection with the death of a white man who happened to be a member of the Harvard University football team. See Charles E. Walker, Jr., Inflicting Soares: The Continuing Viability of Peremptory Challenges, 2011 Boston Bar J. 17, 17-21 (2011).


\(^{55}\) 545 U.S. 231 (2005).

\(^{56}\) Id. at 269. See also Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J. concurring) (“[T]he prosecutor’s inability in this case to provide a clear explanation of why she exercised her peremptory challenges may well reflect the more general fact that the exercise of a peremptory challenge can rest upon instinct not reason. Insofar as Batson asks prosecutors to explain the unexplainable, how can it succeed?”). See also Dretke, 545 U.S. at 272 (Breyer, J., concurring).


\(^{58}\) These facts are drawn from the statement of facts that appears in the Supreme Judicial Court’s opinion. See Soares, 377 Mass. at 465-69. See also Alan Rogers, Murder and the Death Penalty in Massachusetts, 319-25 (Univ. Mass. Press 2008).

\(^{59}\) Soares, 377 Mass. at 464.

\(^{60}\) Id.

\(^{61}\) Id.


\(^{63}\) Id. at 465.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id. at 465-55.


\(^{68}\) Id. at 467.

\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id. at 467-68.


\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) Id. at 469.
challenges, he excluded 92 percent of the available black jurors, and only 34 percent of the available white jurors.77 78

The case proceeded to trial, with the result that the defendants were convicted. Three of the defendants who were indicted for the murder in the first degree of Andrew Puopolo, as well as for other charges arising out of the street brawl, were found guilty as charged and the mandatory sentences of life imprisonment without parole were imposed.79 In addition, one of the three defendants was also convicted of assault and battery by means of a dangerous weapon on another Harvard student and sentenced to a term of eight to 10 years, to be served from and after the expiration of the sentence imposed for the murder conviction.80 Soares was indicted for assault and battery by means of a dangerous weapon on two other Harvard students and was convicted of simple assault and battery in each case.81 These charges were placed on file.82 Finally, another of the three defendants was indicted for assault and battery by means of a dangerous weapon on one of the Harvard students, and was found not guilty.83 On remand after reversal, the three defendants who had been convicted of murder in the first degree were retried, with the result that two (including Soares) were found not guilty and the third was convicted of manslaughter.84

B. The Rejection of the Presumption of Regularity

On appeal, the Supreme Judicial Court reversed the convictions. The commonwealth relied on Swain’s presumption of regularity, which the court conceded, if applied, would lead to the rejection of the defendant’s claim because there was no evidence in the case of the systematic use of peremptory challenges to exclude blacks from being seated on Suffolk County juries.85 In rejecting this approach, the Supreme Judicial Court focused solely on the conduct of the prosecutor in the case before it, just as the U.S. Supreme Court would do seven years later in Batson v. Kentucky.86 The court held that:

78. “Thirty-two of the ninety-four available white jurors were challenged by the Commonwealth.” Soares, 377 Mass. at 473 n.7. “Of course, the absolute number of challenges of members of a group is significant only if they constitute a high percentage of that group.” Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 120 (1983).
80. Id.
81. Id.
83. Id. at 461.
85. Soares, 377 Mass. at 475. The Supreme Judicial Court acknowledged that the Swain test, which Massachusetts courts had followed faithfully since 1965, was flawed, because the remedy it provided for an equal protection violation was illusory, where the data required to establish that prosecutors were systematically excluding black jurors was not available. Id. at 475 n.10.
86. 476 U.S. 79 (1986).
88. In Soares, the SJC observed that “[p]revious cases decided by this court delineate the characteristics of the jury contemplated by art. 12. In various contexts, we have remarked that ‘(a) fair jury is one that represents a cross section of community concepts,’ Commonwealth v. Ricard, 355 Mass. 509, 512 (1969); ‘(it) is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community,’ Commonwealth v. Martin, 357 Mass. 190, 191 (1970), quoting from Smith v. Texas, 311 U.S. 128, 130 (1940); ‘(a) defendant is constitutionally entitled to a jury selection process free of discrimination against his grouping in the community …,’ Commonwealth v. Rodriguez, 364 Mass. 87, 92 (1973);” Commonwealth v. Soares, 377 Mass. 461, 478 (1979).
89. 476 U.S. 79 (1986).
90. Commonwealth v. Young, 401 Mass. 390, 402 n.11 (1987), overruled on other grounds, Commonwealth v. Ramirez, 407 Mass. 553 (1990). In Aspen v. Bissonnette, 480 F.3d 571 (1st Cir. 2007), the defendant on habeas corpus argued that Massachusetts law as explained in an unpublished opinion by the Appeals Court violated federal law which provides that a defendant challenging the exercise of a peremptory challenge on constitutional grounds is not required to establish that it is more likely than not that the peremptory challenge was exercised unlawfully. However, the First Circuit found it unnecessary to decide the point, and noted that “the SJC has stated that the prima facie burden under Article 12 is ‘not...a terribly weighty one,’ Commonwealth v. Maldonado, 439 Mass. 460, 788 N.E.2d 968, 971 n.4 (2003), and that the SJC has found a prima facie case established under Article 12 on evidence that would not seem to make it ‘likely’ that discrimination occurred in the use of a peremptory challenge. Commonwealth v. Harris, 409 Mass. 461, 567 N.E.2d 899, 902-03 (1991).” Aspen, 480 F.3d at 575 n.4.
91. Soares, 377 Mass. at 490.
shall not be denied or abridged because of sex, race, color, creed or national origin.”92 While a person’s status as an African-American or Hispanic is sufficient to identify him as a member of a “discrete group,” to date courts have not recognized “minority” as a discrete group.93 The strength of the inference of impropriety from the exercise of a peremptory challenge increases when the challenged juror and the defendant are of the same race.94

The burden is on the party challenging the use of a peremptory challenge to establish that the prospective juror is a member of a protected group.95 The juror’s surname may be a significant consideration in whether the challenging party satisfies the initial burden.96 The trial judge has the power to conduct an evidentiary hearing, if necessary, in order to determine whether the prospective juror falls within a discrete grouping under article 1 of the Declaration of Rights.97 In Commonwealth v. Curtiss,98 the court described the initial burden faced by the party questioning a peremptory challenge in terms of a likelihood of discrimination. The court explained that the assumption that peremptory challenges are valid “is rebuttable, however, on a showing that: (1) there is a pattern of excluding members of a discrete group; and (2) it is likely that individuals are being excluded solely on the basis of their membership within this group.”99 The challenging party’s burden has been refined in later cases and described as “not . . . a terribly weighty one.”100 The most recent definition of this burden by the Supreme Court is that the party challenging the use of a peremptory challenge must offer “evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”101

The trial judge may make a finding of a prima facie showing of impropriety and challenge the presumption of regularity on his or her own without an objection from counsel, thereby shifting the burden of proof to the party exercising the challenge.102 “Classifications based on age are not a discrete or defined group so as to render peremptory challenges of the defense counsel improper under the Soares holding.”103 Persons who cannot speak English and noncitizens are not members of a discrete group for purposes of a Soares analysis.104 “Suburban parents or caretakers of...”


93. In Gray v. Brady, 392 F.3d 296, 305 (1st Cir. 2004), the First Circuit made this observation: “While the Supreme Court has treated both African-Americans, see Batson, and Hispanics, see Hernandez, as a ‘cognizable group’ in this sense, it has never passed upon whether ‘minorities’-a term that Gray does not define, but that presumably includes African-Americans and Hispanics at a minimum-fit that description in the aggregate. Gray provides no authority from any court simply treating ‘minorities’ as the relevant ‘cognizable group’ for purposes of a Batson challenge in the way he urges. The only authority we know of is to the contrary. See California v. Davis, 46 Cal.4th 539, 94 Cal.Rptr.3d 322, 208 P.3d 78, 115 (2009); People v. Smith, 81 N.Y.2d 875, 597 N.Y.S.2d 633, 613 N.E.2d 539, 540 (1993)” (footnote omitted).


96. Id. (surname thought to be indicative of Hispanic or Italian origin). See also Commonwealth v. Carleton, 418 Mass. 773, 775 (1994) (Irish-sounding surname was sufficient to identify juror as member of protected class). But see footnote 97, infra.

97. See Commonwealth v. Bourgeois, 391 Mass. 869, 878 n.12 (1984). Uncertainty about the racial or ethnic background of a prospective juror may present challenges for the trial judge and the lawyers. This interesting exchange occurred in Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 637 (2000): In the course of exercising his peremptory challenges, the prosecutor selected the only black juror in the venire. Trial counsel promptly objected, saying that “out of approximately forty or so jurors, the Commonwealth challenged the only black juror in this particular venire.” That prompted the following sidebar discussion between the judge, prosecutor, and trial counsel. The judge asked whether the defendant was black. Then he remarked that the defendant’s surname sounded “Spanish.” Trial counsel made the trenchant response that the defendant’s father was a “Black American.” That led the prosecutor to offer that he knew the defendant’s family and that his surname is Italian. At this juncture, the judge stated that the genealogical discussion was going nowhere. He noted for the record that “[t]he defendant is not particularly of dark complexion. He certainly is Brown.”

The Supreme Judicial Court has pointed to the shortcomings of relying on surnames alone to determine race or ethnicity. See Commonwealth v. Arriaga, 438 Mass. 556, 563-64 (2003); Commonwealth v. Calderon, 431 Mass. 21, 25 n.2 (2000) (“The usual tools we rely on to measure one’s ethnicity, primarily name and appearance, are often deceptive. (Even self-identification is not always determinative).”). In a similar context, the Commonwealth, in defending its use of peremptory challenges, assumed the victim was black. Commonwealth v. Riviera, 50 Mass. App. Ct. 532, 536 (2000). The court noted: “Here is a demonstration of ‘the fluidity and sheer unnaturalness of racial identity’: the victim was Hispanic—so observed and testified to by Officer Ramirez in a seemingly overlooked part of the record; also so stated in the victim’s death certificate.” Id. Courts in other jurisdictions have also weighed in on this issue. In People v. Motton, 39 Cal.3d at 604 (1985), the prosecution alleged that the defendant had not established the racial identity of the jurors who had been struck because he “did not establish the juror’s race by direct question and answer.” In support of this allegation, the government noted that “[a]ppearances may deceive... a juror who appears to be Black may not be, and vice-versa.” Id. See also United States v. Espersen, 930 F.2d 1461, 1466 (10th Cir. 1991) (noting that defendant had failed to establish that Hispanic-sounding surnames of struck jurors were, in fact, Hispanic and that the jurors with those surnames were Hispanic). The California Supreme Court rejected this argument because “it is unnecessary to establish the true racial identity of the challenged jurors; discrimination is more often based on appearance than verified racial descent, and a showing that the prosecution was systematically excusing persons who appeared to be Black would establish a prima facie case under [California’s equivalent of Soares].” Motton, 39 Cal.3d at 604. See also United States v. Ochoa-Vasquez, 428 F.3d 1015, 1057-58 (2005) (“Litigants do not need to know the self-reported race or ethnicity of a juror to violate Batson. Rather, the Supreme Court recognizes that litigants can and will discriminate during the jury selection process based on venire members’ appearances, demeanor, and voices, and not simply on the basis of their self-reported race.”); but see Espersen, 930 F.2d at 1466 (noting the importance of ascertaining the actual ethnicity of jurors and stating “we cannot sustain a Batson challenge on conjecture” based on surnames). The California Supreme Court further noted that “such questions [regarding race] may be offensive to some jurors.” Motton, 39 Cal.3d at 604.


101. Johnson v. California, 545 U.S. 162, 170 (2005) (holding that the burden is not evidence that meets the “more likely than not standard”).

102. Reid, 384 Mass. at 754 n.7; Curtiss, 40 Mass. App. Ct. at 353.

103. Wood, 389 Mass. at 564. For this reason, students are not a discrete group. See Commonwealth v. Evans, 438 Mass. 142, 149, cert. denied, 538 U.S. 966 (2003). Thus, there is no basis to inquire into the bona fides of a series of peremptory challenges of young women, so long as the challenges do not constitute a pattern of conduct to exclude prospective jurors on the basis of their sex. See Commonwealth v. Samuel, 398 Mass. 93, 95 (1986). See also Commonwealth v. Manning, 41 Mass. App. Ct. 696 (1996) (upholding constitutionality of Mass. GEN. LAWS ch. 234A, §4, which exempts persons seventy years of age and older (excluding from jury duty). Because age is not among the groupings listed in article 1 of the Declaration of Rights, whether peremptory challenges based on age should be prohibited is a matter best left to the legislature.

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adolescent children are not a ‘distinctive’ group from whose exclusion a defendant is constitutionally protected.”

Although religious belief represents a discrete grouping, a party cannot establish a pattern of peremptory challenges based on religion simply on the basis of the jurors’ ethnic sounding surnames. A good illustration of the complexities involved when a Soares challenge is based on the jurors’ surnames is Commonwealth v. Burns, where following individual voir dire and the seating of 15 indifferent jurors, the prosecutor exercised four peremptory challenges, removing potential jurors with the surnames “Kronenberg, Alford, Downing and King.” These four potential jurors were replaced in the jury box and their successors were challenged by one of the defendants. After these four seats were filled, the prosecutor “exercised another peremptory challenge to a potential juror with the surname Abraham.” Defense counsel objected and called upon the trial judge to require that the commonwealth give its reason for the challenge. Defense counsel argued that, in his opinion, this was the second potential juror “with a Jewish surname — Kronenberg — being the first to be challenged by the commonwealth, and it was his experience over the years that when someone does have a Jewish surname ... they are being challenged.” The trial judge interpreted the objection as one based on a claim that the prosecutor was attempting to use a peremptory challenge to exclude jurors on account of their religious affiliation, in violation of the Soares doctrine. Apart from the fact that some people identify themselves as “Jewish” in an ethnic or cultural sense, but not in a religious sense, the trial judge concluded that a pattern of discriminatory challenges had not been established as required by Soares, and did not require the commonwealth to state reasons for the challenges. The Appeals Court upheld the conviction. The U.S. Supreme Court has not addressed whether a peremptory challenge based on religious discrimination is unlawful under federal law.

The rule announced in Soares applies equally to efforts to eliminate persons who are members of more than one protected group. “[I]t would seem anomalous and inconsistent with the primary end of ensuring an impartial jury and a fair trial to conclude that the protection we afford to groups defined by race or gender against impermissible exclusion from jury panels ought not extend to groups defined by race and gender. We decline to do so, and conclude that Article 12 proscribes the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in a group delineated by race and gender.”

A party challenging the use of a peremptory challenge does not have to be a member of an excluded group to assert the right. Also, in Massachusetts, unlike in the federal system under Batson, both defense counsel and prosecutors are governed by the same rules in their use of peremptory challenges.

The burden of proof on the party defending the exercise of a peremptory challenge is not equivalent to the burden to establish a good basis for a challenge for cause, but general assertions that are not personal to the individual qualities of the juror being challenged — as opposed to qualities of the group to which that juror belongs — are not sufficient.

The remedy for a single improper peremptory challenge may be that all jurors previously selected must be struck, and jury selection must begin anew with another venire. A party that indicates to the court that it is content with the judge’s ruling as to the selection of the jury has waived its right to litigate the issue on appeal.

III. The Approach at the Federal Level

Batson v. Kentucky was decided seven years after Soares. In Batson, a Kentucky trial judge allowed the prosecutor to use his peremptory challenges to remove all four black persons who were available to be seated on the jury. The result was that a jury composed only of white persons was selected. The trial judge refused to grant defense counsel’s request for a hearing, remarking that the parties were entitled to use their peremptory challenges to “strike anybody they want to.”

