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Claims under Massachusetts General Laws chapter 93A (Chapter 93A) have become a hallmark of civil litigation in recent years. They are often affixed to the end of civil complaints and have the appeal of a promise of attorneys’ fees and multiple damages. Many Chapter 93A claims have no chance of success, however, as the courts have identified many types of claims as the sort that categorically do not give rise to liability under Chapter 93A. Inclusion of meritless Chapter 93A claims in complaints and responsive pleadings not only dilutes the impact of Chapter 93A as a whole, but also may damage a litigant’s credibility in the eyes of the court and opposing counsel.

The judiciary has clarified the reach of Chapter 93A in recent years, but the sheer number of decisions coming from state and federal courts in Massachusetts makes it difficult for the average practitioner — and the courts — to keep track of the trends. The goal of this article is to clearly demarcate the statute’s scope and provide a road map to those looking for guidance on the statute’s reach. In furtherance of this goal, the authors have synthesized key findings concerning Chapter 93A in an effort to preserve the strength of the statute for claims falling within its scope.

**INTRODUCTION**

In very general terms, Chapter 93A provides for a private right of action for two distinct groups of plaintiffs: Section 9 allows consumers to bring suit against persons engaged in trade or commerce; and Section 11 allows persons engaged in trade or commerce to bring suit against other persons engaged in trade or commerce. A Chapter 93A claim must be brought under either Section 9 or Section 11. Section 9 applies to consumers, whereas Section 11 can be considered a business person’s cause of action. In order for certain conduct to rise to the level of a Chapter 93A violation, it must include “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce....”

**COMMON EXAMPLES OF IMPROPER CHAPTER 93A CLAIMS**

Frequently, decisions on motions to dismiss and for summary judgment address whether a case falls within the scope of Chapter 93A. A close reading of the formative Chapter 93A cases, as well as case law decided over the past five years, demonstrates that certain courts increasingly have taken pains to clarify the types of conduct and factual circumstances that are excluded from the Chapter 93A context.

5. See Mass. Gen. Laws ch. 93A, §2(a) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful”) (emphasis added).
Claims brought under Section 11 require both a defendant and a plaintiff to be engaged in trade or commerce. The courts have refined this Section 11 prerequisite; a plaintiff and defendant within the context of a Section 11 claim cannot be in spheres of trade or commerce parallel to each other. The plaintiff must demonstrate that the conduct giving rise to the Chapter 93A violation took place within a “commercial relationship” or “business transaction” between the plaintiff and the defendant. Although the parties in a Section 11 action do not necessarily have to be in contractual privity with one another in order to demonstrate the existence of a “commercial relationship,” the courts repeatedly have stated:

[Section 11 of Chapter] 93A requires that there be a commercial transaction between a person engaged in trade or commerce with another person engaged in trade or commerce. Once it has been established that a commercial transaction exists, then one may address whether the individuals are acting in a business context.

In Szalla v. Locke, the SJC rejected the plaintiff’s argument that he had engaged in a “commercial transaction” with the defendant by virtue of “selling” his services to the business that he formed with the defendant. The SJC explained that the statute’s inclusion of “offering for sale . . . any services” within the definition of “trade or commerce” “are those offered generally by a person for sale to the public.” The court distinguished the statutory definition from the circumstances in that case, where the plaintiff provided time and labor to the venture and the defendant contributed capital and property.

The scenarios falling outside of the scope of Chapter 93A discussed below largely stem from the courts’ interpretations of what constitutes “trade or commerce” under Section 9 for any given defendant, or whether the alleged conduct arises out of a “business transaction” where the parties were acting in a “business context” for a Section 11 claim. A “purely private” dispute — such as a typical sale of residential real estate between an individual owner and buyer — does not fall within the scope of Chapter 93A. The distinction between a “purely private” dispute and one that falls within the scope of Chapter 93A can be difficult to corral.

A. The Largest and Most Litigated Trade or Commerce Exception: Intra-Enterprise Disputes

Individuals and entities who are involved in the same company, venture or enterprise cannot assert Chapter 93A claims against one another, no matter how devious or conscience-shocking the conduct involved.

The courts often refer to this as the “intra-enterprise exception” to Chapter 93A liability. Common scenarios that fall within this exception are disputes among LLC members, such that they were acting in a business context’”) (citing Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 563-64 (2008)). In Milliken, the Massachusetts Supreme Judicial Court (SJC) held that the parties were not engaged in trade or commerce with one another, nor acting in a business context, where the only dealings between them occurred during discussions about restructuring a trade debt owed to plaintiff by one of the defendants’ predecessor corporations and during subsequent litigation. Id. at 564; see Kraft Power Corp. v. Merrill, 464 Mass. 145, 155 & n.13 (2013) (“Section 11 governs commercial transactions between two parties ‘acting in a business context’”); see also Green v. Parts Distrib. Xpress, Inc., 2011 U.S. Dist. LEXIS 136616, at *13-15 (D. Mass. Nov. 29, 2011) (performing dual inquiry under Chapter 93A, §11, and finding both a commercial transaction and a business context).

10. Id.
11. Id.
12. As a practice note, a Section 11 claim should not be brought lightly. If a counterclaim is then brought alleging Chapter 93A liability under the same set of circumstances, challenging that counterclaim — such as by arguing the lack of a “business transaction” — would certainly be more difficult after pleading one’s own Section 11 claim.
13. Milliken, 451 Mass. at 563 (“We have stated that G.L. c. 93A is not available to parties in a strictly private transaction, where the undertaking is not in the ordinary course of a trade or business”); Lantner v. Carson, 374 Mass. 606, 607-08 (1978) (concluding that Chapter 93A claims are not available for “strictly private” transaction between buyers and sellers of residential real estate).
shareholders of a close corporation, business partners, or joint venturers and disputes between employers and employees. 16

As a practice note on the intra-enterprise exception, the SJC recently held that the “trade or commerce” requirement of Chapter 93A does not go to the court’s subject matter jurisdiction and may be waived if not preserved in the trial court. 17 Therefore, any party charged with a violation of Chapter 93A should carefully review the allegations of the complaint and consider moving to dismiss if the challenged conduct falls within the intra-enterprise exception.

1. Intra-corporate Disputes

The intra-enterprise exception not only includes internal corporate disputes, but also prevents members of a close corporation, a limited liability company or a partnership from asserting Chapter 93A claims against one another. 18 The relationship need not be particularly formal. 19 In the context of a close corporation, the courts have explained the basis for the exclusion by reasoning that aggrieved shareholders have an alternative avenue of relief available in the form of a suit for breach of fiduciary duty. 20

A brief case study will illuminate how the intra-enterprise exception plays out in practice. Selmark Assocs. v. Ehrlich, decided by the SJC in March 2014, involved two Massachusetts close corporations, Selmark and Marathon. 21 Evan Ehrlich (Ehrlich) worked as a salesperson for Marathon. 22 In 2001, Marathon’s sole shareholder, who was planning to retire, entered into a contract with Ehrlich and Selmark, a company in the same business as Marathon, whereby Selmark and Ehrlich would gradually acquire Marathon’s stock and, upon payment of the full purchase price, Ehrlich had an option to convert his stock in Marathon to Selmark stock and to become an officer in Selmark at that time. 23

After executing the contract, by all outward appearances, Ehrlich acted as an employee and officer of Selmark and the two companies operated as one. 24 Six years later, by which time both Selmark and Ehrlich owned part of Marathon, Ehrlich announced that he wanted to finish paying for his shares in Marathon earlier than planned. 25 In response, Selmark’s owner summarily terminated Ehrlich’s employment in Marathon. 26 Ehrlich remained a minority shareholder of Marathon and took a job with a competing corporation. 27 Selmark sued him for breach of fiduciary duty for competing with Marathon while remaining its shareholder. 28 Ehrlich asserted numerous counterclaims in response, including one under Chapter 93A, based upon his wrongful termination and breach of the parties’ stock conversion agreement. 29 The SJC reversed a jury finding that Selmark had violated Chapter 93A, holding that the intra-enterprise exception barred Ehrlich’s Chapter 93A counterclaim. 30 Ehrlich argued that Selmark and Marathon were separate entities and did not fall within the exception. 31 The SJC disagreed, based upon a finding that the parties had an “intra-organizational connection” that was “undeniable” and fell outside the scope of Chapter 93A. 32

The Massachusetts Appeals Court recently reiterated that the intra-corporate exception does not protect outsiders to an organization who have aided and abetted insiders in their breach of fiduciary duty. 33

2. Employment Disputes

The scope of the intra-enterprise exception in the employment context is broad and prohibits Chapter 93A claims based on disputes arising out of an employment relationship. 34 For example, claims alleging improper termination or violation of a non-compete agreement by a former employee — whether against the former employee


17. Weiler, 469 Mass. at 92-95 (“We continue to view a rule 12(b)(6) motion as the proper vehicle for a party to raise such a defense”).


22. Id.

23. Id. at 527-29.

24. Id. at 529-30.

25. Id. at 531.

26. Id.


28. Id. at 533.

29. Id.

30. Id. at 549-51.

31. Id. at 550.

32. Id.


and/or his or her new employer — have been held to be outside the scope of Chapter 93A. The United States District Court for the District of Massachusetts recently held that even conduct taking place prior to the formation of an employment relationship may be outside the scope of Chapter 93A. In Smith v. Zipcar, the court dismissed a Chapter 93A claim based on an allegation that the employer made misrepresentations about stock options during the hiring process. The court stated that “any dispute arising out of the hiring and firing of plaintiff falls outside the purview of chapter 93A.” Nevertheless, the existence of an employment relationship and its centrality to a dispute will not always insulate non-parties to that relationship (e.g., subsequent employers) from Chapter 93A liability. For example, if the former employee owed a duty of loyalty to his or her former employer and breached it along with a current employer, although the former employee will not be liable under Chapter 93A, the current employer may indeed be held liable.

a. An Exception to the Employer-Employee Exception: Misappropriation of Trade Secrets Claims against Former Employees

The Appeals Court in Specialized Tech., Inc. v. JPS Elastomers Corp. explained that Chapter 93A claims may be viable against former employees in cases alleging misappropriation of the employer’s trade secrets. In that case, the Appeals Court upheld a Chapter 93A verdict in favor of an employer against a former employee even though the former employee still had ties to the employer in the form of ongoing confidentiality obligations. The basis of the court’s holding was that the misappropriation of trade secrets was actionable independent of the former employee’s ongoing contractual obligations.

The Specialized Tech. case, however, has been the subject of recent criticism by the Massachusetts Superior Court. In The Gillette Company v. Provost, also involving a Chapter 93A claim against former employees who misappropriated trade secrets, the defendants argued that Chapter 93A should not apply to their conduct because the misappropriation claim stemmed from a confidentiality agreement that was part of their employment relationship. The court found this argument persuasive, agreeing with the defendants that Specialized Tech. may have been wrongly decided. Despite its doubts, the court ultimately declined to dismiss the Chapter 93A claim based on its unwillingness to contradict Specialized Tech.’s binding precedent, but the court’s ambivalence about its ruling indicates that this area of the law is still developing.

b. Claims Involving Independent Contractors as Opposed to “Employees”

Chapter 93A claims between a company and its “independent contractors” have been more likely to withstand dismissal. The reasoning behind the distinction appears grounded in the fact that an independent contractor offers services to the general public within “trade and commerce” and is not beholden to one, exclusive enterprise as is an employee. Accordingly, plaintiff employees on occasion attempt to characterize themselves as independent contractors, but that can be a trap for the unwary. The distinction is not simply a matter of pleading semantics because courts look to indicia of employment in order to make the determination. For example, in Debnam v. FedEx Home Delivery, the United States District Court for the District of Massachusetts rejected an employee’s attempts to characterize himself as an independent contractor where he also alleged Wage Act claims that were premised upon the allegation that the plaintiff was an employee. Although the court noted the availability of pleading in the alternative, it held that the plaintiff’s factual allegations were consistent with a claim of employment. After the court later held that the plaintiff failed to demonstrate that he was an employee for purposes of his Wage Act claim, he appealed the District Court’s earlier dismissal of his Chapter 93A claim. The United States Court of Appeals for the First Circuit affirmed the dismissal, instructing that “the relevant inquiry” was

37. Id. at 55.
38. Id. at 9; but see Reyad v. Caritas Norwood Hosp., Inc., 2011 Mass. Super. Lexis 208, at *16 (Aug. 18, 2011) (doctor’s claim against hospital for violation of Chapter 93A based on denial of staff privileges survived dismissal based on the allegation the doctor operated his own clinic and was not a “traditional employee,” coupled with the “unique relationship between physicians and hospitals at which they have privileges”).
40. Id. See alsoinfra Section I.A.2.a.
44. Id.
46. Id.
47. Id.
48. Id.
50. Debnam v. FedEx Home Delivery, 766 F.3d 93 (1st Cir. 2014).
52. Id.
54. Debnam, 766 F.3d at 94.
not whether the plaintiff was an independent contractor as such, but whether he was offering his “services generally for sale to the public in a business transaction.” The court held that the plaintiff was not truly independent from FedEx because he worked exclusively for it and did not hold himself out as available to provide services to the general public.

B. Other Private Disputes

A party has not engaged in “trade or commerce” for purposes of Chapter 93A if the claim arises from a purely private dispute or transaction between two individuals or entities. Examples of conduct that has been deemed too private to give rise to a Chapter 93A violation include: (1) a dispute between a condominium owner and members of a condominium association; (2) a claim based on a bank’s failure to correct an allegedly false police report; (3) a dispute over a loan made between two friends; (4) a sale of a private home; and (5) an isolated rental of a home. In addition, a claim involving a trust or other fiduciary arrangement that serves a principally private function will typically fall outside of the scope of Chapter 93A. A professional trustee who advertises and sells his services to the general public, however, may be subject to liability under Chapter 93A.

C. Conduct within the Context of Litigation

Conduct occurring within the context of litigation or an attorney-client relationship may also give rise to Chapter 93A liability, so long as the circumstances of the parties’ dealings demonstrate the requisite nexus to trade or commerce.

