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Analyzing the Impact of the Supreme Court’s Decision in Kindred Nursing Centers Limited Partnership v. Clark on Massachusetts Estate Planning and Arbitration Practitioners

By Rebecca Tunney and Ashly E. Scheufele

Introduction: The Fundamental Tension Presented By Nursing Home Arbitration Agreements

Our society recognizes the need for individuals to appoint someone to make health care and financial decisions when they are incapable of doing so themselves. Accordingly, state legislatures have enacted statutes to create methods for the appointment of health care agents and to delineate their authority to make health care decisions for incapacitated principals. Similarly, statutes have been enacted to create methods for the appointment of attorneys-in-fact and to delineate their authority to make decisions relating to finances and business transactions on behalf of incapacitated principals. Following the enactment of such legislation, the use of health care proxies and powers of attorney has proliferated, with many individuals selecting close family members to serve as their agents.¹

One of the most significant decisions such agents make is admitting their principals to a nursing facility. As anyone who has made this decision knows, a nursing home admission is often finalized while the agent is under a tremendous amount of stress and personal grief. Nursing home admissions are also frequently time-sensitive. Part of the admission procedure at many nursing facilities includes the execution of an agreement to arbitrate any disputes arising out of the patient’s stay — i.e., a contract agreeing to arbitrate personal injury claims, wrongful death suits, and other actions arising out of the nursing facility’s provision of care, and waiving the right to litigate those claims in court where a jury trial would ordinarily be available. Under current interpretations of the Federal Arbitration Act (FAA), pre-dispute agreements by competent principals to arbitrate claims against nursing homes are governed by the FAA and generally enforceable.² But what authority do agents have to enter into arbitration agreements on behalf of their principals in a health care setting, particularly in connection with admission to a nursing home?

The Supreme Judicial Court of Massachusetts (SJC) has held that signing an agreement to arbitrate does not constitute a “health care decision” and thus arbitration agreements signed by health care agents are unenforceable against the principal.³ Some courts in other states, by contrast, have held that health care agents may

1. Other relationships can be used to manage decisions during periods of incapacity, including guardianships and conservatorships authorized by court order when an individual is incapacitated. See e.g., Guardianship of D.C., 479 Mass. 516 (2018). Intervivos trusts, created while an individual has capacity, have long been used for similar purposes.
2. See Discussion, Part II.
agree to arbitrate on behalf of their principals, particularly where signing an arbitration agreement is a prerequisite to admission to a nursing facility. Some state courts have held that attorneys-in-fact have authority to enter into arbitration agreements, while still others have held that even broad powers of attorney do not confer upon attorneys-in-fact the authority to sign arbitration agreements on behalf of their principals, unless express authority to enter into arbitration agreements is included in the power of attorney.

The Supreme Court put to rest much — but not all — of the discord amongst state courts when it issued its opinion in Kindred Nursing Centers Limited Partnership v. Clark. In Kindred, the court overturned a Kentucky decision it characterized as holding that “a power of attorney could not entitle a representative to enter into an arbitration agreement without specifically saying so.”

This article examines the Kindred decision and discusses the impact it may have on Massachusetts practitioners. First, the article describes the statutory landscape in Massachusetts relating to health care proxies, powers of attorney, and other relationships governing substituted judgment for health care decisions and other decisions for incapacitated persons (Part I). Second, it describes federal and state statutes regarding the validity and enforceability of arbitration agreements (Part II). Third, it examines the pre-Kindred Massachusetts case law concerning the authority of agents to enter into arbitration agreements on behalf of principals (Part III). Fourth, the article undertakes an in-depth analysis of the Kindred decision (Part IV). Fifth, it highlights additional complications stemming from administrative regulations (Part V). Sixth, it assesses the impact of Kindred on Massachusetts law and identifies some of the issues that remain to be resolved by future litigation (Part VI). Finally, the authors comment briefly on a few lessons to be drawn from Kindred by Massachusetts practitioners (Part VII).

I. THE RELEVANT STATE STATUTORY LANDSCAPE REGARDING AGENCY RELATIONSHIPS

A. The Massachusetts Health Care Proxy Statute

Massachusetts General Laws (G.L.) chapter 201D, the Massachusetts statute authorizing health care proxies, provides that “every competent adult shall have the right to appoint a health care agent by executing a health care proxy.” The health care proxy shall:

(i) identify the principal and the health care agent; (ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal’s behalf; (iii) describe the limitations, if any, that the principal intends to impose upon the agent’s authority; and (iv) indicate that the agent’s authority shall become effective if it is determined … that the principal lacks capacity to make health care decisions.