The Supreme Court of Kentucky rejected out of hand the reasoning in Soares, and held that a defendant who alleges his jury was not drawn from a fair cross section of the community cannot succeed by pointing to the exclusion of potential jurors in a single case, but instead must demonstrate systematic exclusion of a group of jurors from the venire. In reversing Batson’s conviction, the Supreme Court reassessed its earlier decision in Swain v. Alabama, where it held that the equal protection clause was violated when the prosecutor used his challenges to exclude blacks from the jury “for reasons wholly unrelated to the outcome of the particular case on trial” or to deny to blacks “the same right and opportunity to participate in the administration of justice enjoyed by the white population.” In Batson, the court acknowledged that Swain had fallen short of providing defendants with a meaningful remedy.

A number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish from the jury.

108. Id. at 269.
109. Id. (quotations omitted).
110. Id.
111. See United States v. Girouard, 521 F.3d 110, 113 n.3, 116-17 (1st Cir. 2008) (rejecting claim that two peremptory challenges of prospective jurors who self-identified as Jewish established a prima facie case of unlawful discrimination, and noting that there may be important distinctions to be made between religious beliefs, general religious tenets, and religious affiliation, such as membership in the clergy).
119. Id. at 83.
120. Id.
121. Id.
122. Id. at 84. See Commonwealth v. McFerron, 680 S.W.2d 924 (1984).
125. The only one of the several opinions in Batson to put the failure of Swain
a violation of the Equal Protection Clause. Since this interpretation of \textit{Swain} has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since \textit{Swain} for assessing a \textit{prima facie} case under the Equal Protection Clause.\textsuperscript{126}

In \textit{Batson}, the Supreme Court recalibrated the test for unlawful, purposeful discrimination in the exercise of peremptory challenges, and held that a \textit{prima facie} case of an equal protection violation could be established solely on the basis of the facts of an individual case.\textsuperscript{127}

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during \textit{voir dire} examination and in exercising his challenges may support or refute an inference of discriminatory purpose . Once the defendant makes a \textit{prima facie} showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.\textsuperscript{128}

in context was Justice Marshall's concurrence. There, he wrote, Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See \textit{United States v. Carter}, 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81\% of black jurors), cert. denied, 425 U.S. 961 (1976); \textit{United States v. McDaniels}, 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9\% of their peremptory challenges against black jurors, who made up less than one-fourth of the venire); \textit{ McKinney v. Walker}, 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82\% of black jurors), affir...
peremptory challenges, unconscious biases and prejudices could result in discrimination on the basis of race:

“[S]eat-of-the-pants instincts” may often be just another term for racial prejudice. Even if all parties approach the court’s mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels — a challenge I doubt all of them can meet. It is worth remembering that years after the close of the War Between the States, and nearly 100 years after _Strouders_, racial and other forms of discrimination still remain a fact of life in the administration of justice as in our society as a whole.136

Justice Marshall’s pessimism about the utility and effectiveness of the _Batson_ framework to eliminate the unlawful use of peremptory challenges led him to conclude that they should be eliminated.134 Justice Marshall’s criticism has animated the modern debate over whether to preserve or abolish peremptory challenges. There is no satisfactory answer to the concern that a party exercising a peremptory challenge may offer a juror-specific, group-neutral reason for the challenge that is merely a mask for a challenge that is in fact based on the juror’s membership in a discrete group.135

Under _Batson_, there is “a three-part test for adjudicating claims that peremptory challenges have been exercised in a discriminatory manner.”136 As explained by the Court of Appeals for the First Circuit:

The moving party bears the initial burden of demonstrating a _prima facie_ case of discrimination. _Batson_, 476 U.S. at 96. If this burden is met, the non-moving party must then offer a non-discriminatory reason for striking the potential juror. _Id._ at 97. Finally, the trial court must determine if the moving party has met its ultimate burden of persuasion that the peremptory challenge was exercised for a discriminatory reason. _Id._ at 98. Most significantly for present purposes, _Batson_ also described the moving party’s burden at the _prima facie_ stage. To establish a _prima facie_ case, the moving party must “raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury” because of their membership in a protected class. _Id._ at 96. The judge may consider all “relevant circumstances” in making this determination. _Id._. _Batson_ established that the moving party’s burden in meeting the _prima facie_ requirement is not substantial.137

The efficacy of the _Batson_ framework in eradicating the unlawfully discriminatory use of peremptory challenges in the federal system is beyond the scope of this article.138 The analytical framework prescribed by _Batson_ is essentially the same as the framework established in _Soares_. As the First Circuit observed, _Batson_ challenges are conducted “with few formalities,” and the court will not inquire into the accuracy, i.e., the validity of the prosecutor’s reason for challenging a juror so long as it is race-neutral and genuine.139 What differentiates Massachusetts practice from federal practice are procedural refinements of the _Soares_ test which require trial judges and appellate courts to more closely scrutinize the exercise of peremptory challenges.

IV. Refinement of the _Soares_ Test

Following the decision in _Soares_, the court initially indicated that it would leave details as to its implementation up to trial judges, in much the same way that the Supreme Court announced seven years later in _Batson_.140 In numerous cases, however, the Supreme Judicial Court has faced difficulties in evaluating records on appeal where the trial judge either called on the party exercising the peremptory challenge to supply a neutral and sufficient reason for exercising it without first finding a _prima facie_ case of discrimination, or allowed or rejected the challenge without making any findings that it was based on neutral and sufficient reasons. The two principal areas of difficulty are determining when a _prima facie_ case of unlawful discrimination exists, and, if a _prima facie_ case exists, whether the non-discriminatory reason offered for the peremptory challenge is valid or pretextual.

As discussed above, _Soares_, like _Batson_, mandates a three-stage, burden-shifting framework: at stage one, the moving party opposed to the peremptory challenge must establish a _prima facie_ case of discrimination against a member of a discrete group. At stage two, a burden of production shifts to the non-moving party, which must supply a discrete group-neutral, bona fide reason for the challenge. At stage three, the judge must evaluate the evidence and determine whether the moving party carried its burden of establishing that the peremptory challenge was in fact a bona fide reason, or was a pretext to disguise a challenge based on the potential juror’s membership in a protected class.

A. What Constitutes a _Prima Facie_ Case of Unlawful Discrimination?

_Soares_ instructs that the trial judge must recognize that the parties enjoy “wide discretion” to exercise peremptory challenges, and that there is a rebuttable presumption that such challenges are regular and lawful.141 “What we view Article 12 of the Declaration of


134. _Batson_, 476 U.S. at 107-08.

135. See _Anthony Fassano_, _The Roshomon Effect, Jury Instructions, and Peremptory Challenges: Rethinking Hernandez v. New York_, 41 Rutgers L.J. 783 (2010) (observing that the divided decision of the New York Court of Appeals and the plurality decision of the United States Supreme Court in _Hernandez v. New York_, 476 U.S. 79 (1986), which upheld the trial judge’s finding that the prosecutor was justified in striking Hispanic jurors peremptorily in a case where Spanish would be translated into English during the trial, illustrates a fatal flaw in the _Batson_ test).

136. _Aspen v. Bironnette_, 480 F.3d 571, 574 (1st Cir. 2007).

137. _Id._

138. At least one former federal trial judge regards the federal courts, especially the First Circuit, as reluctant to second guess the exercise of discretion by trial judges in addressing _Batson_ challenges. See _Herbert v. Dickhaut_, 2011 WL 3021770 (D. Mass. 2011) *2, *10 (“To date, the First Circuit has never affirmed a district court decision granting a writ of habeas corpus with a _Batson_ claim; “The First Circuit is particularly inhospitable to _Batson_ claims.”).”

139. United States v. Aranjo, 603 F.3d 112, 116 (1st Cir. 2010). The unavoidable result, of course, is that the exercise of peremptory challenges may have the perverse effect of perpetuating stereotypes about potential jurors, resulting in the exclusion of jurors who might be more willing to consider the merits of a party’s claim or defense than the supposedly impartial persons who are seated on the jury.

Rights as proscribing is the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community.

In deciding whether a peremptory challenge presents a prima facie case of impermissible discrimination, the trial judge must consider all relevant circumstances.

A single peremptory challenge of a person within one of the protected classes may be sufficient to support an objection and to require a Soares inquiry. On the other hand, a single peremptory challenge of a member of a protected class "does not, by itself, constitute a prima facie showing of impropriety in all circumstances. To hold otherwise would unduly prolong trials and render peremptory challenges meaningless." Even the use of several peremptory challenges against members of a discrete class may not constitute prima facie evidence of a pattern of unlawful discrimination when there are a number of other members of that class in the venire and seated on the jury. For example, in Commonwealth v. Young, the Supreme Judicial Court observed that "[t]he prosecutor used three peremptory challenges against blacks. Two of the members of the jury who were seated and sworn were black, and two more black persons were in the venire. Thus, out of the seven blacks eligible to be seated, the prosecutor challenged three, a far cry from the 12 out of 13 in the Soares case." Nonetheless, cases decided during the decade following Soares reflect the struggles of trial and appellate judges to define what constitutes a prima facie case of unlawful discrimination. For example, in Commonwealth v. Harris, the Appeals Court upheld the trial judge's determination that the prosecutor's peremptory challenge of a single black juror did not constitute a pattern of discriminatory challenges that called for further scrutiny. On further review, however, the Supreme Judicial Court reversed on grounds that the challenge to the only black person in the venire was a prima facie showing of unlawful discrimination, even in the absence of a pattern of such challenges, and that none of the reasons given by the prosecutor for the challenge was "neutral." To address the problem in cases like Harris, in which a judge faces a difficult decision when trying to determine whether a pattern of improper exclusion exists after only one or two members of a discrete group have been challenged and the venire contains only a few members of the group, the Supreme Judicial Court created an exception that permits the trial judge to require justification for the peremptory challenge prior to the existence of a pattern of challenges. "The judge is permitted to treat the early use of challenges in such circumstances as establishing a pattern. ... In such cases a judge has broad discretion to require an explanation without having to make the determination that a pattern of improper exclusion exists."

B. Are the Reasons for the Peremptory Challenge Group-Neutral or a Pretext?

"The determination whether an explanation is 'bona fide' entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how 'sound' it might appear) is the actual motivating force behind the challenging party's decision. "An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' (in this case race), and related to the particular case being tried." Ordinarily, attitude, [bearing] and demeanor of a juror during voir dire may constitute a sufficient basis for peremptory removal." It is not necessary that the judge must have observed the demeanor relied on by the party who makes the challenge as long as the judge is satisfied that it is both an adequate reason and a genuine reason. However, "mere affirmations of good faith" by the lawyer or the party exercising the peremptory challenge is not sufficient. Likewise, a mere statement by a party that the peremptory challenge is based on the "looks" of the prospective juror, without more, is not sufficient.

142. Id. at 486. See also Commonwealth v. Watson, 381 Mass. 48, 670 (1980) ("[T]he existence of racial prejudice in some persons in the Commonwealth of Massachusetts is a fact of which we take notice.").
145. Commonwealth v. Roche, 44 Mass. App. Ct. 372, 378 (1998) (reversing defendant's conviction because trial judge improperly rejected defense counsel's challenge of the only black person in the venire without an initial finding that the presumption of regularity was overcome). See also Commonwealth v. Vega, 54 Mass. App. Ct. 249, 251-52 (2002) (prosecutor's peremptory challenge of one of four prospective jurors with Hispanic surnames did not constitute a prima facie case of unlawful discrimination against a protected group). A good illustration of the danger associated with premature judicial intervention when there is a single challenge to a member of a protected classification is illustrated by State v. Bol, 29 A.2d 1249 (Vt. 2011), where the Supreme Court of Vermont reversed a conviction because the trial judge declined to allow a black defendant to challenge the single black member of the venire.
148. Harris, 409 Mass. at 466-68.
149. See, e.g., Commonwealth v. Paniniquia, 413 Mass. 796 (1992) (prosecutor's challenge of one Hispanic juror from a venire of about 50 jurors, in which it was said there was one other Hispanic juror, was sufficient to call for a neutral justification, but issue waived by the defendant).
152. Id. (citations omitted).
154. See Thaler v. Haynes, 130 S. Ct. 1171 (2010) (holding no Supreme Court case clearly establishes that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based).
“[A] juror’s occupation alone may be facially insufficient to rebut a prima facie showing that a peremptory challenge was improperly exercised. The converse is also true.”157 For example, in Commonwealth v. Garrey, the Supreme Judicial Court indicated that a prosecutor’s justification for exercising a peremptory challenge because the juror was employed as a “guidance counselor,” was non-pretextual and satisfactory to overcome the prima facie showing of unlawful discrimination, based on the trial judge’s assessment “that because the juror was engaged in a rehabilitative occupation that probably called on her to show sympathy for human weakness, the prosecutor’s challenge was legitimate.”158

In Commonwealth v. Nom, a prosecutor’s attempt to strike the only black member of the venire with a peremptory challenge was questioned by defense counsel. Although the judge did not make a finding that a prima facie case of unlawful discrimination existed, he required the prosecutor to state a reason for the challenge.160 In endorsing the trial judge’s decision to accept the prosecutor’s explanation as legitimate, the Supreme Judicial Court noted that the prosecutor cited “the admission of the member of the venire that he had a prior ‘domestic arrest.’ The stated reason was a specific reference to the member of the venire personally and not to his racial group. Moreover, given the fact that the defendant was charged with the most extreme form of domestic abuse, the judge was warranted in ruling this reason to be legitimate. Accordingly, there was no error.”161

Even if a group-neutral reason is given for a challenge, the trial judge has the responsibility to determine whether purposeful discrimination exists. Moreover, the judge is entitled to disbelieve a group-neutral reason for a peremptory challenge. What is critical, however, is that the party exercising the challenge, not the court, supply the race-neutral reason. In Commonwealth v. Fryar, the defendant was a young black man who was accused of stabbing a white college student in what the Supreme Judicial Court described as “a black versus white street brawl.”164 The court pointed out that there were no eyewitnesses and the defendant testified and denied that he committed the crime. The defendant also denied that the admissions he made to the police were voluntary. The victim’s friends who testified were all white. On appeal, the court held that the trial judge acted properly in finding the prosecutor’s peremptory challenge a prima facie case of unlawful discrimination since it appeared that the juror in question was the only black person in the venire, but nonetheless reversed the conviction and ordered a new trial because the trial judge supplied the neutral reason for the challenge instead of waiting to hear from the prosecutor.168

C. The Importance of Findings by the Trial Judge

In Commonwealth v. Burnett, in an effort to make appellate judicial review of Soares and Batson issues simpler and more effective, the court added a requirement that the trial judge must make findings as to whether an initial prima facie showing of impropriety was established, and whether the reasons advanced by the exercising party were “bona fide or a mere sham.” As stated in Soares, the “trial judge must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation.” At this stage the burden shifts to the party exercising the peremptory challenge to demonstrate “that the group members of disproportionately excluded were not struck on account of their group affiliation.” The trial judge is not required to use any specific form of words in making these determinations.172 When the trial judge does not make the findings required by Burnett, it is very difficult for an appellate court to decide whether a prima facie case was made and, if so, whether the party exercising the challenge met its obligation to give a race-neutral reason that bears on the juror’s personal characteristic.173