1. Claims Based on Frivolous or Groundless Litigation

A Chapter 93A claim may be based upon frivolous or groundless litigation only if: (1) the defendant is acting in trade or commerce in connection with filing the suit (if the claim is brought pursuant to Section 9) or the conduct arises out of a commercial relationship between the parties (if the claim is brought pursuant to Section 11); and (2) the conduct rises above mere filing of litigation, such that the lawsuit was motivated by “a pernicious purpose collateral to winning the suit,” extortion, or similar conduct. The filing of a lawsuit cannot create the “business transaction” between the parties that is necessary for a successful claim brought under Section 11, nor can it create the “business context” within which the defendants’ unlawful conduct must arise for a Section 9 claim.

Thus, cases finding Chapter 93A liability involving litigation conduct do not hold that the extortionate or meritless litigation was by itself a commercial transaction, but that the conduct took place within a business context — i.e., within the marketplace, in the public realm, involving competitors or in a clearly commercial context such as a transaction involving a sale of goods. For example, in Arthur D. Little Int’l, Inc. v. Dooyang Corp., the plaintiff alleged that Dooyang engaged Arthur D. Little’s consulting services with no intention to pay and further attempted to “force favorable price concessions through the threat of expensive litigation.”

2. Conduct of Attorneys and Law Firms

As with other individuals and entities, attorneys and law firms may be liable for violating Chapter 93A if they act unfairly or deceptively in trade or commerce. The proper plaintiffs in those cases typically are an attorney’s clients, i.e., the parties with whom the attorney is acting in a business context. However, rendering legal advice alone is not sufficient to bring conduct of an attorney within the scope of Chapter 93A. Where an attorney enters into a business relationship with his or her client and acts unfairly or deceptively in connection with the representation of a client, the attorney may be liable for violating Chapter 93A.

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55. *Id.* at 96.
56. *Id.* at 98.
58. Bargantine v. Mechs. Coop. Bank, 2013 U.S. Dist. LEXIS 169284, at *20-22 (D. Mass. Nov. 26, 2013) (reasoning that although both plaintiff, a telephone equipment dealer, and defendant, a bank, operated in trade or commerce, the dispute between them — resulting in the bank filing a police report for plaintiff’s failure to return telephone equipment — was too tangentially related to their businesses to form the basis of a Chapter 93A claim). The lesson from this case is that the mere presence of commercial actors on each side of a dispute does not mean that there is a viable Chapter 93A claim, where those actors did not hold a sufficient nexus to trade to fall under the scheme of Chapter 93A.
61. Neihau v. Maxwell, 54 Mass. App. Ct. 558, 563 (2002) (finding party not engaged in trade or commerce “with respect to the isolated rental of his home while he was temporarily living overseas”).
64. Scholz Design, Inc. v. Liquori, 659 F. Supp. 2d 275, 277-78 (D. Mass. 2009) (holding that filing of baseless litigation nearly 10 years after parties had decided not to enter into a business relationship clearly fell outside scope of Chapter 93A); see also Chervin v. Travelers Ins. Co., 448 Mass. 95, 112-13 (2006) (party alleging Chapter 93A claim must point to a “relevant business transaction” with the defendant in order to fall within the scope of the wrongs the statute seeks to address; holding that filing a medical malpractice action did not amount to a “business transaction”); see also Stromberg v. Costello, 456 F. Supp. 848 (D. Mass. 1978) (explaining that a misuse of the legal system must have a sufficient nexus to trade to fall under the scheme of Chapter 93A).
68. See, e.g., GTE Gov’t Sys. Corp. v. Rackemann, Sawyer & Brewster PC, 1996 Mass. Super. LEXIS 509 (Apr. 4, 1996) (law firm violated Chapter 93A when, in 1989, it advised property owner that purchase option was invalid after, in 1963, advising option holder that option was valid).
within that relationship, such as entering into an unlawful contingent fee agreement, the attorney may be held liable for violation of Chapter 93A.71

Courts have held that an attorney is not acting in trade or commerce vis a vis opposing parties in litigation.72 An attorney may, however, be liable to a non-client if the attorney makes false statements or joins, rather than simply relays, his client’s positions, and those communications to the non-client knowingly or carelessly turn out to be false, misleading, and harmful.73 An attorney may be liable for a “per se” violation of Chapter 93A by virtue of unlawful debt collection practices.74 In addition, an attorney may be liable if he uses litigation to perpetrate a fraudulent scheme.75 For example, in Shirokov v. Dunlap, Grubb & Weaver PLLC, the complaint alleged that the defendant attorneys engaged in a scheme of mass mailing demand letters to hundreds of “John Doe” defendants with no intention of pursuing claims against the recipients.76 The court rejected the defendants’ claims that their actions were insulated from Chapter 93A liability because they took place within the context of litigation.77 The court held that the attorneys were not simply representing their clients; they had designed the fraudulent scheme and filed the lawsuit as part of their scheme and to provide their settlement demands with a “vein of legitimacy.”78

D. Charitable Organizations and Universities

Universities and other charitable institutions are not engaged in trade or commerce for purposes of Chapter 93A when they act in furtherance of their charitable or educational mission.79 However, when a charitable organization’s business motivations, in combination with the nature of the transaction and the activities of the parties, establish that the organization was acting in a business context such that the “economic benefits it receives . . . are not incidental” to its mission, Chapter 93A may be applicable.80 In Linkage Corp. v. Trustees of Boston Univ., for example, the SJC upheld Chapter 93A liability against Boston University, where it had entered into a contract with a provider of corporate training classes at a location outside of Boston University’s campus, partly in order to generate funds from the property, upon which Boston University had a large debt.81 The court reasoned that although Boston University did not make a “profit,” per se, on the transaction with Linkage, it acted unfairly and deceptively by creating a pretext to termination of the contract, denying a renewal of the contract, and directly hiring the plaintiff’s employees in violation of the contract, all in an effort to funnel funds to itself.82

E. Governmental Entities and Conduct Motivated by Legislative or Statutory Mandate

The courts appear to analyze governmental bodies in a manner similar to charities, and in all reported cases, there are no cases holding a governmental body or agency liable under Chapter 93A.83 Frequently, the issue is addressed by holding that a party does not engage in trade or commerce when its actions are motivated by compliance with a statutory or legislative mandate, as opposed to business or personal reasons.84 For example, in Lafayette Place Assocs. v. Boston Redevelopment Auth., the SJC reasoned that there was incidental to charitable purpose, was not an effort to generate profit, and was outside of the trade or commerce requirement of Chapter 93A; see also S. Shore Hellenic Church, Inc. v. Arttech Church Interiors, Inc., 2016 U.S. Dist. LEXIS 56907, at *2-4 (D. Mass. Apr. 28, 2016) (finding that plaintiff church was not engaged in trade or commerce where it was seeking at all times to further its core charitable mission); Brodsky v. New Eng. Sch., of Law, 2009 U.S. Dist. LEXIS 39420, at *12-14 (D. Mass. Apr. 29, 2009) (no Chapter 93A liability based on law school’s refusal to allow a student to retake certain courses, its refusal to readmit him, and its educational advice).

80. See Reyad v. Caritas Norwood Hosp., Inc., 2011 Mass. Super. LEXIS 208, *14 (Aug. 18, 2011) (plaintiff doctor stated Chapter 93A claim where complaint alleged that he was ousted from hospital staff because he opposed what would be a profitable “hospitalist” program that the hospital planned to undertake).


84. See Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Inst. for Biomedical Research, 850 F. Supp. 2d 317, 329 (Mass. 2011) (“The parties have cited no case, and the court could not find one, where the state or a subdivision thereof was held liable under Chapter 93A. To date, Massachusetts courts have only specified that Chapter 93A does not apply when governmental entities are not engaged in trade or commerce”) (emphasis in original); see also Gianfrancesco v. Town of Wrentham, 2012 U.S. Dist. LEXIS 49149, at *8-9 (D. Mass. Apr. 9, 2012) (no Chapter 93A claim against town where complaint did “not even suggest” that town was acting in a business context, as opposed to being engaged in governmental activity); United States Leasing Corp. v. Chicopee, 402 Mass. 228, 232 (1988) (city officials’ actions concerning lease of computer system for schools did not constitute “trade or commerce” under Chapter 93A).

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no question that when the Boston Redevelopment Authority (BRA) engaged in conduct alleged to violate Chapter 93A, it “took place in the context of [its] pursuit of [statutory] urban renewal and redevelopment goals” with which it was tasked. As a result, the SJC held that the BRA was not liable under Chapter 93A.

F. Probate Matters

The Probate Courts have no jurisdiction over Chapter 93A claims.

II. CLAIMS BASED ON A SIMPLE BREACH OF CONTRACT

One of the most frequent reasons for dismissal of a Chapter 93A claim is that it is found to have been based on a simple breach of contract between the parties.breach of contract, standing alone, does not constitute an unfair or deceptive trade practice, as required by Chapter 93A.

Similarly, a Chapter 93A claim is not proper if it is based on nothing more than a genuine dispute over whether money is owed or over the interpretation of a contract. Accordingly, the United States Court of Appeals for the First Circuit has found that a basic foreclosure action did not give rise to Chapter 93A liability.

In addition, in the products liability context, the United States District Court for the District of Massachusetts recently held that a breach of warranty did not violate section 11 of Massachusetts General Laws chapter 93A. In United Nat'l Ins. Grp. v. BMW of N. Am., LLC, the plaintiff alleged that BMW violated Chapter 93A based on alleged defects in its Mini Cooper automobiles. In dismissing the plaintiff's Chapter 93A claim, the court explained that a party seeking to establish Section 11 liability for breach of warranty must allege conduct which, if true, “would render the breach repugnant to the milieu of the commercial marketplace.” In that case, the complaint failed to set forth facts indicating that BMW failed to act while knowing of the defect.

In some circumstances, however, a breach of an agreement may constitute a violation of Chapter 93A. In order for a breach of contract claim to rise to the level of a Chapter 93A violation, there must be evidence that the breaching party acted in disregard of known contractual arrangements and in a manner intended to secure benefits for itself. This generally occurs where one party breached the contract in order to gain an unfair advantage over the other party — in other words, where the breach takes on an extortionate quality. For example, in Certified Power Sys. v. Dominion Energy Brandywine Point LLC, the court found that the defendant contractor violated Chapter 93A because it used “coercion and unscrupulous leverage” to withhold payments owed to its piping subcontractor at a time when it knew that the subcontractor was “financially exposed,” which conduct destroyed the subcontractor’s company. In Newly Wed Foods, Inc. v. Superior Nut Co., the court held that the defendant’s conduct rose above mere breach of contract where it failed to disclose that its product contained peanuts and subsequently attempted to cover up the product’s peanut content in an effort to continue selling the product to the plaintiff. In the majority of situations set forth in the case law, however, such extortionate conduct is missing.


86. Lafayette Place Assocs., 427 Mass. at 535-36.


93. Id. at *1. 6.

94. Id. at *9-10.


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III. CLAIMS BASED ON NEGLIGENCE

As with basic breach of contract claims, a claim based on simple negligence, without more, does not support a finding that a defendant violated Chapter 93A. In order to give rise to a potential Chapter 93A violation, the negligence must have amounted to or resulted in an unfair or deceptive act or practice. In Patterson v. Christ Church, for example, the plaintiff alleged an injury due to the defendants’ improper maintenance of a church pew, which the court found “at most could be construed as negligent supervision of a renovation project.” As a result, the conduct did not rise to the level of a Chapter 93A violation. Similarly, a negligent misrepresentation, standing alone, will not violate Chapter 93A.

Some instances of negligence and negligent misrepresentation do, however, rise to a Chapter 93A violation. Attempts by the courts to draw a line between actionable and non-actionable conduct have been fact-based and difficult to extrapolate. Generally, if conduct constitutes negligence and is also “extreme or egregious,” it will violate Chapter 93A.

IV. CLAIMS BASED ON CONDUCT OCCURRING OUTSIDE MASSACHUSETTS

Section 11 claims must be based on an unfair or deceptive act that occurred primarily or substantially in Massachusetts. Courts have explained that, under this provision, the “center of gravity” of the deceptive conduct must have occurred in Massachusetts. It is not sufficient if merely some acts related to the deceptive conduct took place in the commonwealth. For example, it is not enough to allege that several business meetings took place in Massachusetts if there was nothing unfair or deceptive about those meetings.

The fact that a party suffered a loss in Massachusetts is not determinative of whether the unfair or deceptive conduct occurred substantially in Massachusetts for purposes of Chapter 93A. In Pine Polly, Inc. v. Integrated Packaging Films IPF, Inc., for example, the court explained that injury to the plaintiff, a Massachusetts company, was not enough — even where the parties’ distribution agreement provided for Massachusetts law and jurisdiction — to demonstrate that the “center of gravity” of the wrongful conduct took place in Massachusetts. The defendant in that case, a Canadian company, allegedly used the plaintiff’s confidential customer information for its own benefit, but the complaint alleged no information concerning the location of the customers. In Auto Shine Car Wash Sys., Inc. v. Nice ’N Clean Car Wash, Inc., by contrast, where the defendants’ deceptive communications were made in Massachusetts and the plaintiff’s loss was suffered in Massachusetts, the center of gravity of the Chapter 93A claim was primarily and substantially within the commonwealth.

As a final practice note, the complaint should allege facts indicating that the deceptive acts occurred in Massachusetts. However, this issue is not typically decided on a motion to dismiss.


103. Id. at 164.

104. Id.


106. Baker v. Goldman Sachs & Co., 949 F. Supp. 2d 298, 308 (D. Mass. Sept. 4, 2013) (negligence must be “extreme or egregious” to violate Chapter 93A); see also Glickman v. Brown, 21 Mass. App. Ct. 229, 235 (Mass. App. Ct. 1985) (“[a] negligent misrepresentation of fact, the truth of which is reasonably capable of ascertainment is an unfair and deceptive act or practice within the meaning of c. 93A”); Synergy Commun., Inc. v. Citizens Bank, 2003 Mass. Super. Lexis 136, *10-11 (Mass. Super. Ct. March 17, 2003) (“In cases where the courts have found liability under c. 93A for negligent misrepresentations, the facts indicated a series of misrepresentations over a period of time, or at least more than a single response to a single inquiry. . . . these cases also reveal that the misrepresentations, although determined to be negligent and not intentional, were made in circumstances where the defendant benefitted from the plaintiff’s reliance on the erroneous statements, and, one may infer, would have known of the benefit at the time the misrepresentations were made.”).