Should the principal become incapacitated or unable to communicate his or her own wishes or decisions, the agent named in a properly executed health care proxy has “authority to make any and all health care decisions on the principal’s behalf that the principal could make, including decisions about life-sustaining treatment, subject, however, to any express limitations in the health care proxy.” The statute defines “health care” as “any treatment, service or procedure to diagnose or treat the physical or mental condition of a patient.” It also defines a “health care decision made by an agent under a health care proxy” as “a decision which is made in accordance with the requirements of this chapter, is consistent with any limitations in the health care proxy, and is consistent with responsible medical practice.” The health care proxy takes effect once an attending physician makes a determination that the principal lacks the authority to make or to communicate health care decisions.

5. See, e.g., Extendicare Homes Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015).
7. Id. at 1426 (emphasis in original).
8. Mass. Gen. Laws c. 201D, § 2 (2017). The agent can be anyone other than an operator, administrator, or employee of a facility if the principal, at the time of executing the health care proxy, is a patient or resident of such facility or has applied for admission to such facility unless said operator, administrator or employee is related to the principal by blood, marriage or adoption. Mass. Gen. Laws c. 201D, § 3 (2017).
12. Id.
The health care proxy statute is rooted in the doctrine of informed consent, which requires that the acceptance or rejection of treatment be based on one’s voluntary and informed decision.\textsuperscript{14} Health care proxies are designed so that, should individuals no longer be able to make voluntary or informed decisions, they will have named an agent in a health care proxy to make these decisions on their behalf. Agents must make decisions from the point of view of the principal and in accordance with the wishes of the principal should he or she have been able to make decisions at the time and given the circumstances.\textsuperscript{15}

B. The Massachusetts Durable Powers of Attorney Statute

G.L. chapter 190B, the Massachusetts Uniform Probate Code, provides in Article V for durable powers of attorney. A durable power of attorney is a document by which a principal designates another as his or her attorney-in-fact in writing. It must contain the words: “this power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,” or “this power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s subsequent disability or incapacity or the lapse of time.\textsuperscript{16} The choice of draftsmanship distinguishes between a “durable” power of attorney and a “springing” power of attorney. A durable power of attorney takes effect upon execution of the document, and will not be affected by the principal’s subsequent disability or incapacity. A springing power of attorney, in contrast, becomes effective only upon the disability or incapacity of the principal.

Typically, in today’s practice, powers of attorney differ from health care proxies in that they designate an agent to make financial or business decisions on behalf of the principal, as opposed to only health care decisions. Sometimes, the same person is designated in both documents and sometimes different persons are designated, choices that may have significant legal consequences ( infra, Part IV). Authorized acts done by an attorney-in-fact pursuant to a power of attorney during any period of disability or incapacity of the principal typically inure to the benefit of and bind the principal as if the principal were competent and not disabled.\textsuperscript{17}

C. Massachusetts Guardianship and Conservatorship Provisions

Massachusetts Uniform Probate Code provisions on guardianship and conservatorship confer potentially broad decision-making authority, which may extend beyond the authority of an agent under the health care proxy statute.\textsuperscript{18} A guardian may have the authority, subject to any limitations imposed by a court, to “make decisions regarding the incapacitated person’s support, care, education, health and welfare.”\textsuperscript{19} A conservator usually has financial powers, subject to any limitations imposed by a court, to “expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and dependents.”\textsuperscript{20} In simple terms, guardians and conservators are appointed pursuant to court orders, as opposed to attorneys-in-fact and health care agents, who can be appointed pursuant to a document executed outside of the courtroom.