In Burnett, both the Appeals Court and the Supreme Judicial Court evaluated the reasons given by the prosecutor for the exercise of two peremptory challenges of black juries out of a venire of 35 jurors in which there were three other black jurors excused for cause. As in Commonwealth v. Harris, the procedure employed was not in keeping with the two-stage model set forth in Soares, involving judicial findings at each stage. Even before the trial judge made a finding that the defendant had established a prima facie case, the prosecutor chimed in with reasons for each challenge. The trial judge and ultimately the appellate courts accepted as neutral and valid the reason for one challenge (the first challenge was based on the “hostile” and “argumentative” attitude which the juror had demonstrated in responding to the judge’s voir dire questions regarding impartiality), but rejected the other (the second challenge was based on the juror’s occupation as a director of a youth services program, because the prosecutor explained that in her experience, people who “work with


young people have certain feelings about young people and about youth and crime.”175

Despite the directions issued in Burnett, in a number of subsequent cases the appellate courts faced the problem of assessing issues relating to peremptory challenges without the benefit of findings by the trial judge. In Commonwealth v. Latimore,176 for example, where the defendant on trial was black, the court noted that the prosecutor exercised two peremptory challenges and sought to remove two nonwhite members of the venire.177 The prosecutor attempted to strike another potential juror with a peremptory challenge who stated in voir dire that she had “mixed race” in her family.178 There was an objection by defense counsel.179 Instead of making a ruling on whether the defendant had established a prima facie case of unlawful discrimination, the trial judge asked the prosecutor to state his reasons for the allegedly improper challenges.180 The prosecutor explained each of the three challenges by reference to race-neutral factors personal to each of the three jurors.181 “The prosecutor gave reasons for each challenge which the judge accepted, with the result that the jury was comprised entirely of white jurors. On appeal, the Supreme Judicial Court noted that the trial judge had not followed the correct procedure. “Here, the judge shifted the burden to the commonwealth without first finding that the defendant had made a sufficient showing of impropriety. Nevertheless, the record shows to our satisfaction that the prosecutor advanced … race-neutral bases for the challenges, which were clear and reasonably specific … and personal to the juror.”182

Commonwealth v. Maldonado,183 is a good illustration of how the failure of the trial judge to make adequate findings leaves the appellate court in a position where it is impossible to determine whether a peremptory challenge was or was not exercised unlawfully. The court explained:

Once a trial judge has ruled that a prima facie showing of the improper use of a peremptory challenge has been made, the need for specific findings by the judge as to whether the explanation offered by the challenging party is both adequate and genuine becomes readily apparent. On appeal, the appellate court must be able to ascertain that the judge considered both the adequacy and the genuineness of the proffered explanation, and did not conflate the two into a simple consideration of whether the explanation was “reasonable” or “group neutral.” While the soundness of the proffered explanation may be a strong indicator of its genuineness, the two prongs of the analysis are not identical. The appellate court must also be able to ascertain that the consideration afforded to both adequacy and genuineness was itself adequate and proper. For example, while a proffered explanation based solely on the innocuous demeanor of a juror might generally be considered inadequate, the judge’s specific observations of the juror might well provide the basis for exclusion where odd or inappropriate deportment is noted. Without a finding explaining why the judge permitted the exclusion of such a juror, the appellate court would be left with a record reflecting a generally unacceptable basis for exclusion. Finally, while appellate courts may be equipped to some extent to assess the adequacy of an explanation, they are particularly ill-equipped to assess its genuineness. The prosecutor’s own demeanor — the furtiveness of a glance, the hesitation in giving a response or the frantic reading of the juror questionnaire before proffering an explanation, may provide valuable clues as to whether even a sound reason for the challenge is genuine or merely a post hoc justification for an impermissibly motivated challenge. See Miller-El v. Cockrell, 123 S. Ct. 1029, 1041 (2003) (“reviewing court, which

175. Burnett, 36 Mass. App. Ct. at 4. The Appeals Court explained that “'[t]he record is destitute of any legal or factual basis supporting whatever may have been the prosecutor’s belief regarding the unexplained propensities of those who work with youth; nor was any authority offered for the propriety of taking judicial notice of any such occupational attitudes.” Id. at 5.


177. Id. at 137.

178. Id.

179. Id.

180. Id.

181. The reasons given for each of the prosecutor’s challenges are reproduced in the Supreme Judicial Court’s opinion. With regard to Juror 1-3, the prosecutor stated that “she appeared young, she wouldn’t speak up, at one point she didn’t even answer your Honor, you had to ask a question I think a second time and ask her to speak. She kept looking down. She didn’t seem to want to look the Court in the eye when you were speaking with her and she appeared very tentative. I didn’t take note of her race. I don’t know what she is. Her name strikes me as being a Portuguese name but that’s all I can say. But given her youth, I think she’s only twenty-one, and how tentative she appeared, it struck me that she would not be a good person to have to decide a difficult case.” Commonwealth v. Latimore, 423 Mass. 129, 137 n.8 (1996). With regard to Juror 1-15, the prosecutor stated that “I was concerned about several things with her; one was that she only had a ninth grade education and that she had apparently no outside occupation in this world in her adult years. The fact that she had some sort of mixed race marriage somewhere in her family was of no concern to me. She mentioned that she had a domestic relations injunction case sometime, I gather, recently within the last year or so which tend to be very emotional types of things that the District Attorney’s Office usually gets involved in, a [c.] 209A, and quite often they are resolved, if you will, in a fashion that isn’t satisfactory to the person seeking the injunction, whether it’s because they don’t think the DA’s office did a good job or because there’s further trouble with the person that the injunction simply doesn’t work against, it can happen in a number of ways, so that was a concern to me. And finally, she just struck me as a little bit odd . . . .” Id. Finally, with regard to Juror 5-2, the prosecutor stated that “he looks to me as if he’s a Portuguese man and I assume if you categorize him racially I assume he’s a white person but I don’t know. His skin is somewhat darker tone than, for example, your Honor’s or mine but I don’t know what race he is but I don’t see him as a black man sitting up there. My concern with him really revolves around a constellation of issues where he’s quite youthful, he’s only 22, he’s a full-time student in school and my own experience is generally with jurors is that young people still in school tend to be much more liberal in their views of society and issues because of their lack of experience out in life than the general population. And when that is combined with the fact that I believe he was wearing only a sweatshirt to come here for what is a serious public obligation, to appear in Superior Court, the juror, unlike many of the jurors who have come very well dressed today, as your Honor knows, many of the gentlemen were wearing suits or sport coats with ties and so on, and this young fellow shows up in a sweatshirt. He doesn’t strike me as the type of person, given all of that, who’s appropriate to sit on jury to decide a case like this and so I challenged him. It has nothing to do with the racial question at all. I don’t even know what race he is and I don’t think he’s a black man.” Id. The court described these reasons as “plausible.” Id.


analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"). For these important reasons, it is imperative that the record explicitly contain the judge’s separate findings as to both adequacy and genuineness and, if necessary, an explanation of those findings.

In *Maldonado*, the trial judge faced a situation in which the prosecutor had used her last peremptory challenge to eliminate the only African-American juror. The judge called on her to supply an explanation. "Having heard and questioned the explanation, however, the judge did not find that the prosecutor had met her burden of establishing an adequate, race-neutral explanation that was the genuine reason for the challenge, and offered no explanation for why she was permitting it to stand. In these circumstances the judge’s ruling excluding the juror is accorded no deference."

D. The Judge’s Determination that a Peremptory Challenge Was Based on a Bona Fide Reason Involves a Two-Part Inquiry

In *Maldonado*, the Supreme Judicial Court added a further refinement at stage three, when the trial judge decides whether the reason given by the non-moving party for a peremptory challenge was bona fide or a pretext. The trial judge must make findings that address two distinct points:

The determination whether an explanation is “bona fide” entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how “sound” it might appear) is the actual motivating force behind the challenging party’s decision. In other words, the judge must decide whether the explanation is both “adequate” and “genuine.”

The court added that the demeanor of the lawyer exercising the challenge may give the trial judge a clue in determining whether the reason given for a peremptory challenge is credible or a mere pretext. In *Maldonado*, because the record lacked adequate judicial findings as to the adequacy of the peremptory challenge, the court reversed the defendant’s conviction and ordered a new trial.

In *Commonwealth v. Benoit*, the Supreme Judicial Court reversed a first degree murder conviction and once again demonstrated the critical importance of the findings that must be made by trial judges. The court concluded that defense counsel had made a prima facie showing of an unlawful peremptory challenge by the prosecutor, but the trial judge’s findings that the challenge was race-neutral were inadequate. The case involved a murder charge against a black defendant. The victim was a white person. After the jurors were questioned and found to be indifferent, a peremptory challenge was made by the prosecutor. The defendant objected on grounds that the juror appeared to be the only African-American person in the venire. The prosecutor alluded to the juror’s sympathetic leanings toward criminal defendants because of her work as a teacher of special needs children.

A majority of the court found the trial judge’s findings inadequate to support his determination that the challenge was not race-based. In so holding, the court stated that a trial judge must make explicit findings as to both the adequacy of any race-neutral justification for a challenge, and it genuineness.

Three dissenting justices in *Benoit* expressed the view that the majority had added an unwarranted level of specificity to the nature of the judicial findings that are required when there has been a prima facie showing of an unlawful peremptory challenge.

A further indication of the demanding nature of the trial judge’s responsibilities in addressing the adequacy and genuineness of a peremptory challenge that is found to be prima facie evidence of unlawful discrimination is found in *Commonwealth v. Douglas*, in which the Appeals Court reversed a conviction once again due to its determination that the trial judge did not make adequate findings.

In *Douglas*, the court observed,

In sum, the record contains references to three possible grounds for disqualification of the juror: her staring at the prosecutor; her suspected slowness; and the recent involvement of her son as a defendant prosecuted by the same district attorney’s office. The judge did not address the ground of staring. She rejected the suspected slowness. She introduced, a day later, the experience of the son, a potentially serious ground but one never

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184. Id. at 465-66.
185. Id. at 466.
186. Id.
187. Id. Initially, the prosecutor stated that the reason for the peremptory challenge of the juror in question was that he was "single." When pressed further, the prosecutor added the following:

“Well, I mean, it’s like anything. I mean, there was a minister up there who[m] I thought would do the righteous thing, but he also had an earring in. You know, I mean, there’s many ways of just looking at the jurors, too. And I think the fact that he doesn’t have any kids, and he’s fifty-five years old— I have a young— I’m a young [district attorney]. I have a young witness, which is the only one that saw the gun in the lap. That’s the reason that I would excuse him. It’s just a feeling. That’s why I used my peremptory. I mean, it’s not because of his color. It’s certainly not that.”

*Maldonado*, 439 Mass. at 462.

189. Id. at 467. It is important to note that in a concurring opinion, Chief Justice Marshall, joined by Justices Greaney and Spina, issued a call for further restrictions on or the elimination of peremptory challenges. “Despite vigilant efforts to eliminate race-based and other impermissible peremptory challenges, it is all too often impossible to establish whether a peremptory challenge has been exercised for an improper reason. I am therefore persuaded that, rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives, it is time either to abolish them entirely, or to restrict their use substantially.” See *Maldonado*, 439 Mass. at 468 (Marshall, C.J., concurring) (internal citation omitted).

191. Id. at 213.
192. Id.
193. Id. at 214-16
194. Id. at 216.
196. Id. at 222-23. *See id.* at 217 (noting that in overruling the objection, the trial court stated, “I’m also satisfied that the Commonwealth’s reasons for challenge is [sic] not race based. That there are race neutral reasons which the Commonwealth has articulated which justify the challenge. Therefore, the objection is overruled, but the defendant’s rights are saved. She may be excused.”).
197. Id. at 221.
198. Id. at 231-32 (Cowin, J., dissenting).
invoked by the prosecutor in support of the suspect peremptory challenge. In these circumstances, we simply do not have the specific, clear findings upon adequacy and genuineness required by the cases to sustain the peremptory challenge. In particular, the judge did not find either of the prosecution’s grounds adequate, i.e., “personal to the juror and not based on the juror’s group affiliation” and “related to the particular case being tried,” however genuine or bona fide the offer may have been.\(^{200}\)

Recently, in Commonwealth v. Rodriguez,\(^{201}\) the Supreme Judicial Court reiterated the importance of explicit judicial findings both as to whether a *prima facie* case of discrimination exists and, if so, whether the challenging party’s proffered reasons for the peremptory challenge or challenges are adequate (lawful) and genuine (credible).

Ultimately, appellate courts must rely on the judgment and experience of the trial judge to decide whether the juror-specific, group-neutral reason advanced by the party exercising the peremptory challenge has overcome the *prima facie* case of unlawful discrimination established by the objecting party. Inevitably, as in all cases of judicial discretion, the result may vary from judge to judge. What should not vary, however, is the judge’s focus on the two independent questions framed by the Supreme Judicial Court: is the reason given by the challenging party adequate, and is it genuine?\(^{202}\)

V. Conclusion

Any fair assessment of the practice of exercising peremptory challenges must take into consideration the evidence that they have been used unlawfully to discriminate against potential jurors solely on account of the jurors’ sex, race, color, creed or national origin in violation of Articles 1 and 12 of the Declaration of Rights. Even when a peremptory challenge is exercised in a lawful manner, social science research indicates that the result may be that a potential juror who actually was indifferent is mistakenly excluded due to the implicit bias of the party or attorney responsible for the challenge.\(^{203}\) The weight of academic writing on this subject favors the abolition of peremptory challenges.\(^{204}\) However, some academic writing has strongly favored the retention and strengthening of peremptory challenges.\(^{205}\)

The determinative consideration, in my view, is that our system for selecting trial jurors, which seeks to screen out those who are not indifferent, is far from perfect. The jury selection process gives the lawyers and judges only limited information about the potential jurors and is supervised by a trial judge who, like all of us, may be affected by biases or prejudices that may influence her decisions.\(^{206}\) Moreover, a trial judge, acting in good faith, may simply rule incorrectly on a challenge for cause that may leave the objecting party with no effective remedy other than a peremptory challenge. Our system of peremptory challenges may not be a perfect solution to the elimination of jurors who may not be fair and impartial, but it has the advantage of providing a check on the nearly unreviewable discretion of the trial judge. As Justice Antonin Scalia observed: “The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point.”\(^{207}\) Finally, the comprehensive survey of lawyers conducted in 2010 by the Massachusetts Bar Association’s Task Force on Peremptory Challenges demonstrates that there is overwhelming support for maintaining peremptory challenges.\(^{208}\)\(^{209}\)

Compliance with the framework established in Soares, refined in Maldonado and further explained in Benoit, Douglas and Rodriguez, presents lawyers and judges with special challenges. These recent decisions by the Supreme Judicial Court and the Appeals Court confirm that the failure on the part of trial lawyers and judges to comply strictly with the governing standards will have severe consequences.

The guidelines set forth in Appendix One to this article are intended to assist parties and the trial judge in adhering to the applicable standards governing the exercise of peremptory challenges.

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\(^{200}\) *Id.* at 650.

\(^{201}\) 457 Mass. 461, 470-71 (2010).


\(^{204}\) See, e.g., *In re Linahan*, 138 F.2d 650, 651-52 (2d Cir. 1943) (Frank, J.) (“Much harm is done by the myth that mistakenly by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner: the sunlight of awareness has an antiseptic effect.”) (footnote omitted). In view of the growing body of social science research that indicates that judges, as well as lawyers and potential jurors, may be affected by “implicit bias,” i.e., stereotypical views or feelings about members of protected classes of which we are not consciously aware, or about whose source we are mistakenly, the current legal framework for eliminating potential jurors who are not fair and impartial on the basis of challenges for cause may not be adequate, and thus the availability of peremptory challenges may serve as an important check on the operation of judicial bias. Professor Jerry Kang, *Implicit Bias: A Primer for the Courts* (National Center for State Courts) (August 2009), available at http://new.abanet.org/sections/criminaljustice/PublicDocuments/unit%203%20kang.pdf.