109. Id. at 472; see also Pine Polly, Inc. v. Integrated Packaging Films IPF, Inc., 2014 U.S. Dist. Lexis 36757, at *19-26 (D. Mass. Feb. 27, 2014) (it is not enough for a plaintiff to merely allege some connections between a party and Massachusetts — what matters is whether acts connected with the unfair or deceptive conduct itself occurred in Massachusetts) (citing Kuwaiti, 438 Mass. at 472); Evergreen Partnering Grp., Inc., v. Pactiv Corp., 2014 U.S. Dist. Lexis 10218, at *10-18 (D. Mass. Jan. 28, 2014); ADA Solutions, Inc. v. Meadors, 2015 U.S. Dist. Lexis 4, at *59 (D. Mass. Apr. 6, 2015) (aggrieved party was based in Massachusetts and it may have suffered harm in Massachusetts; with only these connections, the court found that the conduct did not occur primarily or substantially in Massachusetts).


111. Id. at *23-24.


114. Resolute Mgmt., Inc. v. Transatlantic Reinsurance Co., 87 Mass. App. 296, 300-01 (2015) (reversing dismissal of complaint, reasoning that “the defendants have cited no appellate case in which the center of gravity of a §11 claim was determined adversely to a plaintiff upon a motion to dismiss (as compared to a motion for summary judgment or after trial), and we are aware of none”); but see Bruno Int’l Ltd. v. Vicor Corp., 2015 U.S. Dist. Lexis 123556, at *68 (D. Mass. Sept. 16, 2015) (dismissing Chapter 93A claim based on plaintiff’s inability to establish that unfair or deceptive acts occurred in Massachusetts).
V. CLAIMS BASED ON FAILED TRANSACTIONS OR CONDUCT DURING SETTLEMENT NEGOTIATIONS

A refusal to negotiate a deal or a decision to stop negotiating is not the sort of conduct that will create liability under Chapter 93A.115 In *Pappas Indus. Parks, Inc. v. Psarros*, the plaintiff unsuccessfully attempted to bring a Chapter 93A claim based on the defendants’ withdrawal from negotiations for a real estate swap.116 The Massachusetts Appeals Court stated “[i]t is not . . . immoral, unethical, oppressive, or unscrupulous — and therefore not unfair or deceptive — to break off incomplete and imperfect negotiations of a commercial agreement . . . . Every deal that goes sour does not give rise to a Chapter 93A claim.”117

Similarly, unfair settlement of claims or litigation violates Chapter 93A only if it also violates Massachusetts General Laws chapter 176D — the statute that requires insurance companies to settle claims fairly.118 Outside of the specific context of the insurance industry, settlement practices generally do not give rise to Chapter 93A liability.119

CONCLUSION

Given the limitations courts have placed on Chapter 93A claims, litigants and their counsel should think carefully before asserting a Chapter 93A claim that has a strong likelihood of being dismissed as outside the scope of Chapter 93A. A clearly improper Chapter 93A claim may damage the credibility of a litigant and his or her counsel. In addition, the overuse and inclusion of meritless Chapter 93A claims in pleadings threatens to dilute the impact of invoking the statute. Of course, when properly asserted, Chapter 93A claims remain powerful tools in the hands of litigants who have been wronged by another party’s unfair or deceptive conduct.

117. Id.
I. INTRODUCTION

This article is written for the next generation. The last several generations appear to be at perpetual war with the criminal justice system and the lawyers who make it operate.¹ Mistrust and skepticism abound.² Even judicial opinions may intentionally or inadvertently leave the impression of shoddy evidence and inept lawyers. Supreme Court Justice Tom Clark once remarked that, “if it weren’t for the incompetence of many lawyers, about half of [the] 2,000 cases [filed annually in the Supreme Court] would never have been docketed.”³ Similarly, Chief Justice Warren Burger accepted as a “working hypothesis” that “from one-third to one-half of the lawyers who appear in serious cases are not really qualified to render fully adequate representation.”⁴ As the siege against the justice system continues, critics worry that trial errors will rarely be rectified because the standard for ineffective assistance of counsel “allegedly tolerates gross incompetence.”⁵ If people knew of American criminal law only through modern commentary, they could be forgiven for thinking it is impossible for a defendant to ever get a fair trial.⁶ Any lawyer, especially a trial lawyer, could not help being disheartened by so many unanswered allegations leveled against members of the bar.

The purpose of this article is to highlight a recent spike in successful ineffective assistance of counsel claims in Massachusetts.

1. The New York Times recently asked, “So why is it so hard to keep [prosecutors] from breaking the law or violating the Constitution?” Editorial, “To Stop Bad Prosecutors, Call the Feds,” N.Y. TIMES, June 6, 2016, at A22. The editors claimed prosecutors “are almost never held accountable for misconduct even when it results in wrongful convictions.” Id. Chicago reporters found a number of cases in which “inept” lawyers were allowed to represent indigent defendants in capital cases. See Ken Armstrong and Steve Mills, “Inept Lawyers Still on List for Capital Cases,” CHICAGO TRIBUNE, March 10, 2002.

2. A 1991 study of the Massachusetts courts noted “the decline in the public confidence in all branches of government.” Harbridge House, Justice Endangered: A Management Study of the Massachusetts Trial Court, 1991, vii. Deterioration of court facilities also adds to the “growing lack of confidence in and respect for the justice system in Massachusetts.” Id. at 48. Court procedures, foreign to most people, also impair confidence: “Few things have so plagued the administration of criminal justice, or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials and the lack of finality.” Evitts v. Lucey, 469 U.S. 387, 405-06 (1985) (Burger, C.J., dissenting).


6. Id. at 1108.

7. Susan Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,” 46 AM. U. L. REV. 1337, 1345 (1997). Commentators agree that additional sources of dissatisfaction may include: (1) lack of civility among lawyers; (2) unethical behavior; (3) aggressive business tactics; (4) fierce competition and pressure to win; (5) absence of loyalty to law firms; (6) frequent and abrupt dissolutions of law firms; (7) aggressive advertising; and (8) a perceived general decline in “values, ideals and morals.” Id. at 1344-45.

Some bristle at the suggestion that the public has any concerns about lawyer competence. Following a survey by the American Bar Association, one author concluded, “Some may recall former Chief Justice Warren Burger’s criticism of the competence of the trial bar in the mid-1980s; it seems the profession has overcome that problem, if it ever existed. Competency is not an issue.” Gary A. Hengstler, “Vox Populi: The Public Perception of Lawyers: ABA Poll,” 79 A.B.A. JOURNAL, Sept. 1993 at 60, 61.

A study commissioned by the American Bar Association in 1999 concluded that “almost half” of the public lacked confidence in lawyers. American Bar Association, Perceptions of the U.S. Justice System, 7, 12, 49-50 (1999). The survey also compared confidence levels among various institutions and professions such as the Supreme Court, local police, physicians, accountants, organized religion, federal courts, judges, the justice system, state and local courts, public schools, the executive branches of governments, legislatures, the prison system, Congress and the media. The media ranked dead last in confidence (8 percent) with lawyers next in line (14 percent). Id.


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This spike is not only significant for trial lawyers and judges, but it also has the potential to become yet another source of the “poor public perception of lawyers.”⁷ Amidst the noble quest to guarantee fair trials, lawyers’ conduct often becomes the medium for expanding constitutional rights. In the process, lawyers are sometimes cast in a negative light. This does not have to be the case. We can have copious rights of the accused without denigrating lawyers. In fact, we should celebrate lawyers — for “there is no law without lawyers.”⁸
II. The Evolving Perception of Lawyers

Colonial Massachusetts initially presented a hostile environment for lawyers because the Puritans “distrusted and deliberately excluded lawyers” from the colony. By the eve of independence from Great Britain, however, the public perception of lawyers had shifted dramatically and Massachusetts lawyers had become an integral part of society. As John Adams, a practicing attorney at the time, noted, “The courts and the bar, instead of scenes of wrangling, chicanery, quibbling and ill manners, were soon converted to order, decency, truth and candor.” As Massachusetts lawyers contributed to the growth of a new nation, they became known as persons of “exceptional intelligence” and “high talents,” as well as “intellectual pioneers,” “wise, able and kindly.”

This perception remained in place during the early years of the republic. In the 1830s, Alexis de Tocqueville wrote:

The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation, because they do not attribute to them any sinister designs. … [L]awyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. … [L]awyers fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution.

The Supreme Judicial Court of Massachusetts (SJC) has traditionally held lawyers in the highest regard. In 1943, Justice Qua defined the essence of the professional lawyer: “The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character.” As members of a special profession, lawyers have a unique role in society: “All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and to separate the fit from the unfit. Only those who pass the test are allowed to enter the profession, and only those who maintain the standards are allowed to remain in it.”

Demonstrating a diplomatic touch, various studies on the court system have managed to criticize the Massachusetts justice system without disparaging lawyers. In 1976, the Governor’s Committee on Judicial Needs characterized the courts as being “on the brink of disaster,” but noted “Massachusetts dispenses a high quality of justice.” In 1991, a consulting firm identified court deficiencies, but noted that the courts “operate with a degree of professionalism” that did not exist years earlier. In 2003, the Visiting Committee on Management did not identify any deficiencies by counsel.

III. The Origin of Effective Assistance of Counsel

While regarded as the seminal case on ineffective assistance of counsel, Strickland v. Washington traces its roots to a case 52 years earlier. Although never previously “directly and fully” addressing a claim of actual ineffectiveness, the Supreme Court noted that a “long line of cases” had previously recognized the Sixth Amendment right to counsel was needed “to protect the fundamental right to a fair trial.”

In Powell v. Alabama, Justice Sutherland, writing for the majority, addressed the “denial of effective and substantial aid” of counsel for the first time. That notorious case recounted the timeline of heinous crimes followed by extraordinarily swift trials: on March 25, 1931, six males raped two females; on March 31, indictments charged nine defendants; on April 6, the first of four separate one-day trials commenced. A jury acquitted one defendant, found the other guilty.

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remaining defendants guilty and imposed the death penalty.25 On a state court appeal, the defendants claimed that they were denied the right of counsel, but the Alabama Supreme Court affirmed with Chief Justice Anderson dissenting.26 The Supreme Court held that the “defendants were not accorded the right of counsel in any substantial sense.”27

Both Alabama Chief Justice Anderson and the Supreme Court arrived at a similar conclusion without blaming the lawyers. The Supreme Court noted that Chief Justice Anderson “disclaim[ed] any intention to criticize harshly counsel who attempted to represent defendants at the trials.”28 The Supreme Court also quoted a colloquy between counsel and the judge at arraignment. If anything, counsel appeared at all times to be professional, eager to assist and concerned about the brief time to prepare for trial.29

Rather than criticizing counsel, the Supreme Court rested its holding on circumstances showing a due process violation:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged

25. Id. at 50. The majority opinion referenced only three trials, did not reference the acquittal, and did not reference a reversal of one conviction. Justice Butler clarified the procedural posture of the case in his dissent:

Nine defendants including Patterson were accused in one indictment, and he was also separately indicted. Instead of trying them en masse, the State gave four trials . . . . Weems and Norris were tried first. Patterson was tried next on the separate indictment. Then five were tried. These eight were found guilty. The other defendant, Roy Wright, was tried last and not convicted. The convicted defendants took the three cases to the state Supreme Court, where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.

Id. at 66 (Butler, J., dissenting).


27. Id. at 58. The Supreme Court emphasized the importance of lawyers in our just system. “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.”

Id. at 64. The accused, no matter how well educated, “lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”

Id. “If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”

Id. “Attorneys are officers of the court, and are bound to render service when required by such an appointment.”

Id. at 65.

28. Powell v. Alabama, 287 U.S. 45, 58 (1932). The court noted that Chief Justice Anderson instead opined, “The record indicates that the appearance of counsel was rather pro forma than zealous and active.”

Id. at 58 (quoting Alabama Chief Justice Anderson).

29. At one point, Attorney Roddy remarked, “I have not prepared this case for trial. . . . they have not given me an opportunity to prepare the case. . . . without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation for it and not being familiar with the procedure in Alabama. . . . If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent.”

Id. at 55 (quoting Attorney Roddy). Attorney Moody said, “Your Honor appointed us all and we have been proceeding along every line we know about it under Your Honor’s appointment. . . . Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do. . . . I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.”

Id. at 56 (quoting Attorney Moody).

Justice Butler’s dissenting opinion sheds even more light on the overall performance of counsel. He noted that the appeals resulted in “three pain-taking opinions” from the Alabama Supreme Court in which “[m]any of the numerous questions decided were raised at the trial and reflect upon defendant’s counsel much credit for zeal and diligence on behalf of their clients.”

Id. at 74 (Butler, J., dissenting). “And no one has come to suggest any lack of zeal or good faith on their part.”

Id. Justice Butler also noted the state court assessment of counsel’s conduct: “[A]torney Moody was an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases. We do not regard the representation of the accused by counsel as pro forma. A very rigorous and rigid cross-examination was made of the state’s witnesses, the alleged victims of rape, especially in the cases first tried.”

Id. at 75 (quoting Weems v. State, 224 Ala. 524, 141 (1932)).


31. Id. at 58.

32. Id.

33. Id. at 59.

34. Commonwealth v. Saferian, 366 Mass. 89, 90 (1974). The SJC has since suggested that Saferian presaged Strickland: “Ten years after we established the Saferian test to determine when a defendant is entitled to a new trial because of the ineffectiveness of counsel, the United States Supreme Court established its own test under Federal constitutional law.” Strictly speaking that timeline is true; however, the concept of ineffective assistance of counsel predates Saferian. In 1970, 14 years before Strickland and four years before Saferian, the Supreme Court noted, “It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”


35. Saferian, 366 Mass. at 89.

36. Id. at 97.

37. Id. In assessing counsel’s conduct, the SJC noted that counsel was a 40-year “veteran of the criminal bar.”

Id. at 93. “Counsel for the defendant engaged fully in the examination of every witness at the hearing on the motion to suppress as well as at trial, and something should be said here about his style. As counsel testified before the special master, his regular method of trying cases relied little on pre-trial preparation and much on impromptu cross-examination of prosecution witnesses.”