D. The Massachusetts Uniform Trust Code

The Massachusetts Uniform Trust Code outlines the requirements for the creation of a valid trust:

- A trust shall be created only if: (1) the settlor has capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust has a definite beneficiary or is: (A) a charitable trust; (B) a trust for the care of an animal or (C) a trust for a non-charitable purpose; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{14} \textit{See} \textit{Johnson}, \textit{466 Mass.} at 782.
\item \textsuperscript{15} Mass. Gen. Laws c. 201D, § 5 (2017).
\item \textsuperscript{17} Mass. Gen. Laws c. 190B § 5-502 (2017).
\item \textsuperscript{18} Johnson \textit{v.} Kindred Healthcare Inc., \textit{466 Mass.} 779 (2014). Note, however, that limited guardianships are preferred and authority to admit the ward to a nursing home ordinarily requires specific Probate Court authorization. Guardianship of D.C., \textit{479 Mass} 516, *5 (2018).
\end{itemize}
Often, individuals create trusts, whether revocable or irrevocable, during their lifetime, and transfer property into the trust in order to protect against incapacity or inability to manage and direct the property. A trustee is named and has a fiduciary duty to act in the best interests of the settlor when managing and distributing the property held in the trust.

II. FEDERAL AND MASSACHUSETTS ARBITRATION STATUTES

The enforceability of nursing home arbitration agreements turns in part on the interplay between the laws discussed in Part I and the arbitration statutes examined here. 

The FAA makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The Supreme Court has held that “the legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.” The court has ruled that the FAA has a broad scope:

Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. … The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

By its express terms, the FAA applies to contracts involving maritime transactions and transactions involving interstate commerce. Courts interpret Congress’s commerce power broadly, and it “may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.” In Marmet Health Care Ctr. Inc. v. Brown, the Supreme Court held that a nursing home admission agreement constituted a transaction evidencing interstate commerce, and was thus subject to the FAA.

Massachusetts also has its own arbitration statute. In 1960, the Massachusetts Legislature enacted the Uniform Arbitration Act for Commercial Disputes, which is commonly referred to as the Massachusetts Arbitration Act (MAA). The MAA “expresses a strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes.” Section 1 of the MAA provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The language of the FAA and MAA regarding the enforceability of arbitration agreements is very similar. This statutory mandate to enforce arbitration agreements has been said “to put arbitration provisions on the same footing as a contract’s other terms.”

In 2007, the SJC held that the MAA applied to a nursing home admission agreement and correctly forecast that the FAA “almost certainly” applied as well. In the court’s view, the interstate commerce requirement was fulfilled because health care constitutes an activity in which the “aggregate economic activity” represents “a general practice subject to federal control.” Nursing homes purchase medicines from other states, work with out-of-state insurance, and accept payments from Medicare — all of which the SJC cited as examples of economic activity subjecting the business of nursing homes to Congress’s commerce power.
Where both acts apply to an arbitration agreement, is the MAA pre-empted by the FAA? Not necessarily. The FAA does not pre-empt all state law on arbitration. The FAA does not contain an express preemption provision, and it does not reflect a congressional intent to occupy the entire field of arbitration. Thus, in many cases, the FAA and MAA can peacefully coexist, so long as the state law does not represent “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” which, in the case of the FAA, is the enforcement of agreements to arbitrate. The Supreme Court has held that “the FAA pre-empts state laws which ‘require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.’” In Marmet Health Care Ctr. Inc. v. Brown, the Supreme Court held that the FAA pre-empted West Virginia’s prohibition on pre-dispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes.

Both the FAA and the MAA carve out exceptions to the enforcement of arbitration agreements for situations involving normal contract defenses, such as fraud, duress, or unconscionability. Thus, state law grounds for the revocation of a contract are relevant to determining whether an arbitration agreement is enforceable.

III. Pre-Kindred Massachusetts Case Law on the Authority of Agents to Enter into Arbitration Agreements

A. Miller v. Cotter

The plaintiff, Charles Miller Jr. (Miller), signed an arbitration agreement on behalf of his father as part of his father’s admission to Birchwood Care Center (Birchwood). Miller’s father later died while still a patient at Birchwood. Miller brought suit against the physician who examined his father at Birchwood, Birchwood, and three Birchwood employees, alleging negligence and wrongful death.

Under a validly executed power of attorney, Miller had the authority to make binding agreements on his father’s behalf. On the day Miller’s father was admitted to Birchwood, Miller and his wife met with a social worker employed by Birchwood to discuss details relevant to the admission and to sign the necessary forms on his father’s behalf. Among this paperwork were a 16-page admission agreement and an agreement providing for the binding arbitration of disputes arising out of Miller’s father’s stay at the facility. Execution of the arbitration agreement was not a condition of admission to Birchwood, and that was noted in capital letters at the top of the arbitration agreement. Miller testified that he was under great stress at the time of his father’s admission to the nursing facility and he did not read the arbitration agreement “word by word.”