\(^{206}\) The 2010 survey revealed that in addition to the availability of challenges for cause, 88 percent of the responding lawyers described peremptory challenges as “important in the trial of civil cases,” and 87 percent of the responding lawyers described peremptory challenges as “important in the trial of criminal cases.” A copy of the MBA survey is available from the MBA upon request.

\(^{207}\) At the national level, the American Bar Association has declined invitations to recommend that peremptory challenges be abolished. See, e.g.,ABA Principles for Juries and Jury Trials, Principle 11(D) (2005) (“Peremptory challenges
Further study of the practice of exercising peremptory challenges may suggest the wisdom of additional changes in the governing principles. 

Appendix One

Guidelines to Insure the Proper Exercise of Peremptory Challenges

[1] Applicability. This checklist is designed for use in both civil and criminal cases. This checklist applies whenever there is an objection to the exercise of a peremptory challenge, or when the circumstances suggest to the court that a peremptory challenge is being used to exclude a prospective juror because of his or her sex, race, creed, religious belief or national origin.

[2] When there is an objection to a peremptory challenge. There is a rebuttable presumption (presumption of regularity) that a peremptory challenge was exercised lawfully. The presumption is overcome by a pattern of challenges, or even a single challenge, that suggests that the prospective juror or jurors were challenged because of their sex, race, creed, religious belief or national origin, or a combination of one or more of these characteristics.

[3] Not all objections require judicial intervention. The law does not forbid the use of peremptory challenges to exclude prospective jurors who happen to be members of a protected class unless the basis for the challenge is their membership in that class. Further, the law allows a party to exercise a peremptory challenge to exclude potential jurors on the basis of their age, their employment, where they reside, their educational level, their income or other factors beside sex, race, creed, religious belief or national origin. The demeanor and conduct of a prospective juror may supply a basis for a lawful peremptory challenge. The SJC has not decided whether a peremptory challenge may be used to exclude a prospective juror on the basis of sexual orientation or status as a transgendered person.

[4] Trial judge can act on his or her own without an objection.

[5] Stage One: Burden is on the objectioning party. When there is an objection, the burden is on the objectioning party to offer evidence that a peremptory challenge is based on the juror’s membership in a protected class and is not based on some personal characteristic of the juror. The burden here is less than what is required to establish a valid challenge for cause; the burden is less than “more likely than not.”

[6] Stage Two: Court must make an explicit finding. The court must make an explicit finding on the record whether the presumption of regularity has been overcome. The court must give the objectioning party and the party exercising the challenge an opportunity to be heard. If the presumption of regularity is not overcome, the court must allow the peremptory challenge. The judge should not require justification for the peremptory challenge unless there has been a prima facie showing. An erroneous denial of a party’s exercise of a peremptory challenge may be reversible error.

[7] Stage Three: Burden shifts to party exercising the challenge. If the presumption of regularity is overcome, the court must require the party exercising the peremptory challenge to demonstrate, if it can, that the challenge was not based on the prospective juror’s sex, race, creed, religious belief or national origin, or a combination of one or more of these characteristics. Judge must give all parties an opportunity to be heard. Judge may take evidence.

[8] Stage Four: Two separate questions. First, the judge must decide whether the challenge is based on some factor other than the person’s sex, race, creed, religious belief or national origin (adequacy prong). Second, the judge must decide whether the reason given for the challenge is genuine and not a pretext (credibility prong). The reason given by the party exercising the challenge must be clear, reasonably specific, related to the case before the court, personal to the juror and not based on the juror’s membership in a protected group. Good faith alone is not sufficient.

[9] The burden of justifying a peremptory challenge must be carried by the lawyer or party exercising the challenge. The judge cannot supply the reason for the challenge; it must be stated by the party making the challenge. The judge should give all parties an opportunity to be heard and to offer reasons for and against the use of the peremptory challenge. A party’s statement that its reason is group-neutral is not entitled to any weight. A remark by the judge to the effect that the court accepts the explanation given by the party exercising the challenge as valid or group-neutral carries no weight and is not a judicial finding. The more generalized the reason (e.g., “I don’t like his looks”), the less likely the reason is adequate.

[10] Nature of the judicial responsibility. The trial judge must make an explicit finding on the adequacy prong as well as the credibility prong. The adequacy prong does not require the judge to agree with the lawyer or party’s reason or decide that it is valid, but the judge must find that it is a reason that is neutral, i.e., a reason that is personal to the juror and not a characteristic of the group to which the juror belongs. The credibility prong means that the judge can decline to believe the neutral reason given by the party challenged and allow the objection.

Sample Judicial Findings

DIRECTIONS: Sample finding [1] should be used when the court finds no prima facie case of an unlawful peremptory
challenge. Sample findings [2] and [3] should be used after a finding has been made that a *prima facie* case exists, but the party challenging the prospective juror has not met its burden of justifying the challenge. Sample findings [2], then [4] and/or [5] should be used after a finding that a *prima facie* case exists, and the party challenging the juror has not has met its burden of justifying the challenge.

[1] The objection is overruled. After hearing, I find that a *prima facie* case has not been established that the peremptory challenge of juror ___ was based on her/his membership in a protected class (sex, race, creed, color, religious belief or national origin).

[2] After hearing, I find that a *prima facie* case exists that the peremptory challenge of juror ___ was based on her/his membership in a protected class (sex, race, creed, color, religious belief or national origin). The burden is now on the party exercising the challenge to justify the challenge of juror ___.

[3] After hearing, I overrule the objection to the peremptory challenge of juror ___ because: FIRST, I find that the peremptory challenge was based on a specific reason other than the prospective juror’s membership in a protected class (sex, race, creed, color, religious belief or national origin), namely __________; and SECOND, I find that the reason given for the challenge was credible, genuine and not a pretext.

[4] After hearing, I sustain the objection to the peremptory challenge of juror ___ because I find that the peremptory challenge was not based on a specific reason other than the prospective juror’s membership in a protected class (sex, race, creed, color, religious belief or national origin); OR

[5] After hearing, I sustain the objection to the peremptory challenge of juror ___ because I find that the reason given for the challenge was not credible or genuine, and is a pretext.
I. Introduction

There are three fundamental principles with regard to the taxation of damages. First, the default rule under the Internal Revenue Code (IRC) is that everything is taxable unless there is a specific exemption. To quote IRC section 61(a), “gross income means all income from whatever source derived ….” The primary exemptions of interest to litigators are IRC section 104(a)(2), covering damages from personal physical injuries or physical sickness, gifts and inheritances under IRC section 102(a), and recovery of tax basis. After that, tax lawyers are left tinkering at the margins — trying to avoid withholding taxes, making legal fees deductible against gross income from whatever source derived ….

Second, there is a limit to what can be accomplished with a settlement agreement. Although beneficial allocations to non-taxable damages can be made there, we cannot change the fundamental economics of the settlement or judgment. Under the general principles of Commissioner v. Court Holding Co., as well as cases which specifically address settlement allocations, the substance of the transaction, rather than its form, determines the tax result. For litigators, this means that the Internal Revenue Service (IRS) is free to ignore the terms of the settlement agreement if they are not consistent with the economic reality of what the damages represented.

The revision to the statute limited the non-taxability of personal injuries or sickness, often interpreted to include such non-physical injuries as emotional distress. As the result of the amendment, the statute now requires that the damages, in order to be non-taxable, arise from “physical” injuries or “physical” sickness. No longer will damages from emotional distress not directly related to a physical injury be excludible.

The court articulated a two-part test, following up on the holding in Burke v. United States: the recovery must be based on tort or tort-type rights; and the damages must be received “on account of” personal injuries or sickness.

The revision to the statute limited the non-taxability of personal injuries or sickness, but it also appears to continue a significant additional exclusion. If the gravamen of the complaint is personal

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1. All references to the IRC or the Internal Revenue Code mean the Internal Revenue Code of 1986, as amended. This is the version of the Internal Revenue Code currently in effect.
2. A reduction to gross income is preferable to a reduction in adjusted gross income because it avoids possible reductions as the result of either the phase-out of miscellaneous itemized deductions above certain income levels and the alternative minimum tax, which would eliminate the reduction entirely as a deduction.
10. Schleier, 515 U.S. at 337.
physical injuries or physical sickness, then all damages that are a direct result of the physical injury, even otherwise taxable damages such as those from lost wages and emotional distress, will also be excluded. To quote the House Committee Report,

If an action has its origin in a physical injury, … then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury. … whether or not the recipient of the damages is the injured party. … Because all damages received on account of physical injury … are excludible … the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to physical injury or physical sickness.11

The IRS’s regulations further clarify the committee report and provide the following:

Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or a physical sickness are excluded from income under §104(a)(2).12

It is noteworthy that the regulations also eliminate the test originally articulated in Burke as to the requirement of “tort or tort-type rights.”13 “The injury need not be defined as a tort under state or common law.”14

The IRS has issued numerous private letter rulings in the 16 years since the amendment. Although they cannot be used or cited as precedent, they give a good idea of how the service has been interpreting the statute and the statements in the committee reports. This is especially important in light of the IRS’s failure to define “physical injuries” and “physical sickness.”

Private Letter Ruling 2001-21-031 (May 25, 2001) best articulates the standard. In describing the tax treatment of damages associated with a wrongful death, the IRS ruled the following:

Because there exists a direct link between the physical injury suffered and the damages recovered, taxpayer may exclude from gross income any economic damages compensating for such injury. These would include damages received for the survival action, loss of consortium and wrongful death of taxpayer’s spouse.

The key is the “direct link.” As long as there is a direct link between the physical injury and the otherwise taxable damages, those damages will be excludible as well. In this context the IRS has allowed lost wages15 and loss of consortium16 claims to be excludible.17 In drafting settlement agreements, counsel should make sure to state that otherwise taxable damages resulted directly from the physical injury; otherwise, their client may end up losing the tax benefit.

The IRS’s definition of “physical injury” may be broader than one might assume. In 2008, the service appears to have allowed damages paid for emotional distress when the taxpayer was an adult, arising from sexual abuse — the apparent physical injury — when the taxpayer was a child.18

There is one caveat to the exclusion: damages paid to persons other than the injured plaintiff. If it is possible someone other than the plaintiff will be paid damages, he must be named as a party in the original complaint; if not, nothing paid to him will be excludible. In Trent v. United States,19 amounts paid to a mother for the ongoing care of her paraplegic son were held not to be excludible, because she was not a party in the original action.

III. Prejudgment Interest

Under Mass. Gen. Laws ch. 235, section 8, prejudgment interest is applied to jury verdicts awarding damages. Unfortunately, the interest is taxable, even if the underlying award was for damages from personal physical injuries. The seminal case is Kovacs v. Commissioner,20 where the Tax Court held that interest on a wrongful death claim constituted taxable interest, not damages for personal injuries excludible under IRC section 104(a)(2).

Two First Circuit cases answered the more difficult query whether a case settled after a verdict was entered also included prejudgment interest, even though the settlement agreement specifically stated that no amount was being paid for prejudgment interest. In Delaney v. Commissioner,21 the parties settled a personal injury claim after the verdict for a lump-sum payment of $250,000. The agreement did not include any mention of either an apportionment among the claims or interest, though the stipulation of dismissal specifically stated that no amount was being paid for interest. The First Circuit held that the IRS’s pro rata allocation of 39 percent of the settlement to interest, based on the same proportion of interest that was awarded in the original judgment, was correct.

In Rozpad v. Commissioner,22 the First Circuit specified what is required to reduce the allocation for prejudgment interest in the original verdict. Rozpad had similar facts to Delaney: personal physical injury cases were settled after verdict, and no amount was allocated to any of the elements of the verdict, including prejudgment interest. As the court said,

[W]hen there has been a jury verdict and an ensuing judgment that contains separate itemizations of damages and interest — a subsequent settlement that does not purport to make a different allocation is quite logically viewed as including a pro rata share of the interest. In this hermeneutic, the parties have settled a claim for a liquidated amount — and it is not unfair to assume, in the absence of a contrary allocation that interest and damages compose the same proportion of the settlement as of the antecedent judgment.23

22. 154 F.3d 1 (1st Cir. 1998).
23. Id. at 4 (emphasis added; citations omitted).
Based on *Rozpad*, it appears that counsel could have put their clients in a better tax posture simply by allocating the settlement amount among the individual aspects of the claim: the personal physical injury, the lost wages incurred as the direct result of the personal physical injury, the emotional distress suffered as the direct result of the personal physical injury, and some small amount for prejudgment interest.24 With nothing to go on except a bare assertion in the settlement agreement excluding interest, the First Circuit had no choice but to allocate the same proportion to prejudgment interest as the original judgment had.

*Rozpad* also clarified that prejudgment interest would not be applied in a case settled before verdict: “When the interest component of a personal injury settlement is difficult to delineate, there is every reason for courts (and the commissioner) to defer to section 104(a)(2) and treat the entirety as free from tax.”25

There is one situation in which prejudgment interest may be eliminated from a post-verdict settlement. In *McShane v. Commissioner,* a Massachusetts case, a lawsuit was settled after trial for more than the original jury verdict. All the attorneys testified that if the case were appealed a new trial would be ordered, and the damages likely would be higher. In that context, the Tax Court did not allocate any of the settlement to prejudgment interest.

**IV. Estate Tax**

Death is the ultimate physical injury, and its occurrence always results in the possibility of estate tax. From an income tax standpoint, it does not matter whether the damages are allocated to conscious pain and suffering or wrongful death. Because both such damages are from personal physical injuries, they are both excludable from income. Where it makes a huge difference, however, is in the estate tax. Damages from wrongful death, which cannot arise until after plaintiff’s decedent has died, are fully excludable from the estate.27 Damages for conscious pain and suffering, on the other hand, are included in the gross estate under the general rule of IRC section 2033, because the decedent could have sued for them himself had he lived.

If plaintiff’s decedent died instantly, allocation of the total recovery to wrongful death is clearly sustainable, and the IRS is unlikely to challenge it — at least, not successfully. If, on the other hand, plaintiff’s decedent spent six months in Shriner’s with third-degree burns before dying, a total allocation to wrongful death is going to be difficult to support, especially when the IRS sees the complaint and some of the other ancillary material.

Just because something is taxable, however, does not mean that tax will necessarily be paid. Here is where it is advisable to consult the attorney for the estate, because there are significant deductions and exemptions that can have the effect of eliminating or significantly reducing the estate tax.

Any amount that passes to a same-sex spouse is deductible from the Massachusetts gross estate pursuant to the instructions to Form M-706, but not the federal gross estate as the result of the Defense of Marriage Act, 1 U.S.C. § 7, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419.

24. *Such an amount could be calculated from a date certain.*
25. *Id.* at 3.
30. *Any amount that passes to a same-sex spouse is deductible from the Massachusetts gross estate pursuant to the instructions to Form M-706, but not the federal gross estate as the result of the Defense of Marriage Act, 1 U.S.C. § 7, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419.*
34. 519 U.S. 79 (1996).
35. *Id.* at 82.
36. *Id.* at 83 (*quoting Webster’s Third New International Dictionary 13 (1981)).
37. *Id.* at 84 (*quoting Commissioner v. Schleier, 515 U.S. 323, 332 (1995)).
39. *Even if the taxpayer is not subject to the AMT, he may still have his itemized deduction reduced.*

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The resulting numbers are staggering. With a punitive damage award of $750,000, no other taxable income and no deductions other than the $250,000 legal fee attributable to it, an unmarried Massachusetts resident would pay $206,500 to the federal government, $39,517 to the commonwealth and $250,000 to the attorney, ending up with only $253,983 — barely one-third of the amount originally recovered.