Id. at 94 (footnotes omitted). Counsel was also “thoroughly accessible to his client during the two-day proceedings on the motion to suppress and again for the two days of the trial itself.”

Id. at 97. A special master found that counsel’s “conduct of the trial was by no means lackadaisical or perfunctory.”

Id. at 94 n.5.
passed over, for he points to no particular motion that would have been of value to the defendant. \(^{48}\) The SJC cautioned against such rigid standards because courts should “not be carried to the opposite extreme of holding that assistance was inadequate when counsel did not conform in some respect to an ideal model of how counsel should collate evidence or otherwise conduct himself.” \(^{39}\) Mere errors are not sufficient to show counsel was ineffective; there must have been “serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer — and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense.” \(^{40}\)

During four years following the *Safetyian* decision, the SJC did not find any prejudicial errors by counsel, despite numerous claims of ineffective assistance. \(^{41}\) The SJC rejected an assortment of claims: counsel imbibed intoxicating liquors during the trial, \(^{42}\) counsel requested that the jury be informed of the codefendant’s guilty plea, \(^{43}\) counsel conferred with the defendant only once before trial, \(^{44}\) counsel did not file a plethora of pre-trial motions, \(^{45}\) counsel made flawed judgments, \(^{46}\) and counsel was less than zealous. \(^{47}\) Far from being critical of counsel, the SJC went out of its way to point out areas where counsel performed well. \(^{48}\)

In these cases, the SJC repeatedly emphasized the need for independent professional judgment and the inherent imperfections in the trial process. As such, counsel cannot be expected to “conform[] in some respect to an ideal model of how counsel should conduct himself.” \(^{49}\) Counsel must be free to exercise independent professional judgment without the constant dread of an ineffective assistance claim lurking in the background. \(^{50}\) The SJC repeated, “it is not our intention to second guess competent lawyers working hard for defendants who turn on them when the jury happens to find their clients guilty.” \(^{51}\) Once again, the SJC warned, “[t]he test is not to be made with the advantage of hindsight, and any violation of the attorney’s duty must be both substantial and prejudicial.” \(^{52}\) The SJC also acknowledged that the right to effective counsel does not mean the right to perfect counsel: “We have made it clear that ‘the guaranty of the right to counsel is not an assurance to defendants of brilliant representation or one free of mistakes.’” \(^{53}\) “[T]he representation one receives is not constitutionally infirm unless it is tantamount to no assistance at all . . . thus depriving the accused of a ‘trial in any real sense.’” \(^{54}\)

Given the deferential standard in *Saferian*, it is not surprising that it took four years and 10 cases claiming ineffective assistance of counsel before the SJC found a prejudicial error in the case of Commonwealth v. Bolduc. \(^{55}\) In that case, Bolduc escaped from prison and participated in robberies with two co-defendants. \(^{56}\) Counsel represented Bolduc and the co-defendants. \(^{57}\) Following guilty pleas, counsel delivered a disposition argument for his three clients and requested mercy for all. \(^{58}\) “He stated, however, that Bolduc’s position was probably hopeless since he was already serving a life sentence. He therefore concentrated on the plight of the codefendants, arguing that Bolduc was the instigator of the criminal activity, and that they, the codefendants, had participated only because they felt honor-bound to help an escaper who had no one else to look to for aid.” \(^{59}\) The SJC held that “joint representation of the defendant and his codefendants is enough to require a ruling that, as to his personal obligations to his client.” \(^{60}\)

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38. Id. at 99.
39. Id.
41. Commonwealth v. Stone, 366 Mass. 506, 516 (1974) (“The defense has joined the large number of other defendants who in recent years have alleged ineffective assistance of counsel as a denial of the Sixth Amendment right.”).
43. Stone, 366 Mass. at 516-17.
48. Commonwealth v. Mains, 374 Mass. 733, 738 (1978) (“His trial counsel presented that defense to the jury fully and fairly, through cross-examination of the witnesses for the prosecution, through examination of the defendant, and in argument.”); Satterfield, 373 Mass. at 111 (“[C]ounsel for the defendant in his general conduct of the case in court gave competent service to his client. He made a full battery of pre-trial motions. He had a command of the facts and examined the witnesses with care. His interactions with opposing counsel and the court were those of a lawyer of some experience.”); Delle Chiaie, 367 Mass. at 537 (“it is apparent that the attorney was well acquainted with the facts of the case”); Commonwealth v. Stone, 366 Mass. 506, 517 (1974) (“A review of the transcript gives no indication that counsel should be subjected at this juncture to the statement that he was ineffective. Rather, he actively presented pre-trial motions, took part in the voir dire, and put the Commonwealth’s three principal witnesses through intensive cross-examination, bringing out their roles in the conspiracy, challenging their credibility, and occasionally casting doubt on some of the evidence.”).
49. Stone, 366 Mass. at 517. The SJC also addressed the growing practice of filing frivolous motions merely to guard against ineffective assistance claims: “The practice of filing such motions apparently has grown to the point that such motions have been referred to as ‘routine pre-trial motions’ and the failure to file them has been claimed to indicate per se incompetence or a deficiency in counsel’s representation of his client. We rejected such a claim in [Saferian].”
50. Stone, 366 Mass. at 517.
51. “Most important, the quality of counsel’s representation of a criminal defendant is certain to improve by following the practice of preparing and filing motions which are significant and appropriate to the particular case, instead of the blunderbuss approach of filing every known ‘boiler plate’ type of pre-trial discovery motion.” Commonwealth v. Hall, 369 Mass. 715, 723 (1976).
55. 375 Mass. 530 (1978). One year earlier, the SJC addressed the problem of counsel not taking steps to “file a timely bill of exceptions or otherwise to preserve [the defendant’s] right to seek appellate review of the convictions.” Pires v. Commonwealth, 373 Mass. 829, 830 (1977). At a hearing, counsel testified that he considered perfecting the appeal, but decided, without consultation with the defendant, that an appeal would fail. Id. at 831-32. The SJC did not directly address whether counsel erred under Saferian or whether Saferian even applied to appeals. Id. at 835-36. Instead, the court noted that counsel’s “failure to inform the petitioner of his statutory right to appeal was not in accord with his professional obligations to his client.” Id. at 835 (citing American Bar Association Standards for Criminal Justice). Nevertheless, the defendant suffered no prejudice because any appeal “would be frivolous — that is, it not merely lacked merit, but would not have a prayer of a chance.” Id. at 838.
56. Id. at 531.
57. Id.
58. Id. at 533.
59. Id.

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sentencing, the defendant’s Sixth Amendment right to the effective assistance of counsel was violated.60

V. SUPREME COURT STANDARD

Six years later, in 1984, in Strickland, the Supreme Court articulated the federal standard for ineffective assistance of counsel. Through that case, the court preserved, if not hallowed, the professional judgment of the lawyer in the face of a menu of alleged missteps.61 The Supreme Court ultimately rejected the claims and held that the record “made clear that the conduct of respondent’s counsel at and before respondent’s sentencing proceedings cannot be found unreasonable.”62 Even if the challenged conduct was unreasonable, “respondent suffered insufficient prejudice to warrant setting aside his death sentence.”63 Just as it had done in the Powell case, the Supreme Court in Strickland successfully advanced the rights of the accused with and without designating counsel.

In fact, the Supreme Court went out of its way to defend the unique challenges lawyers face and to establish standards of review that respect the role of lawyers. The court noted that neither lawyers nor trials can be expected to be perfect. “Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . . Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”64 Reasonable minds can differ over how best to represent a client. “Even the best criminal defense attorneys would not defend a particular client in the same way.”65 Rigid standards are simply inconsistent with the role of a lawyer. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”66 Strategic decisions are particularly insulated from attack. “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”67 “The object of an ineffectiveness claim is not to grade counsel’s performance.”68 Based on these considerations, judicial scrutiny of counsel’s performance must be “highly deferential,” eliminate the “distorting effects of hindsight,” and presume that counsel’s conduct “falls within the wide range of reasonable professional assistance.”69

Defending lawyers, the majority eschewed any standards that would “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.”70 More specific guidelines would be inappropriate given the language of the Sixth Amendment referring “simply to ‘counsel,’ not specifying particular requirements for effective assistance.”71 The court chose to rely “on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the amendment envisions.”72 The court also emphasized that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”73 “The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.”74 In prophetic language, the court warned that “[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”75

60. Id. at 543. In Massachusetts, claims of ineffective assistance in capital cases may also be reviewed under Mass. Gen. Laws ch. 278, §33E: “In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence.” The SJC may order a new trial or enter a verdict of a lesser degree of guilt if the verdict is against the law or the weight of the evidence or “for any other reason that justice may require.” Id. The SJC described the relationship between §33E review and review under Saferian: “We conclude that, if a defendant convicted of murder in the first degree is unable to show on his direct appeal that, as to an unpreserved claim of error, there is a substantial likelihood of a miscarriage of justice, he would not prevail by asserting as to the same issue the ineffectiveness of his counsel. In other words, the statutory standard of § 33E is more favorable to a defendant than is the constitutional standard for determining the ineffectiveness of counsel.” Commonwealth v. Wright, 411 Mass. 678, 683 (1992). Whether an ineffectiveness claim is raised under §33E or §33E, the SJC still must determine “whether there was an error in the course of the trial.” Wright, 411 Mass. at 683. If there was an error, the question of prejudice in a capital case will turn on “whether that error was likely to have influenced the jury’s conclusion.” Id.

61. The menu of errors included: (1) failure to move for a continuance; (2) failure to request a psychiatric report; (3) failure to investigate and present character witnesses; (4) failure to seek a presentence investigation report; (5) failure to present meaningful arguments; (6) failure to investigate the medical examiner’s report; and (7) failure to cross-examine medical experts. Strickland v. Washington, 466 U.S. 668, 675 (1984).

62. Id. at 699.

63. Id. at 698-99.

64. Id. at 693.

65. Id.

66. Id. at 688-89.


68. Id. at 697.

69. Id. at 689. In a dissenting opinion, Justice Marshall criticized the majority for providing too much deference to lawyers: “My objection to the performance standard adopted by the court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.” Id. at 707 (Marshall, J. dissenting). Justice Marshall would have preferred rigid standards. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one’s client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

70. Strickland, 466 U.S. at 689.

71. Id. at 688.

72. Id. “Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.” Id.


74. Id. at 690. Anyone can fight a better battle in hindsight. “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Id. at 689.

75. Id. at 690.
VI. Supreme Court Jurisprudence

In the years since Strickland, the Justices have reached unanimous agreement on competent conduct: counsel did not err by failing to follow American Bar Association standards, by withdrawing an insanity plea, by conceding guilt, by failing to include all possible points in a closing argument, by failing to file a suppression motion, by failing to consult with an expert, by refusing to present false evidence or by failing to have a certain level of experience.

The Justices have also agreed on non-prejudicial errors: failing to anticipate inadmissible evidence years after trial, providing inadequate closing argument, failing to present additional mitigating evidence, and providing erroneous advice as to parole eligibility.

The Justices have also been able to agree on conduct that results in prejudicial error: failure to seek funds for an expert under the mistaken belief that funds were unavailable, failure to uncover and present extensive mitigating facts in the death penalty sentencing phase, and failure to conduct any pre-trial investigation that would have uncovered critical evidence.

The Justices often disagree on conduct that falls outside the “wide range of professionally competent assistance,” such as: providing advice during plea negotiations, obtaining discovery, proposing jury instructions, and investigating mitigating facts in death penalty sentencing phases.

76. Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (“Judging counsel’s conduct in the 1980’s on the basis of these 2003 guidelines — without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial — was error [on the part of the reviewing court].”)

77. Knowles v. Mirzayance, 556 U.S. 111, 125 (2009) (“Counsel reasonably concluded that this defense was almost certain to lose.”)

78. Florida v. Nixon, 543 U.S. 175, 178 (2004) (no error by counsel, “when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death.”)

79. Yarbrough v. Gentry, 540 U.S. 1, 8 (2003) (“Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach. . . . In short, judicious selection of arguments for summation is a core exercise of defense counsel’s discretion.”)

80. Premeo v. Moore, 562 U.S. 115, 130 (2011) (“A defendant who accepts a plea bargain on counsel’s advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.”)


82. Nix v. Whiteside, 475 U.S. 157, 166 (1986) (the duty of counsel “is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.”)

83. United States v. Cronic, 466 U.S. 648, 665 (1984) (counsel is not ineffective due simply to fact that defense “lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case.”)

84. Maryland v. Kulbicki, 136 S. Ct. 2, 4 (2015) (“It was, on this record Thompkins cannot show prejudice.”)

85. Spisak v. Morrison, 477 U.S. 362, 398 (2000) (“We find counsel’s decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison’s attorney offered for his omission betray a startling ignorance of the law — or a weak attempt to shift blame for inadequate preparation.”)