The SJC considered the validity of an arbitration agreement executed in the context of an admission to a nursing home. Citing the Massachusetts arbitration statute, it stated that an arbitration agreement “shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract” (emphasis added).

The SJC therefore concluded that Birchwood was entitled as a matter of law to a judgment dismissing Miller’s complaint and compelling arbitration. Miller’s father was bound, by reason of the arbitration agreement signed by his son, as attorney-in-fact, to arbitrate any disputes arising between his father and the nursing facility.

37. Id.
38. See Volt Info. Sciences v. Board of Trustees, 489 U.S. 468, 477 (1989); see also Moses H. Cone Memorial Hosp., 460 U.S. at 24-25 (discussing federal pre-arbitration policy).
42. 9 U.S.C. § 2 (2012) (“valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”) (emphasis added); Mass. Gen. Laws c. 251, § 1 (2017) (“A written agreement to submit any existing controversy to arbitration ...shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract”) (emphasis added).
44. Id. at 672. Miller sued Birchwood in his capacity as personal representative of his father’s estate. The physician was not a party to the arbitration agreement or the appeal. Id. at 674-75.
45. Id. at 672.
46. Id.
47. Id. at 673.
49. Id. at 672.
52. Id. at 680.
On May 24, 2007, Dalton Johnson executed a health care proxy pursuant to the Massachusetts health care proxy statute, G.L. c. 201D, § 1-17, authorizing his wife, Barbara (Barbara), as his “Health Care Agent to make any and all health care decisions for me, except to the extent that I state otherwise.” He was admitted to a nursing facility, Braintree Manor Rehabilitation and Nursing Center (Braintree Nursing) in September, 2007. On Aug. 6, 2008, Barbara, in her capacity as health care agent, signed an agreement with Braintree Nursing to submit any disputes that may arise between Dalton and the nursing home “for resolution by mediation, and if mediation is unsuccessful, then by arbitration.” Thereafter, while a resident at Braintree Nursing, Dalton suffered burns and was transported to a hospital where he later died.

Plaintiffs, the administrators of Dalton Johnson’s (decedent) estate, filed a complaint in Superior Court against Braintree Nursing alleging negligence and seeking damages under the wrongful death statute. Braintree Nursing sought to enforce the arbitration agreement. The plaintiffs argued that the agreement to arbitrate disputes arising out of the decedent’s stay at the nursing facility was not a health care decision, and therefore, Barbara did not have authority to sign such an agreement. The Superior Court judge concluded that whether to enter into an arbitration agreement was in fact a health care decision, because the whole purpose of the decedent’s admission to Braintree Nursing was to receive health care. He opined that “a patient or his agent is free to choose whether or not to accept a proposed arbitration agreement, but either way that decision is a health care decision, because the whole purpose of the decedent’s admission to Braintree Nursing was to receive health care.”

The SJC reversed. It concluded that a health care agent’s decision to enter into an arbitration agreement is not a health care decision as that term is defined and used in the health care proxy statute. Therefore, the agreement to arbitrate all claims arising out of a principal’s stay in a nursing facility did not bind the principal where the agreement was entered into by a health care agent under the authority of a Massachusetts health care proxy.

In reaching its conclusion, the SJC first analyzed the definition of “health care.” The health care proxy statute defines “health care” as “any treatment, service or procedure to diagnose or treat the physical or mental condition of a patient,” and defines “health care decision” as “a decision which is made in accordance with the requirements of this chapter, is consistent with any limitations in the health care proxy, and is consistent with responsible medical practice.” The SJC concluded that the definitions, taken together, appear to limit “health care decisions” to those that directly involve the “provision of responsible medical services, procedures, or treatment of the principal’s physical or mental condition.”

The SJC also focused on the legislature’s intent when enacting the relevant agency statutes. It emphasized that the legislature intended to distinguish between a health care proxy and a durable power of attorney, guardianship or conservatorship. In 1990, the legislature contemplated enacting a bill that would have combined the roles of a health care agent and an attorney-in-fact by “empowering the attorney-in-fact to enter into agreements concerning the care of the principal or concerning medical or surgical procedures.” Instead, the legislature enacted House Bill No. 3006, which eventually became the health care proxy statute.