There is a way to defer the tax, though not to eliminate it. If the client is willing to do some planning before his right to punitive damages becomes absolute — in other words, while the appeal is pending and before any settlement has been agreed to — the tax on the punitive damages can be deferred and spread over as long as 20 years. The technique is the assignment of the right to the net punitive damages — punitive damages minus legal fees — to a charitable remainder unitrust, a similar technique to what was approved in IRS Priv. Let. Rul. 2001-070-19 (Feb. 16, 2001). In effect, this technique converts the immediately taxable damages into a de facto structured settlement. The difference is that the annual payments are taxable to the non-charitable beneficiary to the extent of the punitive damages received, as is any other distributed income.

A charitable remainder unitrust (CRUT) is a split-interest trust where the non-charitable beneficiary receives a fixed percentage, between 5 percent and 50 percent of the fair market value of the trust assets, valued annually, per year, and the charity receives the balance when the trust terminates. If the trust is set up for a term, it can last no longer than 20 years. For clients who are not charitably inclined, the attraction is how little has to pass to the charity on termination for the trust to qualify as a CRUT — only 10 percent of the remainder value of the total contributions to the trust, determined when the contributions are made and not at termination.

Because tax is a numbers game, it is useful to explore the numbers. Under current rates, a client can set up a CRUT for a $1 million award for 20 years, retaining a 10 percent annual distribution interest. On a calculated basis, the client receives $878,423, and the charity receives $121,577. If the client wishes to speed up his receipt of the proceeds, he can set up a five-year CRUT with a 30 percent annual payout. In that case the client would receive $831,930 and the charity, $168,070. Where appreciation is taken into account, the numbers become truly impressive. Using a 20-year CRUT distributing 10 percent per year and annual appreciation rates of 3 percent, the client would receive about $1.33 million, and the charity would receive $390,000.

The distributions themselves are fully taxable to the non-charitable beneficiary to the extent of accrued income, and so the original punitive damages award, as well as all income generated in the trust, are taxed as they are distributed. The benefit is that the tax is deferred. Moreover, because there are only minimal legal fees after the first year, the client may not end up in an alternative minimum tax posture if his usual financial situation does not give rise to the alternative minimum tax. The trust itself is tax-exempt, so the award is allowed to grow tax-free until it is distributed.

Obviously if one can in good conscience allocate settlement proceeds away from punitive damages, that is the preferable approach. But if plaintiff’s decedent is a janitor from Dorchester whose family is close to collecting $10,000,000, this technique may be the only way to avoid immediate and excessive taxation.

VI. Employment Claims

Employment claims that are purely breach of contract where no federal or discrimination statute is implicated raise interesting questions. In general, all damages associated with the employment relationship are taxable, except for reimbursement for otherwise non-taxable fringe benefits, and unreimbursed medical expenses that were not deducted in an earlier year. The goal in this area is not to minimize taxable damages but rather to minimize the amount characterized as wages, which triggers 15.3 percent withholding, half from the employer and half from the employee.

The definition of wages is broad. Pursuant to Treasury Regulation section 31.3121(a)-1(i), all payments for employment, even former employment, constitute wages, unless they are specifically excepted. Wages under the provisions governing both the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act are characterized as wages, which triggers 15.3 percent withholding, plus FICA tax, plus FUTA tax, plus federal and state unemployment tax.

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Act (FUTA)\textsuperscript{53} include, “all remuneration from employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.” “Remuneration from employment” is not limited to payments made for work actually performed, but includes the entire employer-employee relationship for which compensation is paid from the employer to the employee.\textsuperscript{54}

The only employment-related award that does not generally constitute wages, is for emotional distress. Although emotional distress damages are taxable, they are not wages for withholding purposes. Consequently, to the extent damages can be allocated to emotional distress, they are not subject to 15.3 percent in withholding taxes.\textsuperscript{55}

As with punitive damages, the treatment of legal fees is a complication, as they are a tax preference item under the alternative minimum tax and are consequently likely to be eliminated as a deduction. Adding insult to injury, Massachusetts does not allow miscellaneous itemized deductions at all,\textsuperscript{56} so the gross award will be taxed for state income tax purposes in any case.

Here is where the posture of the case can make a big difference. Although a pure contract claim allows legal fees to be deducted only against adjusted gross income, a federal employment claim under Title VII and a number of other statutes\textsuperscript{57} enumerated at IRC section 62(e), will allow the legal fees to be deducted against gross income. Because the deduction for legal fees will be taken against gross income rather than adjusted gross income, neither the alternative minimum tax nor the limitation on miscellaneous itemized deductions will apply to reduce or to eliminate the tax benefit of the legal fees, so the client will be taxed only on what he actually receives. IRC section 62(a)(20) covers unlawful discrimination claims, and I.R.C. section 62(a)(21) extends the deduction to whistleblowers.

Furthermore, under IRC section 62(e)(18), state and local claims for enforcement of civil rights and claims “regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law,” including common law claims, are also deductible against gross income. Again, the effect will be to tax the net recovery.

Although damages from the enumerated claims will be equally taxable, the net recovery will be significantly larger as the result of taking the full deduction for legal fees against gross income. This provision applies in a number of other contexts besides employment, including Fair Housing Act\textsuperscript{58} and False Claims Act\textsuperscript{59} claims, so it is advisable to check its applicability in any given suit. If the complaint does not mention these statutes, the settlement agreement cannot allocate damages to them.

 VII. Business Damages

The key differentiation in business damages is between damages for lost profits, which are taxed as ordinary income, and damages for loss of capital or goodwill, which are non-taxable to the extent the business can establish basis. As would be expected, the default rule is that any damages paid to a business are for lost profits, and hence taxed at ordinary income rates.

The different tax treatments of damages for breach of a covenant not to compete aptly illustrate this point. In State Fish Corp. v. Commissioner,\textsuperscript{60} the plaintiff had acquired a covenant not to compete when it bought a business, and it separately allocated a portion of the purchase price to it, so it was severable from the rest of the assets. The plaintiff subsequently sued the defendant for breach. The Tax Court held that the recovery was not taxable to the extent the plaintiff could establish basis in the covenant.

If no amount is allocated to the covenant in the original purchase, there is no basis, and everything will be allocated to lost profits.\textsuperscript{61} The same would hold true for a suit against a former employee: what is recovered is lost profits, not a capital asset.

But what about the situation in which basis can be established in the covenant, but the recovery is in excess of basis? Should that not be taxed at capital gains rates, because a capital asset was involved? The answer is typically “no.” In order to take advantage of capital gains rates, there must be a sale or exchange within the meaning of IRC section 1222.\textsuperscript{62} Unless the plaintiff releases the defendant from the covenant in the settlement agreement, no sale or exchange occurs and ordinary income rates apply.

Breach of fiduciary duty resulting in the embezzlement of assets presents a case similar to State Fish Corp. The business is allowed to recover, tax free, everything that it lost. Any excess is likely to be taxed at ordinary income rates as the result of the absence of a sale or exchange.

A complication arising from the recovery of embezzled assets, is that lawsuits often take years to resolve, while tax returns are prepared and filed on an annual basis. Usually, the firm’s accountants will have already deducted the loss by the time of any recovery. If that is the case, the damages may or may not be excludable depending on the results under the tax benefit rule, IRC section 111. If the loss was deducted in an earlier year, but no tax benefit was realized, any Whistleblower Protection provisions; any actions under 42 U.S.C. §§ 1981, 1983 or 1985; Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2102 et seq: provisions concerning the employment rights of servicemen, 38 U.S.C., ch. 43; and others.

58. Fair Housing Act, §§ 804, 805, 806, 808, or 818, 42 U.S.C. §§ 3604, 3605, 3606, 3608 or 3617.


61. See Baker v. Commissioner, 118 T.C. 452 (2002) (termination payments to an insurance agent under a contract that included a covenant not to compete were held to be ordinary income), aff’d, 338 F.3d 789 (7th Cir. 2003).


63. Even the generation of loss carryovers under I.R.C. § 111(c) would constitute a tax benefit for the purposes of this rule.
then they remain excludable. If a tax benefit was previously realized, the recovery proceeds are taxable.63

The deductibility of damages in a business context turns on whether they were ordinary and necessary business expenses, which are deductible under IRC section 162, or capital expenditures under IRC section 263, which may or may not generate deductions over time.

Fortunately for business, the definition of “ordinary and necessary business expenses” is very broad.64 It includes not only the usual expenses, but damages paid in litigation, including damages for such socially suspect behavior as discrimination, provided the acts that gave rise to the litigation were performed in the ordinary conduct of the taxpayer's business;65 punitive damages,66 unless the damages were awarded in the context of an antitrust suit in which there was also a criminal conviction;67 and even some fines and penalties, despite the existence of IRC section 162(f), apparently depending on whether they qualify as compensatory or punitive.68

Capital expenditures, on the other hand, are amounts paid for acquisition of a capital asset. Depending on what was purchased, the amount may or may not be recovered over time through deductions for depreciation and amortization.

Proceeds paid to redeem a dissenting shareholder are a non-deductible capital expenditure under IRC section 162(k). The expenses are not even deductible if there was a premium paid over fair market value, unless the premium can legitimately be allocated to non-stock items. Allocation after the fact is ineffective.69

Like everything else in tax, even this rule has exceptions. If the redemption is more in the nature of a severance payment, then the redemption amount may be deductible. This was the case in Five Star Manufacturing v. Commissioner,70 where amounts paid to a shareholder-employee who depleted the corporation’s assets for his personal gain, were held to be ordinary and necessary business expenses, apparently incurred for the preservation of the business.

The taxation issues for the redeemed shareholder are complicated and typically depend on the tax and financial position of the corporation as well as other factors, so they will not be discussed. The one noteworthy point with regard to a public company, is that greenmail — amounts paid to a shareholder to stop a tender offer — are taxed at the 50 percent rate, which may explain why greenmail has disappeared from the popular press.71

VIII. Gifts and Inheritances

Gifts and inheritances are excludible under IRC section 102(a). The archetypical case is Vincent v. Commissioner.72 There, the father gave his son a piece of property under a defective deed, and after the father’s death the second wife attempted to set it aside. The son cross-claimed to enforce the gift, claiming an interest in the property. The case was settled by a payment of damages to the son, in exchange for his releasing all interest in the real estate. The Tax Court held that he was suing for a gift and hence the damages were excludible from income.

A more difficult case is a suit for a promised bequest, because the issue is whether the suit is really for an excludible bequest, or a claim for services. In Austin v. Commissioner,73 a boss liked his secretary a great deal, and over the years gave her a house and some cash. After he died, the secretary sued for a bequest that he promised in exchange for her promise not to marry without his permission. The IRS challenged all the transfers as constituting taxable compensation. The Tax Court held that the gifts were excludible, because her companionship was not worth what he gave her — the IRS denied (however implausibly) that it was suggesting moral turpitude — but the suit over the bequest was held to be a fully taxable claim for services as a companion.

The same negative result occurred in Green v. Commissioner,74 where the girlfriend sued over a promised bequest for providing “wifely” services. The problem in Green was that the complaint was presented as a quantum meruit claim, and in that posture the Tax Court had no choice but to rule the award taxable, as the lawsuit by its own terms requested payment for services.

By contrast, the taxpayer prevailed in Roberts v. Commissioner,75 where a man contacted his old girlfriend, who became his caretaker until he died eight years later. When he died, she sued for his promised bequest to “take care of her for the rest of her life.” The Tax Court held the suit was for breach of contract with regard to a promised bequest, not an action for wages. The Tax Court’s explanation of the reason for its holding, is telling: “We find that Mildred cared for Elmer for more than eight years out of love, affection and devotion, rather than a business or employment relationship. We also find that the primary origin and character which gave rise to Mildred’s claim was the breach of promise by Elmer to his ‘good friend, Mildred Robbins’ to make the provisions he had promised.”76

If the claim is treated as one for services, it is fully deductible on the estate tax return. If it is a bequest, it is not deductible as a claim, but may be deductible to the extent it can be characterized as a deductible marital or charitable bequest under IRC sections 2055 and 2056. The issue with regard to claims is whether there was bona fide consideration for the payment. To quote Huntington v. Commissioner,77 a First Circuit case involving payments to stepsons, “[W]hen family members adopt a course of action whose object is to pass on their collective wealth, a deduction for the amount transferred is not permitted under section 2053 unless there is some showing of a bargained-for exchange.”78

Not all gifts and bequests, however, are excludible. Under IRC section 102(b), neither income from a gift or bequest, nor a gift of income from a gift or bequest, is excludible.

The distinction between gifts and bequests on the one hand, and

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64. See Lilly v. Commissioner, 343 U.S. 90 (1952).
67. In that case, only one-third will be deductible under I.R.C. § 162(g).
68. As an aside, one of the Obama administration’s revenue proposals is to eliminate the deduction for punitive damages.
70. 355 F.2d 724 (5th Cir. 1966).
71. I.R.C. § 5881.
72. 63 T.C.M. 1776 (1992)
73. T.C. Memo 1985-22.
74. T.C. Memo 1987-503, aff’d, 846 F.2d 870 (2d Cir. 1988).
75. T.C. Memo 1995-171.
76. Id. (citation omitted).
77. 16 F.3d 462 (1st Cir. 1994), aff’d, 100 T.C. 313 (1993).
78. Id. at 467.
income from gifts and bequests, or gifts and bequests of income, on the other, seemed easy enough, until the Ninth Circuit decided Getty v. Commissioner.79 J. Paul Getty had established a trust in 1934, which left his son Ron Getty $3,000 per year while his other children shared all the remaining income.80 In 1948, J. Paul Getty promised Ron he would correct the disparity, but he did not do so before his death in 1976.81 At that time the trust held approximately $1.3 billion worth of Getty Oil stock.82 Ron sued the Getty Museum as residuary beneficiary of the estate, and the case settled with an unallocated award to him of $10,000,000.83

The IRS claimed that Ron’s suit was for income from property, so the whole recovery was taxable under IRC section 102(b).84 The Tax Court agreed, but also ruled that J. Paul Getty “probably” but not “necessarily” would have made up the difference with an outright bequest of Getty Oil stock.85 The Ninth Circuit reversed, holding Ron was suing for a promised bequest — what his father had promised him to replace the lost trust income — not the income from the trust, and hence the whole settlement amount was excludible, even though the award was based on the lost trust income.86

IX. Conclusion

The taxation of damages is a complicated subject, and this brief article does not purport to cover even the surface of the many issues that may arise, including the important distinction between business expenses and capital losses, the impact of the tax posture of the parties and timing issues. Nevertheless, it is hoped that the principles explained in this article will help litigators to put their clients in a better tax posture. If nothing else, the concepts here should serve to alert litigators to when consultation with a tax attorney would be prudent. Perhaps, once and for all, general releases releasing all claims in exchange for a lump sum settlement will go the way of having to prove fault in a divorce case. Both the attorney and the client will be richer for it.

SIDEBAR

There are many steps a litigator can take to improve the tax posture of his client.

First, make sure there is a settlement agreement specifically allocating the damages to non-taxable claims, or claims that will be taxed more favorably. If there is not, the IRS will look at the pleadings and make its own allocation.

In personal injury cases, make sure that otherwise taxable damages are described as being “as the result of” personal physical injuries. Also, include everyone as a plaintiff who might collect damages in a suit for personal physical injuries, so that their award will not be taxed.