There are many reasons why “[s]urmounting Strickland’s bar is never an easy task.” 96 “An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.” 97 A reviewing court is also at a significant disadvantage when assessing counsel’s conduct. “Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.” 98 Also unlike a reviewing court, an “attorney often has insights borne of past dealings with the same prosecutor or court.” 99

In cases that followed Strickland during the past 30 years, the Supreme Court has also cautioned against demanding perfection. “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” 100 To obtain relief on an ineffective assistance claim, a defendant “must establish both serious attorney error and prejudice.” 101 Reviewing courts, and lawyers too, must resist the “natural tendency to fault an unsuccessful defense.” 102 “After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome.” 103 “[A]n analysis focusing solely on the mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. . . . The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding.” 104 “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” 105 “Counsel is constitutionally ineffective if his performance is both deficient, meaning his errors are ‘so serious’ that he no longer functions as ‘counsel,’ and prejudicial, meaning his errors deprive the defendant of a fair trial.” 106

The court also cautioned against adopting aspirational standards that may not reflect the practice of law. The court has “consistently declined to impose mechanical rules on counsel — even when those rules might lead to better representation.” 107 “Under the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.” 108 Restatements of professional standards may be guides to what reasonableness entails, “but only to the extent they describe the professional norms prevailing when the representation took place.” 109 “When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.” 110

Challenged by rigorous standards of review and the deference shown to counsel, “ineffective assistance claims generally face stiff headwinds in court.” 111 “According to one study, only 3.9 percent of ineffective assistance claims succeed.” 112 In another study of habeas petitions in Michigan from 2005 to 2010, ineffective assistance claims had a success rate of just 1.3 percent. 113 In another study of ineffective assistance claims from 1990 to 1992 in California, New York, Texas and Alabama, claims succeeded in 8 percent of the cases. 114 These low success rates have been generally consistent despite the fact that “ineffective assistance of counsel claims are the

96. Padilla, 559 U.S. at 371.
98. Id.
100. Yarborough v. Gentry, 540 U.S. 1, 6 (2003). “Strickland does not guarantee perfect representation.” Harrington, 562 U.S. at 110. “Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Id. “The law does not require counsel to raise every available nonfrivolous defense. . . . Counsel also is not required to have a tactical reason — above and beyond a reasonable appraisal of a claim’s dismal prospects for success — for recommending that a weak claim be dropped altogether.” Knowles v. Mirzayance 556 U.S. 111, 125 (2009).
102. Id. at 166.
110. Nix, 475 U.S. at 165. Justice Alito has stressed the limited usefulness of bar association recommendations: “[M]y understanding [is] that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole.” Van Hook, 558 U.S. at 13-14 (Alito, J., concurring). Justice Alito emphasized these points once again one year later in a concurring opinion where he noted a couple of problems with adopting standards promulgated by bar organizations. First, “ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts” that are not permitted to delegate that responsibility to others. Padilla v. Kentucky, 559 U.S. 356, 377 (2010) (Alito, J., concurring). Second, “such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.” Id.
112. Id. at 33 n.58. This percentage is based upon an ABA-sponsored study of 4,000 federal and state reported appellate decisions between 1970 and 1983. Id.; Richard Klein, “The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel,” 13 HASTINGS CONST. L.Q. 625, 632 (1986).
114. Ricks, supra note 113, at 1126.
most frequently filed claim in both federal and state post-conviction proceedings.”115 “And the number of ineffective assistance claims is rising.”116

VII. MASSACHUSETTS JURISPRUDENCE

In contrast to the traditional deference shown by appellate decisions, the SJC has recently shown less hesitation in finding counsel incompetent. From January through August 2016, the SJC faced ineffective assistance claims in 13 cases. In 11 cases, through striking unanimity of opinion, that court found errors by counsel, with six resulting in prejudice (46 percent success rate).117 That box score, standing alone, should give lawyers pause. This recent line of cases is even more significant when contrasted with Massachusetts cases from the last several years. In 2013, the SJC heard 21 cases raising ineffective assistance claims and found a non-prejudicial error in one case and remanded a second case for further findings (0 percent success rate).118 In 2014, the SJC heard 23 cases raising ineffective assistance claims and found prejudicial errors in three and non-prejudicial errors in two (13 percent success rate).119 In 2015, the SJC heard 23 cases raising ineffective assistance claims and found one prejudicial error, one non-prejudicial error, and remanded one case for further findings (4.3 percent success rate).120 Thus, the 2016 cases (46 percent success rate) represent not only a variance from national trends (1.3 to 8 percent success rate), but also a departure from the SJC’s own jurisprudence during the last several years (6 percent success rate). Putting aside the spike evidenced by these statistics, a closer look at the rationale for the 2016 cases raises even more significant questions for lawyers and trial and appellate judges.

In two cases, the SJC expressly expanded the concept of effective assistance of counsel. In Commonwealth v. Celester,121 the defendant, following consultation with his lawyer and after being advised by the police of his Miranda rights, denied involvement in a shooting and blamed someone else. The Superior Court rejected the defendant’s post-trial claim that he would not have talked if he had been aware of what the police knew.122 The SJC reversed, ruling

115. Id.
116. Id. “As ‘such claims have become more and more prevalent, claims about other constitutional deprivations have fallen by the wayside,’ causing scholars to suggest that these claims predominate because petitioners ‘perceive[] that other constitutional deprivations have fallen by the wayside,’ causing scholars

Just two cases lacked any error by counsel. See Commonwealth v. Alcayne, 474 Mass. 771, 782-86 (2016) (no error where counsel did not challenge consent to search); Commonwealth v. Cassino, 474 Mass. 85, 94 (2016) (no error where counsel did not challenge DNA evidence that would have shown one in one million chance DNA belonged to another).


that trial counsel erred by failing to make “an effort at a minimum to understand the factual basis for the murder charge that had been lodged against the defendant.” The SJC expressly acknowledged extending the concept of effective assistance of counsel. In Commonwealth v. Epps, defense counsel consulted with two experts on shaken baby syndrome, but ultimately did not call them as witnesses. Counsel also consulted with other experienced lawyers, read literature on the subject, and chose to present a third-party culprit defense. The Superior Court and the Appeals Court rejected the defense claim that counsel should have called an expert to testify — both tribunals agreeing that counsel’s strategic decision was not manifestly unreasonable. The SJC disagreed, but declined to reconcile this case with any precedent.

In three cases, despite the absence of testimony or affidavits from counsel, the SJC found counsel erred. In Commonwealth v. McWilliams, the Superior Court rejected the defendant’s claim that counsel misadvised him about declining to testify at trial. The SJC ultimately affirmed the decision of the Superior Court; however, the SJC assumed counsel misadvised the defendant about the impeachment value of prior convictions, though “[t]rial counsel did not file an affidavit.” In Commonwealth v. Smith, the Superior Court denied a motion to suppress the defendant’s statement to the police as involuntary. On appeal, the defendant raised a Miranda claim for the first time. Without ever hearing from trial counsel, the SJC accepted the Miranda argument and concluded that counsel erred by failing to include that claim in the suppression motion. In Commonwealth v. Navarro, the Appeals Court rejected the defense claim that the trial judge erred by failing to provide an identification instruction sua sponte and counsel erred by failing to request the instruction. On further review, the SJC summarized rejected the allegation of judicial error “because the law as it existed at the time of the trial did not require” such an instruction, but without hearing from counsel, the SJC concluded that it was “inconceivable” for counsel not to request the instruction.

124. Id. at 571. The SJC cited American Bar Association Standards for Criminal Justice, Defense Function, Standard §4-3.7(a) (4th ed. 2015) (“Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and . . . take necessary actions to vindicate such rights . . .”).

125. “The United States Supreme Court does not appear to have considered specifically whether the Fifth Amendment right to assistance of counsel in connection with a custodial interrogation is a right to effective assistance of counsel.” Celester, 473 Mass. at 567 n.19. The SJC based its decision on art. 12 of the Massachusetts Declaration of Rights, which states in relevant part: “No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favourable to him; to meet the witnesses himself, or his counsel, at his election.” The Supreme Court has, however, indicated that the right to effective assistance of counsel is tied directly to the ability of the accused to receive a fair trial — not a favorable interrogation. “[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.” United States v. Cronic, 466 U.S. 648, 658 (1984).

The SJC opinion assumes that counsel would have been successful in disgorging information from the police. Also, the timeline of the Celester case illustrates the extraordinary reach of an effective assistance claim. The lawyer at issue rendered his advice in 1994, and twenty-two years later, in 2016, the SJC established a new constitutional rule, measured counsel’s conduct against that new rule, and deemed counsel’s advice deficient. Thus, the SJC held counsel responsible for an error that was not even recognized as such until more than two decades had passed. Contrast Strickland v. Washington, 466 U.S. 668, 689 (1984) (“it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.”); Maryland v. Kubrick, 136 S. Ct. 2, 4 (2015) (counsel is not “constitutionally required to predict” a post-trial change in the law); Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (“Judging counsel’s conduct in the 1980’s on the basis of these 2003 Guidelines — without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial — was error [on the part of the reviewing court].”); Commonwealth v. Adams, 374 Mass. 722, 729 (1978) (“The test is not to be made with the advantage of hindsight, and any violation of the attorney’s duty must be both substantial and prejudicial.”).


127. Id. at 744, 752.

128. Id. at 752-53.

129. Id. at 752, 755-56.

130. “[T]he defendant was deprived of a defense from the confluence of counsel’s failure to find such an expert [who could be helpful] and the evolving scientific research that demonstrates that a credible expert could offer important evidence in support of his defense.” Id. at 767-68. Contrast Kulbicki, 136 S.Ct. at 4-5 (“Lawyers are not required to ‘go looking for a needle in a haystack,’ [especially] when they have ‘reason to doubt there is any needle there.’” (quoting Rompilla v. Beard, 545 U.S. 374, 389 (2005)).

131. “[W]e recognize that we can cite no case presenting the unusual circumstances found here that would justify such an analysis.” Epps, 474 Mass. at 768 n.28.


133. Id. at 620. In an affidavit in support of the motion, the defendant alleged that trial counsel told him “he could be impeached with his prior convictions.” Id. at 620-21.

134. Id. at 621-22. “Although counsel misinterpreted G.L. c. 233, §21, the defendant has failed to prove by a preponderance of the evidence ‘that, but for his counsel’s erroneous advice concerning the admissibility of his [prior convictions], he would have testified in his own defense.’” Id. at 621 (quotating Commonwealth v. Freeman, 29 Mass. App. Ct. 635, 642 (1990)). “The record suggests that in deciding not to testify the defendant did not rely on trial counsel’s advice regarding prior convictions.” McWilliams, 473 Mass. at 621. Contrast Strickland v. Washington, 466 U.S. 668, 690 (1984)(“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”).


136. Id. at 803.

137. Id. at 807.

138. Id. at 807-10.


141. Id. at 251.

142. Id. at 254. Despite the “inconceivable” conduct by counsel, the SJC concluded that the trial court would not have mattered because an accomplice identified the defendant, telephone records linked the defendant to the crime, and the victims identified the getaway car that was connected to the defendant. Id. at 260. Trial counsel would logically have been aware of the state of the evidence and could easily have reached the same conclusion. See Commonwealth v. Saferian, 366 Mass. 89, 98-99 (1974) (courts do not lend encouragement to “motions that have no purpose in view except to protect counsel against later charges of incompetence or neglect.”). Contrast Strickland v. Washington, 466 U.S. 668, 690 (1984) (“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment.”).
In two cases, the SJC found errors without probing strategic calculations by counsel. In Commonwealth v. Millien, the Superior Court rejected a new trial motion and determined that counsel’s misapprehension about the availability of funds for an expert did not result in prejudice because the evidence was overwhelming and an expert would not have been helpful. Counsel reviewed studies relied upon by the commonwealth’s expert witness and the medical literature on shaken baby syndrome but focused on third parties with access to the child and the possibility that a brain injury resulted from an accidental fall off a couch (consistent with the defendant’s story). The SJC disagreed and concluded the error was prejudicial. The SJC never addressed the strategic judgment by counsel, after his own research into medical literature, to forgo presentation of an expert and to suggest that the evidence showed others could have harmed the child—a strategy that proved successful on two of the charges. In Commonwealth v. Weaver, the Superior Court rejected the defense claim that counsel erred by failing to consult with a mental health expert regarding the voluntariness of the defendant’s statement. The SJC disagreed and “assume[d] without deciding that trial counsel’s failure to consult with a mental health expert was not a strategic or tactical decision and thus manifestly unreasonable.”

The SJC disagreed with counsel’s strategy in two cases. In Commonwealth v. LaBrie, the Superior Court rejected the defendant’s claim that counsel should have consulted with an oncologist. Counsel sought funds for an oncologist but presented testimony from a forensic psychologist. The Superior Court “concluded that defense counsel ‘chose the best possible defense and presented it well at trial.’” The SJC disagreed, holding that it was “patently unreasonable for the defendant’s counsel not to consult” with an oncologist. The SJC reached this decision, despite the trial judge’s positive assessment of counsel’s conduct and the fact that “counsel’s decision not to consult with an independent oncologist appears to have been a strategic decision.” In Commonwealth v. Lally, the Superior Court rejected the defendant’s claim that counsel erred by failing to object to DNA evidence that lacked the required accompanying data to provide context. Although finding no prejudice, the SJC disagreed with counsel’s decision to attack the quality of the evidence rather than press an unavailing challenge to its admissibility.

The SJC gave the defendant in Commonwealth v. Sylvain two chances to demonstrate prejudice. The District Court rejected a claim that counsel provided erroneous advice regarding deportation consequences of a guilty plea. On the first appeal, the SJC disagreed with the District Court, concluded that counsel erred, and remanded the case for further “findings and credibility determinations” on the issue of whether the defendant would have opted for a trial but for his lawyer’s erroneous advice. The defendant then

144. Id. at 428. In an affidavit in support of a motion for a new trial, counsel acknowledged that he did not request funds to hire an expert on shaken baby syndrome because he believed money would not be available. Id. at 426.
145. Id. at 425.
146. Id. at 433.
147. Contrast Harrington v. Richter, 562 U.S. 86, 109 (2011) (“There is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’”) (quoting Yarbrough v. Gentry, 540 U.S. 1, 8 (2003)).
148. Id. at 106. A reviewing court may reasonably conclude that “defense counsel could follow a strategy that did not require the use of experts.” Id. at 106-07.
149. The Millien case is also unlike the facts presented in Hinton v. Alabama, 134 S. Ct. 1081, 1088-89 (2014). Hinton’s lawyer not only failed to seek funds for an expert based on a mistaken belief as to availability, but he also failed “to perform basic research” on the expert issue. Id. Millien’s lawyer did the research and proceeded on a different path. Millien, 474 Mass. at 426. Just because Millien’s counsel misjudged the availability of funds to hire an expert does not necessarily mean that he botched the entire case from that point forward. See Hinton, 134 S.Ct. at 1089 (“We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired.”).
150. Id. at 787 (2016).
151. Id. at 788, 807. The motion judge, who was not the trial judge, made extensive written findings of fact after three days of evidentiary hearings. Id. at 806. The judge found that counsel was a “very experienced and highly regarded defense attorney” who had practiced for over 40 years and had handled over 100 murder trials at the trial and appellate level. Id. Because of the defendant’s age (sixteen), counsel “spent a great deal of time speaking with the defendant’s mother about the circumstances surrounding the defendant’s statements to her, and formulated the defense that the police used [her] as their agent to induce the defendant to admit his involvement in the homicide.” Id. Counsel filed a motion to suppress based in part on that ground. Id. At the time of the trial, counsel researched the issue of using expert testimony regarding coerced or false confessions.
152. Id. at 809. The SJC accepted counsel’s assertion that “there was no strategic reason not to consult with or present an expert on psychological coercion, and that given the nature of the defense, it would not have harmed the defense to do so.” Id. at 806-07. Counsel’s disavowal of any particular strategy should be immaterial. “[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 688, 688 (1984). The requirement of effective assistance of counsel “imposes one general requirement: that counsel make objectively reasonable choices.” Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000). “We begin with the premise that under the circumstances, the challenged action[s] might be considered sound trial strategy.” Cullen v. Pinholster, 563 U.S. 170, 191 (2011) (quoting Strickland, 466 U.S. at 689). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” Yarbrough, 540 U.S. at 5.
154. Defense counsel pursued a theory, supported by expert testimony, that the defendant lacked any intent to kill and was simply overburdened by the responsibility of being a single caretaker for a sick child. Id. at 759, 769-70. A forensic psychologist testified for the defense and opined that the defendant “was overwhelmed with having to cope with an impaired child who had a life-threatening illness, and she was unable to keep in mind the long-range goal of treatment.” Id. at 759.
155. Id. at 769-70.
156. Id. at 771. Apart from testifying at trial to the difficulties caretaking parents face, the expert could have aided defense counsel in cross-examination. Id. at 773.
159. Id. at 702.
160. Id. at 703 n.10.
162. Id. at 833.
filed an affidavit indicating that he would have opted for a trial but for his lawyer’s erroneous advice. The District Court credited this assertion without any testimony from the defendant and vacated the guilty plea. On the second appeal (this time brought by the Commonwealth), the SJC held that the judge could credit the affidavit “without having to test the defendant’s statements through cross-examination and personal observation of his demeanor.”