Second, do not violate the “pig rule” in the allocation. If there was a significant claim for taxable damages, allocate a portion of the settlement to it. Again, the IRS can ignore the settlement agreement under substance over form principles if it is not consistent with the economic reality of what the damages were being paid for.

Third, if it is a death case, have the probate attorney calculate how much can be allocated to conscious pain and suffering without triggering estate tax. A significant allocation to the estate might not trigger any estate tax, but it will be useful to convince the IRS that the allocation is valid.

Fourth, be mindful of the tax implications even when drafting the complaint. If the suit is over a promised bequest, focus on the relationship between the decedent and the claimant, not on the value of the services provided. If it is an employment claim, try to implicate the enumerated federal and state law rights, to make the legal fees deductible against gross income rather than adjusted gross income. In other types of cases, check to see whether statutes allowing deduction of legal fees against gross income can be implicated.

Fifth, if prejudgment interest is being reduced, have the defendant send the plaintiff a Form 1099 for the reduced amount.

Last, disclose the existence of the settlement with the client’s tax return on Form 8275, as well as with the client’s Massachusetts return. Even if the tax treatment is ultimately disallowed, disclosure will allow the client to avoid penalties, which can be substantial.

79. 913 F.2d 1486 (9th Cir. 1990).
80. Id. at 1488.
81. Id. at 1489.
82. Id.
83. Id.
84. Getty v. Commissioner, 913 F.2d 1486, 1492 (9th Cir. 1990).
85. Id. at 1491.
86. Id. at 1491-92.
Case and Statute Comment

Civil Law – Harassment Restraining Orders Pursuant to G.L. c. 258E – Constitutionally Protected Speech


Introduction

In O'Brien v. Borowski,1 the Supreme Judicial Court (SJC) carefully limned the boundary between protected speech under the First Amendment to the United States Constitution and Article XVI of the Massachusetts Declaration of Rights,2 and harassing conduct under Massachusetts’ anti-stalking laws. In doing so, the court cogently proceeded along a statutory path of protection for stalking victims.3 Just as important, for practice in the district and juvenile courts of the commonwealth, the SJC narrowed the language of the statute allowing for the issuance of civil protective orders in cases alleging harassment by individuals.4

Case Background

Alan Borowski is a Northampton police officer who knows Robert O'Brien as a “fighter.” Borowski knew O'Brien before he became a police officer, and had “charged him with a crime” in 2006.5 On May 15, 2010, Borowski went into a bar with his girlfriend, saw O'Brien, and immediately left. O'Brien followed the couple out of the bar, yelled Borowski’s name, raised both his middle fingers in the air and yelled, “fuck you.”6

Nearly three months later, on the afternoon of Aug. 8, 2010, Borowski was moving his truck in his driveway at his home, when he saw O'Brien ride by as a passenger in a truck. As the truck passed Borowski, O'Brien put his hand outside the window and “flipped [Borowski] off” with his middle finger. After Borowski got out of his truck, the O'Brien truck went about 75 yards down the street, stopped in the middle of the street, and sat for several seconds before driving off. An hour and a half later, Borowski was standing on his back deck when he heard a horn sound in front of his house. Borowski then saw O'Brien lean forward in the same truck and extend his middle finger before the truck drove off.7

Two weeks later, on Aug. 23, 2010, Borowski applied for and received an ex parte, temporary, order from a Justice of the Northampton District Court pursuant to Section 5 of Chapter 258E of the General Laws.8 The order directed O'Brien to have no contact with Borowski, stay at least 50 yards away from him, stay away from Borowski’s residence and not to abuse or harass him.9 A hearing was held on Sept. 3, 2010, at which Borowski was the only witness. The order was extended for a year.10

On Sept. 28, 2010, O'Brien filed a petition pursuant to Section 3 of Chapter 211 of the Massachusetts General Laws requesting that the SJC use its general superintendence power to vacate the order and dismiss the complaint.11 O'Brien asserted that Chapter 258E is unconstitutional because it regulates speech protected by the First Amendment to the United States Constitution too broadly. Alternatively, he claimed that even if the statute is constitutional, his conduct constituted protected speech.12 In finding that Chapter 258E “is not constitutionally overbroad because it does not prohibit a substantial amount of protected speech,” the court conducted a First

4. Article XVI of the Massachusetts Declaration of Rights is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution. Massachusetts v. Gilfedder, 321 Mass. 335, 343 (1947) (“From the fact that we rest [a] decision wholly upon the Federal Constitution and its construction by the Supreme Court of the United States no inference should be drawn that the Declaration of Rights of the Constitution of this Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution”).
6. Id.
7. Id. at 417.
9. Id.
11. Chapter 258E of the Massachusetts General Laws does not set out an appellate pathway for aggrieved parties. The SJC announced that future appeals shall be directed to the Appeals Court. Id. at 430.

mass.gov/courts/courtsandjudges/courts/stats/index.html (last viewed February 18, 2012). Nevertheless, in the New Bedford District Court in fiscal 2010, 1,398 orders were sought under Chapter 209A, and 215 under Chapter 258E. In 2011, there were 1,649 Chapter 209A orders sought and 495 Chapter 258E orders sought. In the juvenile courts, there were 504 Chapter 258E orders sought in 2011; none in fiscal 2010. Id. There are no numbers posted on the Massachusetts Trial Court’s Web page for applications under Chapters 209A or 258E in the Superior Court. See http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/2011statscivilloa d.pdf (last viewed February 18, 2012).
Amendment analysis in the context of the statute’s background.13

**Statutory Background**

Chapter 258E was enacted to fill the gap that was left after the enactment of Chapter 209A of the General Laws of Massachusetts.14 Chapter 209A was enacted in 1978 to provide protection for those being abused by a blood relative, household member or a partner in a substantive dating relationship.15 But the legislature clearly did not intend to afford protection for those subject “to acquaintance or stranger violence, nor did it intend to cover the myriad of relationships that exist or even to all those which might be considered in ‘dating’ relationships.”16

In short, Chapter 209A is a pure domestic relations statute that does not cover stalking, sexual assault or other forms of abuse by strangers or mere acquaintances. Over time, the need for orders of protection for those falling outside the domestic sphere became more obvious.

In 2006, the U.S. Department of Justice Office on Violence Against Women surveyed stalking victims and determined an “estimated 5.9 million U.S. residents age 18 or older experienced behaviors consistent with either stalking or harassment in the 12 months preceding” the survey.17 According to the survey, about ten percent of all victims were stalked by a stranger, while nearly 75 percent knew the offender in some capacity, i.e., as a former intimate, friend, roommate or neighbor.18 All 50 states have anti-stalking laws and many provide for issuance of protective orders in domestic relationships similar to those defined in Chapter 209A.19 At the time of the passage of Chapter 258E, 35 states allowed for issuance of an order to protect anyone being stalked.20 In Massachusetts, the gap between those eligible for domestic protective orders and those in need of such an order, but do not qualify, is starkly presented when looking at those who have been sexually assaulted.

The *amicus in O’Brien*,21 pointed out that 14.6 percent of women, and 5.3 percent of men living in Massachusetts will be sexually assaulted in their lifetime.22 And of those sexual assault cases in 2008–09, 27 percent were committed by friends or acquaintances of the victim, 17 percent were committed by strangers, with seven percent committed by persons the victim had known less than 24 hours.23 Obviously, not all sexual violence arises from stalking behaviors.24 But it further promotes public safety to allow orders of protection for victims of extreme violence, whether or not the violence exists on a continuum of stalking behavior.25 With that as a background, the SJC had to address offensive behavior that may not even fall on such a continuum in insuring that free speech is not sacrificed on the altar of individual safety.

**Constitutional Analysis**

In *Commonwealth v. Welch*,26 the SJC concluded that the criminal harassment statute, Section 43A of Chapter 265 §43A of the Massachusetts General Laws, was not constitutionally overbroad.27 But in *O’Brien*, the court had to examine the issue of “whether the differences in the definition of civil harassment so significantly broaden the scope of potentially prohibited speech as to render the civil harassment” statute unconstitutional.28 The court found three differences between the two laws.29

The first involved the intent required under the two statutes.

14. Elyssa Flynn-Poppey, Stefani Guilliano Abhar, Comment, Chapter 258E Harassment Prevention Orders — Balancing the Rights of Victims and Defendants, 94 Mass. Law Rev. 23 (September 2011); see esp. Brief for Amici Curiae of the Victims Rights Law Center, Boston Area Rape Crisis Center and Jane Doe, Inc. at 3-5; O’Brien, 461 Mass. at 419.
17. Katrina Baum, Shannon Catalano, Michael Rand, Katrina Rose, Stalking Victimization in the United States, Bureau of Justice Statistics Special Report 2 (January, 2009). To see the sampling technique and methodology used for the study go to: http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/20080/detail#methodology (last viewed February 18, 2012).
19. Id. at 3; For a summary of each state law as of June 2010, see http://www.ncvc.org/src/main.aspx?dbID=DB_State-byState_Statutes117 (last viewed on February 18, 2012).
23. Brief for Amici, at 6 citing Massachusetts Department of Public Health, Rape and Sexual Assaults in Massachusetts, 2008-2009: Services Provided by Rape Crisis Programs (September 2010) http://www.mass.gov/oeohs/docs/dph/rape-health/violence/survivor-factsheet-08-09.pdf (last viewed February 20, 2012). The foregoing contains the most recently published statistics on sexual assault incidents by the Massachusetts Department of Public Health.
24. For a more detailed study, see David Lisak and Paul Miller, Recent Rape and Multiple Offending Among Unknown Rapists, Violence and Victims, Vol. 17, No. 1, p. 80 (2002)(A study showing that “a relatively small proportion of men are responsible for a large number of rapes and other interpersonal crimes [which] may provide at least a partial answer to an oftnoted paradox: namely, that while victimization surveys have established that a substantial proportion of women are sexually victimized, relatively small percentages of men report committing acts of sexual violence.”).
25. See Flynn-Poppey and Abhar, Comment, 94 Mass. Law Rev. at 23-24; Welch, 444 Mass. at 100.
28. Id.; Welch, 444 Mass. at 99-100.

The civil harassment law requires a complainant to prove that the defendant engaged in “3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (i) an act that; (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.” Mass. Gen. Laws ch. 258E §1 (2011).
Both laws require willful and malicious intent. But, the civil statute also requires that the harassing conduct “be committed with the intent to cause fear, intimidation, abuse or damage to property.” The second difference is that the harassing conduct warranting a restraining order must “in fact cause fear, intimidation, abuse or damage to property,” while to be convicted of a crime one must “seriously alarm the targeted victim.” The third difference is that criminal harassment requires proof of conduct that “would cause a reasonable person to suffer substantial emotional distress.” No such proof is required for issuance of a protective order. In examining those differences, the court first examined the “overbreadth doctrine and the relevant categories of unprotected speech.”

Essentially, the overbreadth doctrine “allows an individual whose speech may be constitutionally regulated to argue that a law is unconstitutional because it infringes on the speech of others.” The doctrine is limited to instances where the law prohibits a substantial amount of protected speech by parties not before the court. A reviewing court will narrowly interpret a statute to avoid overbreadth.

As the SJC noted, most speech is protected from government regulation under the state and federal constitutions. Nevertheless, “there are ‘certain well-defined and narrowly limited classes of speech’ that are not protected because they are ‘no essential part of any exposition of ideas, and are of such slight social value as a step to truth’ that whatever meager benefit that may be derived from them is ‘clearly outweighed’ by the dangers they pose.”

The two classes of unprotected speech that were explored by the SJC in O’Brien, were “fighting words” and “true threats.” Fighting words are simply those words that are likely to provoke a violent reaction causing a breach of the peace. While true threats are those intended to express an intent to commit an act of violence against a particular individual or group of individuals. True threats are distinguished from hyperbole by the speaker’s intent to place the target in fear of harm. True threats are determined by their context and do not necessarily require a present ability to harm the target of the threat or even explicitly state an intent to harm so long as circumstances support the victim’s fearful response. Through its exploration of the elements of the statute, the SJC concluded that the Legislature drafted a constitutionally sound statute as it discerned a legislative intent to “confine the meaning of harassment to either fighting words or true threats.”

In so holding, the court found that the statute requires evidence of subjective intent to communicate a true threat aimed at a specific person. Coupled with a requirement that the pattern of harassment in fact cause fear, intimidation, abuse or damage to property, the offending speech is not protected by the state or federal constitution. Nevertheless, the court narrowed the definition of the intent to cause fear (as opposed to the intent to intimidate, abuse or cause property damage under Chapter 258E) to comport with a constitutionally exempt “true threat.” Specifically, the fear required is of physical harm or physical damage to property rather than a fear of unfavorable publicity or economic loss.

Statutory Application

As a consequence of its constitutional analysis, the SJC not only narrowed the definition of the intent to cause fear contained in the statute, but also seemed to narrow the circumstances under which harassment protective orders should issue. The court measured O’Brien’s conduct of raising his middle finger against the statute. The court found that such conduct is a form of insult dating to ancient Greece. Citing a string of Federal Circuit Court of Appeals cases, the SJC recognized that “[i]ke its verbal counterpart, when [the insult] is used to express contempt, anger or protest, it is a form of expression protected by the First Amendment.” But, in a limited context, in accompaniment with more threatening conduct, giving the middle finger could constitute “fighting words” or a “true threat,” and therefore comprise harassment under Chapter 258E. The court could not determine whether O’Brien’s conduct warranted a protective order as the case, rendered moot by the expiration of the order, needed more factual development.

Conclusion

The message coming out of O’Brien seems clear. In order for a harassment protective order to issue there must be showing of three or more truly threatening events that involve an intent to cause fear, intimidation, abuse or damage to property and that do in fact cause fear, intimidation, abuse or damage to property.

Looked at another way, the requirement that the conduct be
willful and malicious raises the threshold for the statute’s application because there must be a showing that the defendant acted out of “hostility, cruelty or revenge.” This subjective motivation is in contrast to the willful and malicious conduct required for prosecution of criminal harassment. As the Appeals Court held in Commonwealth v. O’Neil, willful and malicious conduct in the criminal setting requires only the intent to perform the prohibited act without intending the harmful consequences or holding any “evil intent” or ill will.

Thus, there is a high level of proof that insures that the legislative purpose to close the gap left by Chapter 209A is met, while not clogging thinly resourced courts with uncivil, albeit offensive, behaviors that do not involve targeted threats of personal harm or property damage. Simply put, the civil harassment statute, much like the criminal anti-stalking laws, is designed to protect “victims from harassment that may begin with words, but tragically end with violence.”

J. Thomas Kirkman

53. Id. at 290 – 293. See also Kirkman, Comment, Criminal Law – Malice as Element of Criminal harassment and Stalking, 90 Mass. Law Rev. 183 (Winter 2007).
54. The legislature and one of the drafters of Chapter 258E were concerned that the statute would be misused against members of public boards, employees against employers, tenants against landlords, neighbors in property disputes, or those engaged in other litigation. Flynn-Poppey, Abhar, supra note 14, p.28
55. Welch, 444 Mass. at 100.
Criminal Law – Presumptive Prejudice and Denying Change of Venue

Commonwealth v. Toolan, 460 Mass. 452 (2011)

Introduction

One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so securing obviously constitutes a denial of due process of law in its most rudimentary conception.