Finally, in Commonwealth v. Vargas, the SJC found that two lawyers erred, despite their sustained success in sparing the defendant a prison sentence. In that case, the defendant pled guilty to robbing a store clerk with a firearm. Though the defendant faced a life sentence, the Superior Court adopted an agreed recommendation and sentenced him to probation with special conditions prohibiting illegal drug use and requiring random drug testing. Within days of the sentencing, the defendant twice tested positive for marijuana. He promptly obtained a “medical marijuana” certificate. Thereafter, the defendant repeatedly tested positive for marijuana and cocaine, faced probation violation hearings, and avoided prison through agreed recommendations for drug treatment. After the defendant tested positive for marijuana again and failed to report for a drug test, the Superior Court terminated his probation and sentenced him to state prison for two to four years. The Superior Court rejected the defendant’s motion for a new hearing.

On appeal to the SJC, the defendant claimed the judge erred because the “medical marijuana” certificate immunized him from adverse action, and he claimed his lawyers erred because they failed to argue the immunity issue. The SJC rejected the claim of judicial error, but found both lawyers erred (though not for the reason advanced by the defendant). The lawyers erred by not seeking to modify the probation conditions. The SJC reached this conclusion despite the admitted “long odds of success,” the Superior Court judge’s emphatic remarks showing such a request would be futile, the repeated success of counsel at keeping the defendant out of prison, counsel’s success at negotiating agreed recommendations, the Superior Court judge’s denial of the motion, the issues of first impression, and the failure of the defendant to raise the issue on appeal.

VIII. Conclusion

Ineffective assistance claims have always carried the risk of overuse and the risk of collateral damage to the legal profession. The Supreme Court warned about ineffective assistance claims becoming commonplace, with defendants being held harmless by simply accusing lawyers of incompetence or misconduct. The SJC provided a similar warning. These concerns carry special significance when medical marijuana certificate after he was placed on probation with conditions prohibiting illegal drug use. It is at 89. Also, the Commonwealth challenged the validity of the “medical marijuana” certificate, “claiming it was obtained from a ‘now-defunct . . . ‘recommendation’ – mill.’” It is at 88 n.6. The SJC declined to address the contention. See Nix v. Whiteside, 475 U.S. 157, 166 (1986) (duty of counsel “is limited to legitimate, lawful conduct.”).

The SJC rejected the defendant’s motion for a new hearing. On appeal, the defendant claimed the judge erred because the “medical marijuana” certificate immunized him from adverse action, and he claimed his lawyers erred because they failed to argue the immunity issue. The SJC rejected the claim of judicial error, but found both lawyers erred (though not for the reason advanced by the defendant). The lawyers erred by not seeking to modify the probation conditions. The SJC reached this conclusion despite the admitted “long odds of success,” the Superior Court judge’s emphatic remarks showing such a request would be futile, the repeated success of counsel at keeping the defendant out of prison, counsel’s success at negotiating agreed recommendations, the Superior Court judge’s denial of the motion, the issues of first impression, and the failure of the defendant to raise the issue on appeal.

163. Id.
164. Id. at 835, 837.
165. Id. at 837.
166. 475 Mass. 86 (2016).
167. Id. at 88.
168. Id.
169. Id. at 88-89.
170. Id. at 89-90. “On November 6, 2012, Massachusetts voters approved by referendum St. 2012, c. 369, ‘An Act for the humanitarian medical use of marijuana.’” Id. at 1 n.2. That legislation included a provision “establishing immunity for the medical use of marijuana.” Id. at 1.
171. Vargas, 475 Mass. at 89-91. Counsel brought the marijuana certificate to the judge’s attention, but the judge refused to grant permission to use marijuana: “[E]ven if [the defendant] has Barack Obama’s permission to toke at will, it doesn’t matter.” Id. at 91 n.11.
172. Id.
173. Commonwealth v. Vargas, 475 Mass. 86, 97 (2016). The Superior Court rejected the motion due to numerous probation violations, including positive tests for cocaine. “In ruling on the defendant’s motion for a new hearing on the probation surrender, the judge specifically cited the compliance issues independent of the marijuana use.” Id.
174. Id.
175. “[T]he judge committed no error in finding the defendant in violation of his probation.” Id.
176. Id. at 95-96. The SJC noted second counsel’s performance was “lacking in the required level of professional competence.” Id. at 96. Counsel told the Superior Court judge that the defendant “believed that ‘this medical marijuana thing was his be all and end all. He then added his own view that ‘it’s not.’” Id. Though never having the benefit of an affidavit or testimony from counsel, the SJC concluded, “On this record, it appears that counsel not only failed to assess the legal viability of the certificate as a defense to the probation violation, but also expressly disparaged its legitimacy.” Id. The SJC rejected the Commonwealth’s argument that counsel must have made a strategic decision to abandon the marijuana issue and to focus on limiting the defendant’s exposure to state prison in light of repeated and various probation violations unrelated to marijuana. Id. at 87.

Notably, the SJC also rejected the commonwealth’s suggestion that the entire marijuana issue was bogus. Id. at 88 n.6. The defendant obtained the medical marijuana certificate after he was placed on probation with conditions prohibiting illegal drug use. It is at 89. Also, the Commonwealth challenged the validity of the “medical marijuana” certificate, “claiming it was obtained from a ‘now-defunct . . . ‘recommendation’ – mill.’” It is at 88 n.6. The SJC declined to address the contention. See Nix v. Whiteside, 475 U.S. 157, 166 (1986) (duty of counsel “is limited to legitimate, lawful conduct.”).

177. Vargas, 475 Mass. at 96-97.
178. Id. at 87-91, 94-97. The SJC ultimately determined that the errors by counsel were not prejudicial because the “use of marijuana was not the only compliance issue for the defendant and the judge properly could have terminated the probation on grounds unrelated to the use of marijuana.” Id. at 97. Counsel would logically have known that the marijuana use was only one of many reasons to terminate probation. See Commonwealth v. Saferian, 366 Mass. 89, 98-99 (1974) (courts do not lend encouragement to “motions that have no purpose in view except to protect counsel against later charges of incompetence or neglect.”).
179. “The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.” Strickland v. Washington, 466 U.S. 668, 690 (1984). “Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” Id. at 697.

Some defendants even take claims of lawyer incompetence a step further by reporting lawyers to the Board of Bar Overseers. “Many incarcerated individuals have filed multiple complaints against a succession of lawyers and some seem to believe that such complaints bolster an ‘ineffective assistance of counsel’ claim.” Massachusetts Bar Association, “Report of the MBA Task Force on Lawyer Discipline Protecting the Public: Reforming the Disciplinary Process,” 11 (2005).
180. “[W]e should still not be carried to the opposite extreme of holding that assistance was inadequate when counsel did not conform in some respect to an ideal model of how counsel should collate evidence or otherwise conduct himself. On the latter view, judgment would be under constant attack, and judges would ‘become Penelopes, forever engaged in unravelling the webs they wove.’” Saferian, 366 Mass. at 99 (quoting Jorgensen v. York Ice Mach. Corp. 160 F.2d 432, 435 (2d Cir. 1947), cert. denied, 332 U.S. 764 (1947)). “Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.” Jorgensen, 160 F.2d at 435.
appeals Court. 

To guard against such undesirable possibilities, courts established rigorous standards of review. “Surmounting Strickland’s bar is never an easy task.” To establish a deprivation of effective assistance of counsel, a defendant must show that counsel committed “serious” error, counsel breached “prevailing professional norms,” . . . [not just] best practices,” counsel “so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect,” and counsel made errors “so serious” that he no longer functions as ‘counsel’ and deprived the defendant of a fair trial.

Despite rigorous standards of review, claims of attorney error have become common and, in Massachusetts, successful. While the Justices of the Supreme Court have struggled to agree on the reasonableness of counsel’s conduct “under prevailing professional norms,” the SJC unanimously found attorney errors in 11 of 13 cases (with six resulting in prejudice) between January and August of 2016. In nine cases finding errors, the SJC disagreed with the Superior Court, the District Court or the Appeals Court on the “prevailing professional norms.” This spike stands in stark contrast to the four years it took following Sajferian for the SJC to find any prejudicial error by counsel, as well as the historically low success rate for ineffective assistance claims. Time will tell whether this line of cases is mere coincidence, an aberration, or new jurisprudence.

To avoid decisions based on an inadequate record, the Supreme Judicial Court has repeatedly suggested “that the preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial.” Commonwealth v. Zinser, 446 Mass. 807, 810 (2006). “[A]n ineffective assistance of counsel challenge made on the trial record alone is the weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight.” Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). “Put another way, our courts strongly disfavor raising claims of ineffective assistance on direct appeal.” Zinser, 446 Mass. at 810.

When there is an ineffective assistance claim, the trial lawyer may never have a chance to address the claims of error raised on appeal. The parties may also have little or no interest in defending counsel’s decisions. For example, for tactical reasons, the commonwealth may simply concede that counsel erred and move right to the issue of prejudice. Thus, prevailing professional norms may be established on less than an ideal record.

To avoid decisions based on an inadequate record, the Supreme Judicial Court has repeatedly suggested “that the preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial.” Commonwealth v. Zinser, 446 Mass. 807, 810 (2006). “[A]n ineffective assistance of counsel challenge made on the trial record alone is the weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight.” Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). “Put another way, our courts strongly disfavor raising claims of ineffective assistance on direct appeal.” Zinser, 446 Mass. at 810.

In the face of uncertainties, one guiding principle must always be kept in mind — lawyers “are necessities, not luxuries” for the smooth functioning of the justice system. Lawyers who practice in the courts know that it is a system that functions remarkably well with extraordinarily busy dockets. For example, in fiscal year 2015, the Massachusetts Superior Court processed 4,906 criminal cases, and the District Court processed 186,713 criminal defendants. A cold appellate record will rarely reflect the successful efforts of counsel and what all practicing lawyers know — lawyers bring numerous, intangible talents to every case: lawyers develop instincts for evaluating the quality of witnesses, evidence and experts; they cultivate a rapport with clients, other lawyers and court personnel; they execute numerous tasks based upon intuition derived from a wealth of experience; and they distinguish between academic arguments that work only on paper from practical arguments that bear the crucible of litigation. It is a privilege and honor to be among that rarest breed known as “a trial attorney” — one “who actually presents cases to juries and judges [and] is still the role model for our profession, however small the percentage of the bar who actually engage in the endeavor.” “Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.” Such scrutiny could also weaken confidence in attorneys, discourage trials and ultimately undermine public confidence in the courts.

181. When there is an ineffective assistance claim, the trial lawyer may never have a chance to address the claims of error raised on appeal. The parties may also have little or no interest in defending counsel’s decisions. For example, for tactical reasons, the commonwealth may simply concede that counsel erred and move right to the issue of prejudice. Thus, prevailing professional norms may be established on less than an ideal record.


186. Maryland v. Kubrick, 136 S.Ct. 2, 2 (2015). “[A]nalysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.”


189. “Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.” Such scrutiny could also weaken confidence in attorneys, discourage trials and ultimately undermine public confidence in the courts.


191. Administrative Office of the Trial Court, The Superior Court Fiscal Year 2015 Criminal Statistics; Administrative Office of the Trial Court, Massachusetts District Court Filings by Court FY 2015.


194. “Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” Missouri v. Frye, 132 S.Ct. 1399, 1407 (2012). The reality is that plea bargains have become “central to the administration of the criminal justice system.” Id. “For some time now, circumstantial and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past.” William G. Young, "Vanishing Trials, Vanishing Juries, Vanishing Constitution," 40 Suffolk U. L. Rev. 67, 73 (2006).
None of this is to suggest that lawyers are perfect and defendants must be satisfied with their performance, come what may. To the contrary, lawyers are fallible. Appellate review is based upon the understanding that errors will occur — whether committed “by defense counsel, the prosecutor or the judge.”\(^{197}\) Litigants are “entitled to a fair trial but not a perfect one,” for there are no perfect trials.\(^{196}\) The Supreme Court has recognized that “given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a trial.”\(^{197}\) There is also “no expectation that competent counsel will be a flawless strategist or tactician.”\(^{198}\) The ordinary criminal process has become “too long, too expensive and unpredictable,” in no small part as a consequence of the “pursuit of perfect justice.”\(^{199}\) Justice, like the human condition it reflects, is not perfect. It is precisely this fallibility that must be kept in mind when reviewing conduct of counsel.

To borrow from Justice Sutherland, what is needed is less of a quest for perfection viewed through the distorting lens of hindsight, and more of an allegiance to the “calm spirit of regulated justice” with due regard for the valuable contributions that lawyers make every day.\(^{200}\) After all, “[i]nvariably the lawyer who refights a campaign on the written record finds ways to fight it better. Indeed, it must be a smug lawyer who, upon completing a trial or an argument, does not reflect ruefully on what should have been said or done.”\(^{201}\) The wisdom and humility of Justice Jackson reminds all of the struggles that even the greatest lawyers face: “I made three arguments of every case. First came the one that I planned — as I thought, logical, coherent, complete. Second was the one actually presented — interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.”\(^{202}\) Perhaps the next generation of lawyers will view the labors of today’s trial lawyers with pride, rather than disdain, and will approach their own work with the same humility, understanding, and affection for the art of advocacy.

195. Commonwealth v. Wright, 411 Mass. 678, 682 (1992). It “would be foolish to think that ‘constitutional’ rules governing counsel’s behavior will not be followed by rules governing the prosecution’s behavior.” Lefler v. Cooper, 132 S.Ct. 1376, 1392 (2012) (Scalia, J., dissenting). “[A] defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.” Imbler v. Pachtman, 424 U.S. 409, 425 (1976). It has become customary, for example, to brand all errors by prosecutors as “prosecutorial misconduct.” In its original conception, prosecutorial misconduct meant “methods calculated to produce a wrongful conviction.” Berger v. United States, 295 U.S. 78, 88 (1935). See, e.g., Namen v. United States, 373 U.S. 179, 186 (1963) (“[S]ome courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.”). Just as defense lawyers are now accused of being “incompetent” for every misstep, prosecutors are now accused of “misconduct” for mere errors. Neither designation is accurate, fair, or consistent with original concepts. See Editorial, “To Stop Bad Prosecutors, Call the Feds,” N.Y. Times, June 6, 2016, at A22 (“So why is it so hard to keep [prosecutors] from breaking the law or violating the Constitution?”).


197. Chapman v. California, 386 U.S. 18, 22 (1967) (“errors or defects which do not affect the substantial right of the parties.”) Chapman v. California, 386 U.S. 18, 22 (1967) (“errors or defects which do not affect the substantial right of the parties.”) Chapman v. California, 386 U.S. 18, 22 (1967) (“errors or defects which do not affect the substantial right of the parties.”)

198. Harrington v. Richter, 562 U.S. 86, 110 (2011). “We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” Engle v. Isaac, 456 U.S. 107, 134 (1982).

199. Lafler, 132 S.Ct. at 1391 (Scalia, J., dissenting). Review of convictions also “extends the ordeal of trial for both society and the accused.” Engle, 456 U.S. at 127. “Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.” Id. (quoting Sanders v. United States, 373 U.S. 1, 24-24 (1963) (Harlan, J., dissenting)).


Robert and Ardis James Foundation v. Meyers1 wrestles with the question of whether a party to a contract may, in good faith, ignore a request from its counterparty to take some action not required by the contract.

The Robert and Ardis James Foundation (Foundation) and Robert James (James) brought the case against Daniel Meyers (Meyers) to force Meyers to sell shares Meyers had purchased in 1998 and 1999 with funds obtained through two loans from the Foundation.2 The written loan agreements provided that the Foundation would be repaid solely from the proceeds of the subsequent sale of the purchased shares, but the agreements were silent as to when that sale was to occur.3 After nearly two years of unsuccessfully trying to get Meyers to discuss the sale of the shares and repayment of the loans, the Foundation and James sued Meyers in November 2006.4

The shares at issue were ownership of First Marblehead Corporation (First Marblehead), a company started by Meyers and Stephen Anbinder (Anbinder) for the purpose of providing loan origination and related services for higher education students.5 In 1998, First Marblehead offered its existing shareholders the right to purchase additional shares of the company on a pro rata basis, commensurate with each shareholder's existing ownership of the company.6 Meyers and Anbinder lacked sufficient capital to purchase shares and feared they would be diluted through the rights offering, so they asked James for help.7

James was a long-time professional investor with an M.B.A. from the Harvard Business School, and a Ph.D. in economics from Harvard.8 He taught at the Massachusetts Institute of Technology and helped create its Sloan School of Management.9 During the trial, James estimated his net worth at hundreds of millions of dollars.10 The Foundation existed to give away the money James and his wife, Ardis, had accumulated.11 James, Ardis and their children, Catherine and Ralph, were trustees of the Foundation.12

James had come to know Meyers and First Marblehead through Catherine and Ralph.13 Catherine had invested in First Marblehead personally and through a private equity firm in which she was a principal.14 Ralph served in various roles as an officer and director of First Marblehead.15 By 1997, James had developed a personal relationship with Meyers, and in November of that year Meyers funded his purchase of a boat by selling 10,000 of his shares of First Marblehead to James.16

In connection with First Marblehead's 1998 rights offering, James, Meyers and Anbinder negotiated an agreement whereby the Foundation provided the funds for Meyers and Anbinder to purchase their full allotment of First Marblehead shares, with the Foundation receiving the right to share in the proceeds of the sale of those shares.17 The agreement was memorialized in a February 20, 1998 letter from Meyers to James.18 The letter provided that the shares would be purchased by Meyers and Anbinder at $20 per share using funds advanced by the Foundation, and that the Foundation would be repaid solely from the sale of the shares, with repayment consisting of $30 per share plus 50 percent of any remaining sale proceeds.19 The letter also provided that the stock certificates would be delivered to James to possess until the shares were sold, and that James would be allowed to vote the shares in the meantime.20

The final agreement differed from an earlier draft in that the repayment terms in the final agreement were more favorable to James, the right to vote the stock was added, and language permitting James to hold the certificates "until such time as [they] agree that the stock should be sold" was deleted.21

James, Meyers and Anbinder each signed the February 20, 1998 letter.22 After the letter was signed, James wired the purchase funds from the Foundation's account directly to First Marblehead.23

In January 1999, James, Meyers and Anbinder entered into a second agreement in connection with a second rights offering by First Marblehead.24 The 1999 agreement differed from the 1998 agreement only in the number of shares to be purchased and the formula for dividing the proceeds.25

2. Id. at 181-82.
3. Id. at 182.
4. Id.
5. Id.
7. Id.
13. Id.
14. Id.
19. Id. at 184; Meyers I, 87 Mass. App. at 88–89.
23. Id.
In total, the Foundation advanced $653,340 on behalf of Meyers and $461,625 on behalf of Anbinder for the purchase of First Marblehead shares under the two rights offerings.26

Between 1999 and 2003, First Marblehead made an initial public offering and saw significant increases in the value of its stock.27 As a result of multiple share splits, each of the shares purchased in 1998 and 1999 turned into approximately 60 shares by 2004.28

In October 2004, Catherine sent an email to Meyers and Anbinder seeking voting proxy cards and asking Meyers and Anbinder to consider whether the parties could come to an agreement to wind down the 1998 and 1999 loan agreements.29 Meyers and Anbinder sent the proxies to Catherine two weeks later.30 Anbinder subsequently agreed to resolve the portion of the 1998 and 1999 loan agreements pertaining to his shares of First Marblehead and, in December 2005, entered an agreement with James to resolve his obligation to the Foundation.31 The 2005 agreement provided Anbinder more favorable terms than were contained in the 1998 and 1999 agreements.32

The Foundation had much less success trying to reach an agreement—or even raising the issue—with Meyers. Catherine called Meyers multiple times in 2004 and left him voicemails concerning the wind-down of the agreements, but Meyers never returned the calls.33 Anbinder informed Meyers of the terms of his deal and repeatedly asked Meyers whether he wanted to speak with the James family.34 Meyers declined.35 James repeatedly attempted to contact Meyers in 2005 and 2006 to discuss winding down the agreements, but was unsuccessful in reaching Meyers.36 In the meantime, between 2003 and 2006, Meyers sold more than three million shares of other First Marblehead stock he owned for more than $86 million, while holding and continuing to collect dividends on the stock he purchased through the rights offerings.37

In 2006, the Foundation hired a lawyer to advise it on its tax-exempt status.38 The lawyer advised the Foundation to liquidate its interest in the First Marblehead shares and to take legal action against Meyers if he did not cooperate in that effort.39

Following the advice of counsel, James sent a letter to Meyers on July 10, 2006, asking for a meeting to discuss the conclusion of the agreements.40 Meyers responded on August 21, 2006, in a letter from his attorney, asserting that Meyers had sole discretion as to when the shares would be sold, but expressing Meyers’s willingness to consider any proposal from the Foundation that would “make him reasonably whole in exchange for surrendering control of a portion of his stock and foregoing future dividends on it.”41

The Foundation filed suit on November 16, 2006.42 Following a six-day bench trial in the Business Litigation Session of the Suffolk Superior Court in April 2011, the trial court found in favor of Meyers on all counts except for the Foundation’s claim that Meyers breached the implied covenant of good faith and fair dealing.43 The trial court determined that Meyers breached the implied covenant as of July 31, 2006, and awarded damages of more than $44 million based on the fair market value of the First Marblehead shares on that date.44

The Appeals Court reversed the trial court’s finding of a breach of the implied covenant.45 The Appeals Court concluded that the trial record did not support a finding of improper motive or lack of good faith on the part of Meyers, and nothing in the record supported the conclusion that Meyers was required to reach an agreement with the Foundation and James by July 31, 2006.46 The Appeals Court noted that Meyers’s August 21, 2006 letter expressed Meyers’s willingness to enter into a deal with the Foundation and James to conclude the contract on terms similar to those agreed to by Anbinder, which had taken more than a year to negotiate and finalize.47 The Appeals Court also concluded that the record did not support the finding that Meyers had delayed responding to the requests from the Foundation as a way to extract additional financial concessions, because the Foundation and James had already indicated a willingness to make concessions to wind down the contracts.48 Finally, the Appeals Court concluded that Meyers’s refusal to unwind the agreements by July 31, 2006 did not deprive the Foundation of the benefit of its bargain because the Foundation was continuing to benefit financially from ownership of the First Marblehead stock, whose growth had exceeded all reasonable expectations of the parties.49 Nor did the record establish that Meyers’s expressed desire to continue holding the shares of First Marblehead was pretextual, as Meyers had retained the majority of his personal shares and James, too, personally continued to hold his shares of First Marblehead well into the litigation.50

The Appeals Court ultimately concluded that the Foundation and James had not carried their burden to show a lack of good faith on the part of Meyers.51 The Appeals Court held that neither the reasonableness of James’s actions nor the possibility that Meyers would breach the implied covenant in the future could carry the burden of proving that Meyers had acted in bad faith as of July 31, 2006.52
The Appeals Court then turned to the issue of damages, criticizing the trial court for arbitrarily choosing July 31, 2006 as the date of the breach and the date from which the damages were to be determined.\footnote{53} In a footnote, the Appeals Court noted the significance of the selection of the breach date, as the value of the First Marblehead shares had fluctuated significantly in 2004 through 2006.\footnote{54}

The Appeals Court did agree with the trial court, however, that the 1998 and 1999 loan agreements contemplated that the shares would eventually be sold and that the implied covenant of good faith and fair dealing prohibited Meyers from refusing to sell the shares indefinitely.\footnote{55} As a result, the Appeals Court remanded the case to the trial court to enter a judgment identifying the parties' obligations.\footnote{56}

The Foundation and James successfully sought further appellate review and the Supreme Judicial Court (SJC) affirmed the trial court's judgment.\footnote{57} The SJC agreed with the trial court's conclusion that "it was part of Meyers'[s] duty of good faith and fair dealing ... to, upon reasonable request, engage in reasonable efforts to arrive at a reasonable time for sale and thus resolve the contracts, rather than continuing to assert his right to delay sale and collect dividends indefinitely."\footnote{58}

The SJC also agreed with the trial court that Meyers "failed to effectuate in good faith the sales of stock that the agreements clearly contemplated."\footnote{59}

The SJC rejected Meyers's argument that the trial court had imposed an obligation on the parties to negotiate a new deal, instead finding that the parties' duty was to "cooperate in effectuating the existing agreed-upon deal on its own terms."\footnote{60} Meyers's breach was not his failure to sell the shares and wind down the agreements, but his failure to "engage with the [F]oundation's efforts to effectuate the sale and division of the proceeds as to which it had a reasonable expectation."\footnote{61}

In distinguishing Eigerman v. Putnam Investments, Inc.,\footnote{62} and Chokel v. Genzyme Corp.,\footnote{63} the SJC specifically rejected the argument that Meyers had sole discretion requiring the time of the sale of the shares.\footnote{64} By refusing to discuss the issue with the Foundation, Meyers destroyed the Foundation's ability to receive the benefit of the agreements and contradicted the reasonable expectations of the Foundation in entering into the agreements.\footnote{65}

The SJC also agreed with the trial court that Meyers's eventual response — the August 21, 2006 letter — did not evidence Meyers's good faith willingness to perform his obligations.\footnote{66}

Finally, turning to the question of damages, the SJC expressed deference to the trier of fact to determine the date of breach and time for performance of a contract and the measure of damages.\footnote{67} The SJC further noted that uncertainty as to the assessment of damages does not bar recovery, particularly where the difficulty in determining the damages arises from the defendant's conduct.\footnote{68} Applying those rules to the present case, the SJC found that it was not clearly erroneous for the trial court to establish July 31, 2006 as the date of the breach or to apply the terms of the Anbinder agreement to calculate damages.\footnote{69}

All three courts that heard this case agreed that Meyers could not simply refuse to sell the shares indefinitely. All three courts also agreed that there was no obligation on Meyers to sell the shares by any particular date. But the courts sharply differed on what constituted good faith between those two end points.

The Appeals Court focused heavily on the fact that the parties were both sophisticated investors who bargained for an agreement that did not give the Foundation any control over when the shares should be sold. As a result, Meyers's failure to reach an agreement with the Foundation by July 31, 2006 could not evidence an absence of good faith. By contrast, the trial court and SJC focused heavily on the fact that Meyers refused to even discuss the issue for nearly two years after the Foundation first raised it. It did not matter that Meyers could have been still negotiating in good faith beyond July 31, 2006; instead, it mattered only that Meyers had refused to come to the table.