Justice Frankfurter’s language reminds us that publicity, inflammatory media coverage and pretrial prejudice can so saturate and infect a jury pool as to rob an accused of the most fundamental right — the right to an impartial jury. In Commonwealth v. Toolan, the Massachusetts Supreme Judicial Court (SJC) wrestled with this very issue. There, the SJC reversed a conviction of first degree murder where the defendant was denied his right to a fair trial because the trial judge failed to conduct an examination of prospective jurors “in a way that would have allowed him to make a sound determination as to whether each juror was impartial despite the exposure” to extensive and emotional publicity and “issues extraneous to the case.”

The holding in Toolan is straightforward and unremarkable: potential exposure to a mountain of potentially prejudicial publicity and media coverage in the “small, socially interconnected community of Nantucket” required the trial court to carefully assess whether each juror could be impartial. The trial court’s voir dire was insufficient to meet this obligation, which deprived the defendant, under the totality of circumstances, of the guarantee of a fair trial.4

At the same time, the Toolan case is remarkable in that the SJC, in affirming the trial judge’s refusal to order a change of venue for the trial, noted that “the defendant points to no case in which this court has overturned a criminal conviction on the basis of presumptive bias in the jury pool, and we are aware of no such case.” Despite the longstanding common law recognition of “the right of a defendant to have the case removed to another community for the purpose of achieving an impartial trial,” and the right to a fair and impartial trial guaranteed by the fourteenth amendment to the United States Constitution, “which right includes the right ‘to show that a change of venue is required’ in a particular case,” the SJC has never found a trial judge to have abused his or her discretion in refusing to change venue on the basis of a presumptively prejudiced jury. In view of the limited size of the prospective jury pool, the tiny population of Nantucket, the publicity and media coverage preceding and continuing throughout the trial, and the myriad connections between the prospective jurors and the witnesses and subject matter of the case, it is arguably “hard to imagine a more compelling case for a change of venue” than in Toolan. Yet the SJC held otherwise. The SJC’s decision, in this regard, not only renews the wide discretion held by trial judges in addressing motions to change venue; it suggests that in Massachusetts a trial judge would virtually never be held to abuse his or her discretion by refusing to change venue on grounds of presumptive prejudice.

The Facts

In the fall of 2004, the 44-year-old victim lived on Nantucket as did her parents and brother. She became romantically involved with the defendant, who lived in New York City, and the victim ended the relationship in late October of 2004 because of the defendant’s heavy drinking. “Leaving the defendant behind in New York, the victim returned to Nantucket on Saturday, Oct. 23, 2004.” The next day, a security officer at LaGuardia International Airport stopped the defendant as he attempted to carry a knife through passenger security. The knife was seized and the defendant received a criminal summons for carrying a knife of more than four inches in length. The next morning, the defendant flew to Nantucket; arrived around 10:45 a.m., rented a car, bought two knives, drove to the location where the victim rented a cottage and asked the victim’s neighbor and landlady, who lived next to the cottage, “if anyone was at home there.” Some time after noon, the neighbor grew concerned when she noticed that one window shade had been lowered and the victim had not yet left the house for a 1 p.m. appointment,” and contacted the victim’s brother, who contacted the police. In response to a 1:15 p.m. dispatch, the police went to the cottage and found the victim lying dead on the living room floor from multiple stab wounds.

3. Toolan, 460 Mass. at 467-469.
4. Id.
5. Id. at 463, n. 17 (2011).
7. Id. (quoting Groppi v. Wisconsin, 91 S.Ct. 490, 400 U.S. 505, 27 L.Ed.2d 571 (1971)).
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
Stab wounds to the chest and back. The defendant, meanwhile, "took a 1 p.m. flight to Hyannis, where he rented a second car." The defendant was ultimately stopped at a roadblock in Hopkinton, Rhode Island on that same afternoon. "Police found blood on the rental car left at Nantucket airport. They matched blood from paper towels found at the airport and from the defendant's clothing to the victim's [DNA]."

At trial, the defense claimed that the defendant was not criminally responsible due to brain damage and mental illness caused by alcohol addiction, "exacerbated by alcohol and prescription drugs ingested on the day of the victim's murder." The jury found the defendant guilty of first degree murder and assault and battery by means of a dangerous weapon.

The Community and the Media

Prior to trial, the defendant moved for a change of venue based on the extraordinary pretrial publicity surrounding the case, "along with an array of exhibits detailing the unique nature of this case." The facts and arguments tending to support a change of venue included the following:

- Nantucket is a small island community with 10,783 residents according to the 2006 town census. The jury pool consisted entirely of Nantucket residents.
- The victim spent many summers on Nantucket since childhood, and moved there in the spring of 2004.
- The victim's brother lived on Nantucket with his wife, an artist who showed her work locally, and their children; the victim's parents lived on the island; the victim's father owned an art gallery on the island; and the family was well-known in the community.
- The defendant lived in New York City and was an outsider.
- The victim's murder was the first murder on Nantucket in more than 20 years.
- National media outlets extensively publicized the murder. The defense counsel noted that national news outlets including Vanity Fair, ABC and CBS intended to cover the case. This included an article from the Cape Cod Times with a "photograph of the friend who introduced the victim ad the defendant to one another, wearing an anguished expression at the defendant's arraignment … ."
- The People magazine article also "described how, when the victim tried to end her relationship with the defendant a few days before the murder, he 'became violent and kept her from leaving his apartment. She apparently managed to slip out at 4 a.m. the next day, [October] 23, when he was asleep, and fled back to Nantucket. The alleged false imprisonment, which was never introduced at trial, appeared in one of Nantucket's local newspapers, The Inquirer and Mirror, on Nov. 6, 2004."
- The People magazine article also gave a glowing portrayal of the victim, along with pictures of her and her family, one of which contained the caption/quote from a friend, "There was a smile in her voice … She always made you happy."
- In 2006, a "true crime" book entitled, Safe Harbor: A Murder in Nantucket, was sold in Nantucket bookstores. The first page of the introduction stated, in part, "Underneath a self-admitted alcohol problem lurked a lethal hatred of women. For much of his adult life, it seemed, [the defendant] was a homicide waiting to happen."
- Local media articles from such outlets as The Inquirer and Mirror, Nantucket Independent and the Cape Cod Times, detailed and highlighted potentially prejudicial issues such as the filings of and hearing on the defendant's motions to suppress evidence; the judge's denial of suppression motions because he found the defendant's statements to police while in custody in Rhode Island to be voluntary; and the defendant's "insanity" defense and the "low success rate" of this "difficult" or "uncommon" defense.
- Local media outlets continued their dramatic detail-laden coverage of the murder and the above-mentioned issues on the eve of jury empanelment and throughout the trial. This included an article from the Cape Cod Times with a "photograph of the friend who introduced the victim ad the defendant to one another, wearing an anguished expression at the defendant's arraignment … ."
- The Cape Cod Times article again repeated the allegation that the defendant had held the victim captive.
- During jury empanelment, 43 members of the jury venire (25 percent) disclosed that they knew the victim or her family either directly or indirectly. Another 67 jurors (38 percent) knew witnesses scheduled to testify. "These relationships ranged from intimate — several jurors were related to witnesses by blood or marriage — to casual. Some members of

16. Id. at 454.
17. Id.
18. Id.
19. Id.
20. Id. at 455.
21. Id.
22. Id.; Brief of Defendant-Appellant at 7-8.
23. Toolan, 460 Mass. at 455
24. Id. at 455, n. 2.
25. Id. at 455.
26. Id.
27. Id. at 452; Brief of Defendant-Appellant at 36. Interestingly, a defendant has a constitutional right to have his or her trial held where the indictment is pending. See Article 13 of the Massachusetts Declaration of Rights ("In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."). As in Toolan, tension may exist between (a) this critical right and (b) the common law right to remove a case to another community and the constitutional right under the Fourteenth Amendment to the United States Constitution to a change of venue in unique circumstances after a "solid foundation of fact has been first established." Crocker v. Justices of the Superior Court, 208 Mass. 162, 180 (1911).
28. Id. at 455.
30. Id. at 455-56. See also Brief of Defendant-Appellant at 8-9 (stating that the People magazine story was titled “MURDER IN NANTUCKET: EVERY WOMAN’S NIGHTMARE,” with the subtitle, “Beth Lochtefeld thought Tom Toolan was Mr. Right. But when their romance soured, cops say the charming ex-stockbroker turned into a killer.”).
31. Id. at 456.
33. Id. at 456.
34. Id. at 456-57.
35. Id. at 457.
the venire knew the medical examiner as their personal physician. Many knew police witnesses. Others knew the victim’s landlord as a close family friend or through her work on the board of a local organization. Still others knew witnesses as neighbors, employers, coworkers, customers and friends.” Although the trial judge “did not systematically question the venire covering media exposure or knowledge of the case,” 50 prospective jurors (29 percent) informed the court that they had discussed the case prior to trial. Seventy-four venire members (42 percent) mentioned that they had seen media coverage of the case. 37 At the conclusion of jury empanelment, the trial judge denied the motion for a change of venue. 38

The Law

In Toolan, the SJC reaffirmed the longstanding rules regarding change of venue due to presumptive prejudice. A judge upon his own motion or the motion of a defendant or the commonwealth made prior to trial may order the transfer of a case to another division or county for trial if the court is satisfied that there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial.39 A change of venue should be ordered only “with great caution and only after a solid foundation of fact has been first established.”40 “Prejudice against the defendant sufficient to preclude a fair and impartial trial may exist because the entire jury pool is tainted by exposure to pretrial publicity … . In such circumstances, the venire is considered presumptively prejudiced, regardless of the details of the voir dire process … and even if individual members of the jury expressly assert their belief that they can be ‘fair and impartial.’ However, presumptive prejudice exists only in truly extraordinary circumstances.”41 Moreover, the mere existence of pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial.42 Rather:

In assessing whether such publicity and resulting local prejudice precludes a fair trial, the United States Supreme Court in Skilling looked to the influence, if any, of the media on the trial; the size of the community, the content of the news stories; the length of time between the peak media coverage and the trial; and any evidence from the verdict itself, such as the jury’s decision to acquit the defendant of any of the charges.43

Similarly, the SJC has identified the nature of the publicity as a highly significant factor, and has held that “[m]edia coverage that is inflammatory or sensational as opposed to factual better supports a claim for change of venue.”44 Ultimately, “[a] trial judge has substantial discretion in deciding whether to allow a motion for a change of venue.”45

The Analysis

The defendant argued that presumptive prejudice existed because:

When you’re considering a change in venue, you have to understand … that it’s a small island. The connection of the family to the island is irrefutable. The hysterical coverage of this case, your honor, is readily apparent from the evidence that’s before the court. How would any juror be able to be objective in this case? You go to breakfast down the street. You go and have a cup of coffee in one of the coffee shops. You go to a restaurant the following week. And I acquitted Tom Toolan? I found Tom Toolan guilty of a lesser offense?46

At a minimum, the defendant’s status as an outsider viewed in conjunction with the tiny size of the community, the saturated local media coverage and the influx of national media coverage, created a unique situation which pushed the boundaries of the “presumptive prejudice” analysis. As the SJC noted, “[t]he question is a close one.”47 A consideration of the relevant “Skilling” factors demonstrates just “how close” the question is.

First, as the SJC held, the “small size of the Nantucket community weighs in favor of finding local prejudice.”48 Community size and the potential impact of media coverage on small communities has been a critical factor in “presumptive prejudice” analysis. In Rideau v. Louisiana, for example, the U.S. Supreme Court held that it was a denial of due process to allow a motion to change venue where “a filmed custodial ‘interview’ in which the jailed defendant confessed to murder was rebroadcast on local television three nights in a row less than two months prior to the trial.”49 The Court reasoned that the exposure of tens of thousands of people in Calcasieu Parish (with a population of approximately 150,000 people), to the televised interviews created a presumptively prejudiced jury, regardless of the voir dire process.50 “Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.”51 In comparison to Rideau, Nantucket, with a much smaller population of only 10,000 permanent residents, presents an even more compelling case.

Second, the connections among the victim, her family and the island, corroborated the concerns underlying the “small community” factor. The victim had deep and prevalent family roots in the community. Twenty-five percent of the prospective jurors disclosed that they knew the victim or her family; 38 percent knew prospective witnesses, some from blood or marriage, and others as “neighbors, employers, co-workers, customers and friends”; 29 percent informed the court that they had discussed the case prior to trial; and 42

38. Id. at 455.
40. Toolan, 460 Mass. at 462-63 (quoting Commonwealth v. Clark, 432 Mass. 1, 6 (2000)).
41. Id., internal citations omitted.
42. Id. (citing Skilling v. United States, 130 S. Ct. 2896, 2916 (2010)).
43. Skilling, 130 S. Ct. 2913-2916.
536, 540 (2003)).
45. Toolan, 460 Mass. at 463.
46. Brief of Defendant-Appellant at 11 (citing Trial Transcript at 1/15-16).
47 Toolan, 460 Mass. at 464.
49. Toolan, 460 Mass. at 464.
51. Id. at 724-26.
percent mentioned that they had seen media coverage of the case.\textsuperscript{35}

Put simply, the venire was saturated with jurors who revealed a form of serious potential bias or prejudice. “The extensive links among the victim’s family, members of the over-all jury venire and trial witnesses demonstrate the network of social relations connecting this community, of which the victim was a valued member, and to which the defendant was an outsider.”\textsuperscript{54}

Third, “the media coverage of the case was extensive, at times emotional, and prejudicial to the defendant’s anticipated theory of defense.”\textsuperscript{55} This was the first murder on Nantucket in decades, and the media attention was massive, sustained and prominent before and throughout trial, and consisted of substantial local and national coverage.\textsuperscript{56} Articles portrayed the victim in “the most glowing terms, and described the pain suffered by her family, their anger towards [the defendant] and their hope that he would never be released. These articles were patently intended to, and no doubt did, evoke a visceral emotional response in the reader.”\textsuperscript{57} By contrast, “[p]ortrayals of the defendant emphasized his troubled history with women, his difficulties in holding a job, his erratic criminality and his alcohol problems, while simultaneously suggesting he was unlikely to succeed on his theory that he was not guilty by reason of insanity.”\textsuperscript{58} The consistent message was that the defendant was a bad person; that he had a history of mistreating women; that he murdered a local, “charismatic” woman which brought grief to her family and friends (and thus to the island itself); and that he had a defense that would not (or should not) work.\textsuperscript{59}

And yet, the SJC found that this was not enough. The SJC noted the absence of evidence of a “raucous or carnival atmosphere at trial,” as well as a lapse of three years between the murder and the trial which “was likely to have blunted the impact of initial media coverage.”\textsuperscript{60} Furthermore, the content of the media coverage in Toolan, per the SJC, was not as prejudicial to the defendant as the publicity in cases like Rideau, where the televised confession directly contradicted the defendant’s not guilty plea and “in a very real sense was Rideau’s trial.”\textsuperscript{61} In addition, the “pretrial publicity left open questions of the relationship between or among [the defendant’s] mental problems, alcohol and the victim’s death.”\textsuperscript{62} In the SJC’s final analysis, the pretrial publicity did not rise to the “‘smoking gun variety’ certain to invite prejudgment of culpability.”\textsuperscript{63}

The Lesson

As contended by defense counsel, “[t]he facts here seem more like an implausible law school hypothetical than a real case.”\textsuperscript{64} Yet, the trial judge was clearly in a better position than the SJC to evaluate the jurors’ ability to be impartial. Likewise, the trial judge was clearly more familiar with local feelings and the impact of the media coverage on the relevant populace. Accordingly, a finding of abuse of discretion does not seem warranted. At the same time, one cannot easily reconcile the trial judge’s seemingly boundless discretion in this case with Justice Frankfurter’s admonition in \textit{Irvin v. Dowd}.\textsuperscript{65} The SJC has never overturned a criminal conviction on the basis of presumptive bias in the jury pool, and it is difficult to conjure a more compelling claim of presumptive prejudice than the facts in Toolan presented. The takeaway, in the end, is that under Massachusetts law a finding of an abuse of discretion for failing to change venue on the basis of presumptive prejudice, while available in concept, is highly improbable, if not virtually unattainable, in practice.