The SJC's opinion makes clear that a party to a contract cannot insist on an interpretation of the contract that would deny its counterparty the benefit of the agreement or run contrary to the expectations of the parties. At a minimum, the SJC is saying that Meyers should have engaged James and the Foundation when he learned that they wanted him to sell the shares and close out the agreements, even if Meyers had no interest — or obligation — to sell the shares at that time. Left unsaid is what concessions Meyers might have had to make once he sat down at the bargaining table. Meyers and the Foundation contemplated that the shares would eventually be sold, but the parties may have had diametrically opposed views on when that sale should occur, even if they were both acting in good faith. Could Meyers have insisted on not selling the shares at that time if he expected that the shares were about to appreciate significantly in value? Could he have refused on delaying a sale if doing so would have had positive tax consequences for him? Could he have refused to sell until he had enough liquidity to repurchase the shares himself and avoid dilution (the reason he purchased the shares in the first place)? What does it mean to engage the other parties' demand if you have no obligation to concede to that demand? The SJC did not reach those questions because Meyers never made a good faith effort to resolve the issue with the Foundation.

— Richard G. Baldwin

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\begin{itemize}
\item[54.] Id. at 97 n.19.
\item[55.] Id. at 97.
\item[56.] Id.
\item[58.] Id. at 189.
\item[59.] Id. at 189–90.
\item[60.] Id. at 191.
\item[61.] Id.
\item[63.] 449 Mass. 272, 277 (2007).
\item[65.] Id. at 190–91.
\item[66.] Id. at 192.
\item[67.] Id.
\item[68.] Id. (citing National Merchandising Corp. v. Leyden, 370 Mass. 425, 439 (1976)).
\item[69.] Meyers II, 474 Mass. at 192–93.
\end{itemize}}
BOOK REVIEW

The Court and the World: American Law and the New Global Realities
by Stephen Breyer (Alfred A. Knopf 2015, 359 pages, including endnotes)

Warren Buffett has done quite well. Berkshire Hathaway, the company he leads, consistently outperforms almost everything else in the American economy and it did so again in 2016. So it is no surprise that investors, shareholders and others eagerly await Buffett’s annual late winter investment letter, its review of the year just ended and its forecast for the year to come. Buffett’s description of the American economy in this year’s letter was particularly optimistic. “Americans,” he said, “have combined human ingenuity, a market system, a tide of talented and ambitious immigrants, and the rule of law to deliver abundance beyond any dreams of our forefathers.”

It is hard to quarrel with Buffett’s list. Nevertheless, it was surprising to see “the rule of law” included as one of his four pillars of economic success. It was surprising not because there can be any genuine disagreement about the importance of the rule of law to a stable and advancing economic environment and to most other aspects of American life, but because most of us take that rule so much for granted that we rarely stop to think about it. Like blue sky or green grass, it just is, and we unthinkingly enjoy its benefits every day.

But is it? At its core, that is the question Supreme Court Justice Stephen Breyer addresses in The Court and the World: American Law and the New Global Realities. The book is not new — it was published almost two years ago — but it is deeply relevant to the moment in which we now are living, and to events and philosophies we are currently watching at home and abroad. For that reason, it is worth reading, or rereading, now.

Continuing the moderate, thoughtful and nuanced approach displayed in his earlier books, Breyer here focuses on two broad themes — the Supreme Court’s approach to foreign law and foreign litigants, and the way in which that approach advances the rule of law at home and abroad. As he lays it out, the court’s approach to the first topic reflects an understanding that we cannot withdraw from the world because the world won’t let us, and because our interactions with the world are both vast and enormously beneficial. As for the rule of law, he argues that a principled, thoughtful and interactive approach to international legal issues supports the rule of law here and throughout the world. But as he ends his discussion, he issues a powerful reminder that neither the Supreme Court nor the judicial branch of government can by themselves ensure the rule’s continuing health and vibrancy. Preservation of that health and vibrancy depends instead on an active, engaged and vigilant public.

Before discussing the Supreme Court’s direct interactions with foreign law and foreign judges, Breyer begins with what appears to be a purely domestic question. “To what extent,” he asks, “does the Constitution permit the President and Congress to limit our civil liberties for the sake of national security? And how much power does it give the [Supreme] Court to review the balancing of the two concerns — or put another way, to second-guess Congress and the President in their efforts to do so?”

The answer is evolutionary and the evolution has much to do with the world in which we currently live. Initially, both questions arose in the context of shooting wars and the court, following Cicero’s observation — loosely translated as “when the canons roar, the laws fall silent” — deferred almost completely to the president’s decisions, essentially on the ground that it had no business second-guessing presidential judgments about wartime or war-related activities. That deference was based on the court’s respect for the president’s constitutional role as Commander-in-Chief and the officer primarily responsible for the conduct of foreign affairs. As evidence of that deference, Breyer cites the court’s response to Abraham Lincoln’s suspension of the writ of habeas corpus during the Civil War, the jailing of Eugene V. Debs during the First World War, and the internment of Japanese citizens during the Second World War. Those actions and others like them led Roosevelt’s Attorney General, Francis Biddle, to express the view that “[t]he Constitution has not greatly bothered any wartime President.”

Over time, though, the court’s approach to questions of national security and presidential judgment began to change. At first, in cases like Curtis-Wright, the court began to state that it did have the power to examine what the President had done in the name of national security, and to measure his actions against constitutional standards. It nevertheless maintained a high degree of deference to presidential decisions. But then, during the Korean conflict, it went further and held that President...
Truman’s seizure of steel mills in order to prevent a strike, which he believed would jeopardize production of material necessary for the war effort, was unconstitutional. That ruling, Breyer states, represented an assertion by the court “that it was now in the business of reviewing the President’s wartime authority, on which it would thereafter enforce limits.”

In Breyer’s view, that more active role underlies the approach the court took several years ago when it decided four cases involving prisoners at Guantanamo Bay. In two of those cases, the court rejected claims that Guantanamo prisoners had no right to file habeas corpus petitions in the United States District Court in Washington, D.C. In the third case, the court held that a detainee could not be tried before a military commission President George W. Bush had created by executive order. In the final case, the court decided that prisoners interred at Guantanamo had a constitutional right to file a petition for a writ of habeas corpus, not simply the statutory right on which the court had relied in the first two cases.

Those cases, Breyer explains, “reflect the current way the Court sees the balance between security and civil liberty, the culmination of an evolution that may continue. . . . Today’s Court will be more engaged when security efforts clash with other constitutional guarantees. It will listen to the government and consider its arguments, but it will not rubber-stamp every decision.” The court’s engagement in that fashion is required because it is part of the checks and balances embedded in the “Constitution to protect[] us against abuses of power that can, among other noxious effects, threaten individual liberty. And the need for such protection is not likely to diminish over time.” It is not likely to diminish, he asserts, because of the amorphous and ongoing nature of the threats to national security with which we are continuously confronted, coupled with diminished public “confidence in traditional efforts within the branches (and for that matter, between the executive and legislative branches) to check abuse.”

From that foundation, Breyer turns to the way the court more directly deals with foreign affairs. In this area, he focuses on the extent to which American law applies to activities, commercial and other, that have a heavily international flavor, and on the circumstances under which the doors of American federal courthouses are open to foreign nationals. For example, he discusses the extent to which Rule 10b-5, the SEC’s long-standing and sweeping rule prohibiting materially false statements or other fraud in connection with the purchase or sale of any security, applies when conduct contributing to the fraud takes place in the United States but the actual sale occurs abroad. For another example, he explores the extent to which the “first sale” rule, which allows the purchaser of a copyrighted work to resell that work to others, applies when purchase of the item occurs abroad, the sale occurs domestically, and the work contains a notice that it is authorized for sale only outside the United States.

The answers, “no” in the first case and “yes” in the second, are less interesting than Breyer’s explanation of the approach the court took to arrive at the answers. That approach required an exploration and ultimately an understanding of the impact the court’s decision would have both here and abroad. But how, he wonders, does the court obtain the information it needs to make an accurate assessment of that impact, particularly the extraterritorial impact the decision may have? For the moment, at least, he explains that the court obtains the relevant information the same way it obtains information about the impact of all decisions it makes. Initially, it relies on briefs filed on behalf of parties and those with a particular interest in and knowledge about specific issues the case involves. After adding its own research to that mix, the court issues decisions that are examined and discussed by experts writing in legal and other journals. Then, the next time a similar or related issue arises, the court begins the process all over again, albeit from a base elevated by the prior exploration and discussion. Though that process has worked throughout the court’s history, and seems to work today, he leaves the discussion by wondering if there isn’t a better way.

Discussion of those topics is sometimes technical and requires close reading. So, too, does Breyer’s discussion of the way in which the court interprets and applies treaty provisions, specifically those involving child custody and arbitration. But when he moves to exploration of the treaty power itself, consideration of broader principles reemerges and the questions he raises, though rarely discussed by general audiences, are both fundamental and fascinating. For example, “[d]oes the Supremacy Clause mean what it seems to say — that treaty provisions automatically become the law of the United States, binding individual citizens without Congress’s having to enact an implementing statute? And can a treaty give Congress legislative power that the Constitution otherwise leaves to the states alone? Can the United States enter into a treaty that abridges basic individual rights that the Constitution otherwise protects? If not, just what features of the Constitution trump the authority to make treaties?”

The quest for answers to questions like those has resulted in deep divisions here and abroad. Those divisions should not be surprising, for they ultimately reflect the degree to which one nation’s citizens are willing to cede law-making power to an unelected and often unknown group of citizens from other nations. There are always drawbacks and benefits to doing so. On the one hand, what happens when a treaty grants rule-making or decisional authority to an international body and that body makes a ruling that adversely affects rights protected by the Constitution or other domestic law? On the other hand, international treaties often contain ambiguous provisions and thus are effective only if the treaty itself provides a mechanism for resolving in binding fashion questions the ambiguous provisions create. There is no Supreme Court of the world, so if
we do not join our treaty partners in creating a body with final decision-making power, then how can we effectively create international agreements that benefit all participants? There are no ready answers to those questions and Breyer does not propose any. Instead, for him the questions and the absence of answers provide “the clearest example of the need on the part of the courts and the legal profession to understand both the legal and practical realities elsewhere in the world if we are to preserve our basic American values.”

Equally subtle and nuanced are questions about the extent to which foreign law, statutory and decisional, ought to influence or even receive consideration by the Supreme Court when it decides questions with a purely domestic reach. From time to time those questions have produced considerable heat. Consider Roper v. Simmons, a five to four decision holding that the Eighth Amendment prohibits applying the death penalty to those who were under 18 years old at the time the crime was committed. Writing for the majority, Justice Kennedy stated that “the United States now stands alone in a world that has turned its face against the juvenile death penalty,” adding that it was “proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.” It wasn’t proper to everyone. Those comments provoked strong dissent, particularly from Justice Antonin Scalia, and strong disagreement from elected officials, 74 of whom sponsored legislation stating that judicial determinations regarding the laws of the United States should not be based on “judgments, laws or pronouncements of foreign institutions.” Justice Anthony Kennedy’s comments likewise engendered considerable, heated discussion in political and scholarly forums.

Unsurprisingly, Breyer’s approach to the role of foreign law in domestic decisions, even decisions of constitutional magnitude, is nuanced. Since the end of World War II, he observes, foreign constitutions “have often been crafted and modified to resemble our own, including provisions that protect both domestic political systems and basic individual liberties.” Consequently, he continues, “if someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one I look to, has written a legal opinion about a similar matter, why not read what that judge has said? I might learn from it, whether or not I end up agreeing with it.”

All of this is fascinating, even the parts that require close reading. But the last chapter and the epilogue ought to be required reading for everyone interested in ensuring that the rule of law and the role of the courts in protecting it remain intact during turbulent times. As he ends the book, Breyer reminds us that it was not always clear that political leaders would follow Supreme Court decisions with which they disagreed. As an example, he points to the court’s decision in the Cherokee cases which, according to popular legend, prompted President Andrew Jackson to say, “John Marshall has made his decision; now, let him enforce it,” before he not only declined to enforce it but later deployed federal troops to facilitate the result the court had rejected. One-hundred-twenty years later, a different decision produced a dramatically different result when President Dwight Eisenhower sent the 101st Airborne Division into Little Rock to enforce the Supreme Court’s decision in Brown v. Board of Education that segregation by race in the public schools of the United States was unconstitutional.

During the years between the two decisions, the Supreme Court, and other courts, increased the frequency with which they issued unpopular decisions. Political leaders typically, though not uniformly, followed those decisions, albeit sometimes with vocal disagreement. That process continues today, to the point where we usually take for granted the notion that the court’s decisions, no matter how unpopular, will be observed and enforced. Breyer tells us, however, there is “no secret, no single miraculous reason why the rulings of our Court are followed. There is only the accretion of customs, habits, and understandings about the rule of law, built and maintained over the course of many years.” Maintenance of those customs, habits and understandings is essential because “like democracy and human rights, the rule of law is something more than an ideological commitment for Americans; it is the sine qua non of our system, and where it does not exist, our interests cannot be secure.”

Despite the depth to which the rule of law is embedded in American culture and understanding, Breyer ends on a cautionary note that includes a quotation from The Plague, Albert Camus’ parable about the Nazi occupation of France. “[T]he germ of the plague,’ [Camus] writes, ‘never dies nor does it ever disappear. It waits patiently in our bedrooms, our cellars, our suitcases, our handkerchiefs, our file cabinets. And one day, perhaps, to the misfortune or for the education of men, the plague germ will reemerge, reawaken its rats, and send them forth to die in a once happy city.’ The rule of law is but one defense against the plague germ, but it requires constant use to prevent the arrival of that unhappy day Camus describes. It is vital to our struggle to build a humane, democratic and just society. . . . It is above all the need to maintain a rule of law that should spur us on, jurists and citizens, at home and abroad, to understand these challenges and to work at meeting them together.”

Exactly so.

— James F. McHugh

22. The Court and the World at 235.
25. The Court and the World at 238.
27. The Court and the World at 239.
30. The Court and the World at 279. Justice Breyer notes that, although Jackson’s statement is firmly embedded in popular history, scholars have substantial doubts that Jackson ever made it. The Court and the World at 279 n.8.
32. Id.
33. The Court and the World at 283.
34. The Court and the World at 284 (quoting Camus, Albert, The Plague (London: Hamilton, 1948)).
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