\textsuperscript{52}. \textit{Id} at 726.

\textsuperscript{53}. \textit{Toolan}, 460 Mass. at 457-58.

\textsuperscript{54}. \textit{Id} at 464.

\textsuperscript{55}. \textit{Id} at 465.

\textsuperscript{56}. \textit{Id} at 455-57. \textit{See also} Brief of Defendant-Appellant at 8-11 (delineating, describing, and citing record appendix regarding extent of pre-trial publicity and media coverage).

\textsuperscript{57}. Brief of Defendant-Appellant at 37 (citing \textit{Irvin}, 366 U.S. at 728 (defendant entitled to trial in “atmosphere undisturbed by so huge a wave of public passion”)).

\textsuperscript{58}. \textit{Toolan}, 460 Mass. at 465.

\textsuperscript{59}. \textit{Id} at 456-65.

\textsuperscript{60}. \textit{Toolan}, 460 Mass. at 465. \textit{But see id.} at 456-57 (delineating some of the extensive media coverage in the months preceding trial and continuing throughout jury empanelment and trial).

\textsuperscript{61}. \textit{Id} at 465-66 (quoting \textit{Rideau}, 373 U.S. at 726 (emphasis in original)).

\textsuperscript{62}. \textit{Toolan}, 460 Mass. at 465.

\textsuperscript{63}. \textit{Id} at 466 (citing \textit{Skilling}, 130 S. Ct. at 2916).

\textsuperscript{64}. Brief of Defendant-Appellant at 36.

\textsuperscript{65}. \textit{Irvin}, 366 U.S. at 729-730, 281 S. Ct. at 1646, 6 L. Ed. 2d at 760 (1961)

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Book Review


In 1937, fresh from re-election the prior fall and, like today, during a time of economic turmoil, President Franklin D. Roosevelt launched his ill-fated court-packing plan to revamp the Supreme Court. This was the *Lochner* era, a period characterized by judicial deference to property rights and reliance on a constitutional right of “liberty of contract” to strike down progressive statutes regulating employment relationships. In closely divided decisions, the court repeatedly stymied much of Roosevelt’s New Deal program. Roosevelt’s solution was to seek legislation allowing him to nominate additional justices, who would be more congenial to his policies. The legislation failed, and some observers believe the controversy set back the rest of Roosevelt’s agenda for at least a year. But the President eventually prevailed. After retirements and deaths on the court, Roosevelt got to appoint his justices. Just as he reshaped much of American society, ushering in the modern administrative state and vastly increasing the power of the executive, with his appointments Roosevelt has had a lasting impact on the American judiciary. Through his four most prominent selections, and the competing judicial philosophies that they developed, Roosevelt’s legacy has shaped our legal system to this day.

Over the course of his four terms, Roosevelt appointed nine Supreme Court justices, more than any of his predecessors or successors except George Washington. Four of these men stand out: Hugo Black, William Douglas, Felix Frankfurter and Robert Jackson are among the most influential justices in the court’s history. In *Scorpions*, Noah Feldman, a professor at Harvard Law School, recounts the story of these four justices — from ideological comrades in the political world through their appointments to the court, and their subsequent rivalry. At the outset of their careers, all of the future justices were united in their opposition to the property rights jurisprudence of the pre-1937 court. Roosevelt’s justices agreed that the doctrine underlying *Lochner* was wrong. But, as new issues came to the forefront, the views of the justices diverged, with each developing his own theory of constitutional interpretation that has continued to influence jurisprudence to the current day. These theories — original intent, judicial restraint, legal realism and pragmatism — each found an able advocate on the court.

Hugo Black, Roosevelt’s first appointee, developed the theory of originalism. Black believed that the U.S. Constitution means what its drafters originally intended. In other words, for Black, the text as publicly understood when written should guide current interpretation. Black hailed from a less traditional background than most of his colleagues, and Feldman argues that originalism fit well with his position as an “outsider.” At the time of his appointment, he was neither a legal scholar, nor even a practicing lawyer, but he believed anyone could interpret the Constitution, given adequate study. As a result, Black downplayed precedent as interpreted by legal experts and looked instead to the original source. This approach reflected both his populist political views and his strong Protestant religious heritage, which held that each individual could interpret the *Bible* without expert intermediaries.

For example, Black believed that the framers of the Fourteenth Amendment’s due process right did not intend it to apply to corporations. Thus, as he saw it, the entire *Lochner*-era idea of liberty of contract to protect corporations was flawed. Moreover, because Black put little stock in precedent, he was not reluctant to overturn well-established case law. Similarly, in his dissent in *Adamson v. California*, perhaps his greatest foray into the use of originalism, Black relied on historical research (later disputed) as to the original meaning of the Fourteenth Amendment to argue that all of the Bill of Rights applied to the states, notwithstanding decades of precedent to the contrary. Originalism continues to find strong proponents on the current court in Justices Clarence Thomas and Antonin Scalia.

Feldman describes how, ironically, over time originalism strayed from Black’s populist views. As interest in research into Constitutional origins grew, the topic became the province of professional historians — in other words, experts instead of laymen. According to Feldman, Black reacted by focusing in his later opinions on textual analysis rather than history.

Felix Frankfurter was the great proponent of judicial restraint. His ideas developed while a professor at Harvard Law School and were in reaction to the prevailing conservative court of the *Lochner*

1. *Lochner* v. New York, 198 U.S. 45 (1905). *Lochner* invalidated a New York statute that limited the hours bakery employees were allowed to work to 60 hours per week and 10 hours per day.
3. The proposed bill would have added a new federal judge for each judge over 70 years old who had served at least 10 years. A Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. Doc. No. 75-142, at 9 (1937); see Stephan O. Kline, Revisiting FDR’s Court Packing Plan: Are the Current Attacks on Judicial Independence so Bad?, 30 McGeorge L. Rev. 863, 909-10 & 910 n.274 (1999). At the time, six Supreme Court justices were older than 70 (and had the requisite length of service), allowing Roosevelt to simultaneously appoint a large number of justices congenial to his views. See Feldman at 107-08.
5. See Feldman at 203-04. The other Roosevelt appointees were Stanley Reed, Frank Murphy, Jimmy Byrnes, and Wiley Rutledge. Id. Roosevelt also elevated Harlan Fiske Stone from associate to chief justice. Id.
6. Id. at 145.
7. See generally id. at 144-45.
8. Id. at 146.
10. Id. at 71-75 and App. I. (Black, J., dissenting); see generally Feldman at 310-12.
11. See Jeffrey Toobin, *Partners*, The New Yorker, Aug. 29, 2011, at 40, 42, 51. Toobin portrays Thomas as a more committed originalist than Scalia. Id. at 43. Like Black, Thomas sees himself as a populist and is not swayed by precedent. Id. at 42-43. Indeed, Toobin quotes Yale Law professor Akhil Reed Amar as to parallels between the careers of Thomas and Black. Id. at 41.
12. Feldman at 422.
13. Id. at 31-32.
era. In the view of Frankfurter and like-minded academics, the judiciary should defer to social legislation enacted by the political branches of government — the ones most closely reflecting the popular will. However, this originally liberal judicial philosophy — designed to counter a conservative court’s attack on progressive legislation — was itself transformed into a conservative one when liberals took over the court and began reviewing social legislation that ran counter to their personal preferences. Indeed, Black suffered a similar fate as his theory of original intent was later used by conservatives to oppose more progressive constitutional approaches.

For his part, Frankfurter stayed true to his principles, emphasizing the importance of deferring to the legislature. As Feldman points out, Frankfurter did not distinguish between economic legislation and laws burdening rights of minorities, a distinction which has now been well-accepted. Thus, Frankfurter was able to write the opinion in the so-called flag salute case, upholding the power of a local school board to require students to salute the flag notwithstanding religious objections.

As a result, Frankfurter ceded his intellectual leadership on the court.

Late in his tenure, Frankfurter’s principles were strongly tested in Brown v. Board of Education. Frankfurter opposed segregation, and further believed that segregation damaged American prestige abroad, a particularly significant concern during the Cold War. He was faced with a quandary, however, fearing that Congress would not on its own outlaw segregation, but concerned that a judicial declaration of illegality would run contrary to his theory of judicial restraint. As a result, Frankfurter successfully sought a compromise that would end segregation, but only gradually thereby mitigating the judicial activism that he found distasteful.

William Douglas was a legal realist. Legal realism was the dominant legal theory in the first half of the 20th Century. Under this view, legal rules (i.e., choices made by government) shape property rights and economic relationships, and, in the absence of laws, there would be no property. Accordingly, rather than defer (as did the Lochner court) to the sanctity of contract (which only served to help the beneficiaries of the existing economic order), government should be free to experiment and alter economic relationships in order to serve the needs of the greatest number. Moreover, legal realists rejected the idea that “the law” was a neutral set of rules to be found in legal treatises and case law. Instead, the judges’ personal beliefs, as shaped by economic, social and psychological factors, were decisive. On the current court, Justice Sonia Sotomayor has been described as a legal realist.

But more than just a legal realist, Douglas was a loner, an archetypical western figure who emphasized individual rights and freedom from government interference. This was the image Douglas used to shape the law. As a result, Douglas’s most lasting impact on the court, and indeed the country, was his championing in later years of new rights of privacy and individual autonomy. Feldman observes how Douglas distinguished Lochner by simply declaring that privacy and personal autonomy were different from economic relationships. Hence, while he believed the Lochner court had been wrong to have created a right of liberty to contract (and use it to overturn economic legislation), Douglas had no qualms in creating a right to privacy out of whole cloth and using it to overturn social legislation.

Finally, Robert Jackson was a pragmatist. He believed the job of the court was to resolve disputes arising among other governmental entities — whether the other branches of the federal government, the states, or the states and federal governments. In other words, the court was an umpire that did not impose its own view, but instead tried to make the system function in the real world. Thus, Jackson searched for practical solutions to individual cases rather than relying on precedent, constitutional text or overarching theories. Accordingly, he approached issues on a case-by-case basis. He had no ideology other than to make sure that the system worked.

Feldman points to retired Justice Sandra Day O’Connor as a modern-day disciple of Jackson’s approach, and Justice Stephen Breyer has extolled the benefits of pragmatism.

Jackson’s approach was exemplified by his concurring opinion in the steel seizure case. In reviewing the conflict between President Truman and Congress over the president’s order to nationalize steel mills to avert a strike during the Korean War, Jackson maintained that the “law” did not provide an answer. Nor was original intent helpful to resolve an issue not envisioned by the Framers. On this point, Feldman quotes Jackson’s famous line that the Framers’ intent, “had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”

To determine the extent of executive power, Jackson considered

14. Id. at 105-06, 179.
15. Id. at 31, 179.
16. Id. at 232.
17. Id. at 423.
18. Id. at 232.
20. See Feldman at 182.
21. See id. at 232.
23. Id. at 382-86.
25. Id.
26. Id.
27. Id.
30. Feldman at 323.
31. See id. at 425-26.
32. Feldman at 426 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965), a case decided after both Jackson and Frankfurter had died and the Court membership had changed).
34. Id. at 364.
35. Id. at 363.
36. Id. at 413.
37. Id. at 408.
40. Feldman at 364.
41. Id. (quoting Youngstown, 364 U.S. at 635) (Jackson, J. concurring).
whether the President was acting with congressional authorization (either express or implied), in opposition to congressional directives, or in an area where congress had not acted (the “zone of twilight”). Presidential action would more likely be upheld when supported by congress than in opposition to that branch.\(^{44}\) In the steel seizure case, Jackson maintained that the existence of the Taft Hartley Act, allowing the President to temporarily prevent a labor strike, was an implicit congressional objection to any stronger steps such as a seizure.\(^{43}\) Therefore, Jackson believed President Truman’s action to be unconstitutional.

Like Frankfurter, Jackson’s approach was tested in \textit{Brown}. Jackson personally disliked segregation but believed it was a matter for congress to address. Outlawing segregation, he thought, would cause social conflict, which ran counter to his view of the court’s role of ensuring that the government functioned smoothly. Thus, in \textit{Brown}, Jackson sought to ban segregation without condemning the South.\(^{44}\) Indeed, a draft of a concurrence which he prepared, but did not issue, was based on the pragmatic argument that circumstances had changed so that, while segregation may once have been justified, current conditions no longer made it constitutional.\(^{45}\) In the end, however, Jackson, after suffering a serious heart attack, joined the rest of the court in its unanimous decision.

\textit{Scorpions} is at its best when it traces the evolution of the individual justices’ ideas. Using examples from prominent cases, Feldman describes how national and world events as well as personal tensions affected their viewpoints. Starting with Justice Black’s dissent in \textit{Connecticut General Life Ins. Co. v. Johnson}, and continuing with opinions addressing the flag salute,\(^{46}\) Japanese-American internment,\(^{47}\) German saboteurs\(^{48}\) and Communist Party membership,\(^{49}\) among others, and culminating in \textit{Brown v. Board of Education},\(^{50}\) \textit{Scorpions} shows how the justices either maintained or modified their theories in specific cases to shape constitutional doctrine.

\textit{Scorpions} also illustrates how the personal history of each justice affected his views. Unlike the current court where justices generally come from the lower bench, Roosevelt’s four most famous justices had substantial exposure to the non-judicial world. Three of them — Black, Jackson and Douglas — came directly from the political sphere. Black was a U.S. Senator at the time of his appointment to the court.\(^{51}\) Douglas was chairman of the Securities and Exchange Commission and was seriously considered (while on the court) as a vice presidential candidate.\(^{52}\) Indeed, for many years, Douglas aspired to be President, and Feldman suggests that his early decisions often responded to what he believed was the popular or politically advantageous position.\(^{53}\) Jackson had been a small-town lawyer,\(^{54}\) and later served in the Roosevelt Justice Department, eventually becoming solicitor general\(^{55}\) and attorney general\(^{56}\) (as well as a close legal advisor to Roosevelt).\(^{57}\) At one point, he considered a run for the New York governorship.\(^{58}\) While a member of the court, Jackson took a leave of absence to serve as chief prosecutor at Nuremberg, which experience influenced some of his later opinions.\(^{59}\) None of these justices had a judicial background,\(^{60}\) and only Frankfurter was appointed directly from academia.\(^{61}\)

Justice Black’s personal background may have been integral to his stance in \textit{Brown v. Board of Education}. Black, who came from Alabama, had once joined the Ku Klux Klan to advance his pre-senatorial political career. In Feldman’s view, Black’s forthright position during the court’s deliberations in \textit{Brown} that segregation is unconstitutional was affected by a desire to overcome his personal shame about his former membership in that organization.\(^{62}\)

\textit{Scorpions} is a well-written, engaging account of the justices responsible for several of the most influential theories of constitutional decision-making. The book is written for a general audience and succeeds admirably in explaining the legal reasoning underlying the decisions and analyzing the many factors that influenced the justices. The portraits of the justices in this one volume work necessarily cannot give the detail and nuance of full biographies. Nevertheless, \textit{Scorpions} captures the essence of these men and includes ample notes and bibliographic listings, allowing those who seek more information to do so. In the end, \textit{Scorpions} leaves the reader with a strong appreciation of an exciting time in the court’s history that has continued to influence its jurisprudence to this day.

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