The SJC pointed out that the health care proxy statute gives the health care agent priority over other fiduciaries in making health care decisions. It reasoned that if it were to define “health care decisions” broadly to encompass decisions that relate to a principal’s business affairs, property, finances, or the adjudication of legal claims, all of which fall within the authority of an attorney-in-fact or court-appointed guardian or conservator, many decisions made by the health care agent would override the more expansive powers allocated to these fiduciaries. The SJC believed that the language and intent of the health care proxy statute was limited to a narrowly defined area of health care intentionally, and therefore concluded that a health care agent’s decision-making authority did not include the authority to bind the principal to arbitration.

54. Id. at 780.
55. Id. at 781.
57. Id.
59. Johnson, 466 Mass. at 784.
60. See 1990 House Doc. No. 3367.
Brantree Nursing also argued that an agreement binding a principal to arbitration was no different from other decisions that a health care agent may make on a nursing home resident’s behalf, such as decisions regarding whether and how to sign billing documents. The SJC concluded that the health care proxy statute already directs that “liability for the cost of health care provided pursuant to an agent’s decision shall be the same as if the health care were provided pursuant to the principal’s decisions.” Thus, it concluded that a health care agent’s consent to medical treatment automatically imposes liability on the principal for the costs of such treatment. The fact that a health care agent can sign a “billing document” did not support Brantree Nursing’s argument that a health care agent also has the authority to sign an arbitration agreement.

In Johnson, the SJC emphasized that the legislature did not intend the term “health care decision” to include the decision to enter into an arbitration agreement — i.e., to waive a principal’s right of access to the courts and to trial by jury. It therefore concluded that Barbara was not authorized, as the decedent’s health care agent, to bind the decedent to arbitration.

C. Licata v. GGNSC Malden Dexter LLC

In this case, decided the same day as Johnson, Rita Licata was a patient at a nursing facility operated by GGNSC Malden Dexter LLC (GGNSC) and while there suffered personal injuries that ultimately resulted in her death on Aug. 10, 2009. Her son, Salvatore, filed a wrongful death action in the Superior Court as the administrator of her estate. GGNSC filed a motion to compel arbitration based on an arbitration agreement that Salvatore had signed. A Superior Court judge denied the defendant’s motion to compel arbitration and the SJC affirmed.

On Aug. 19, 2008, Rita was admitted to a medical center where she signed a health care proxy designating Salvatore as her health care agent. On Aug. 22, 2008, Rita’s attending physician at the medical center wrote a transfer report containing a summary of her condition and transferred her to GGNSC’s nursing facility. Upon arrival at the GGNSC facility, Salvatore signed the admission paperwork. Rita was not present during the signing. While Salvatore was signing the admission paperwork, the admission director went to Rita’s room to inform her that Salvatore was signing papers on her behalf, but she did not appear to understand.

Salvatore, as Rita’s “authorized representative,” signed a separate document during the admission process entitled “Resident and Facility Arbitration Agreement” (Arbitration Agreement) which provided that “any and all claims, disputes and controversies … arising out of or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the facility to the Resident shall be resolved exclusively by binding arbitration.” On Sept. 10, 2008, Rita’s physician completed a one-page document titled “Documentation of Resident Incapacity Pursuant to Massachusetts Health Care Proxy Act [G.L. c.] 201D,” recording his determination that she lacked the capacity to make health care decisions. On Aug. 10, 2009, Rita died as a result of personal injuries she sustained while a resident at GGNSC’s nursing facility.

Salvatore filed a wrongful death claim and a number of additional claims for relief on behalf of Rita, among them negligence, breach of contract, and unfair or deceptive acts or practices. Based on the Arbitration Agreement, GGNSC filed a motion to dismiss the complaint and to compel arbitration pursuant to the FAA. It argued that 1) Salvatore had authority under the health care proxy to bind Rita to arbitration; 2) even if he was not authorized as Rita’s health care agent, he was authorized to sign the Arbitration Agreement as Rita’s son and “responsible party” under G.L. c. 201D, § 16, which provides that when there is no health care proxy, a health care provider may rely on the informed consent of responsible parties on behalf of the incapacitated patient; 3) he had apparent authority to sign the Arbitration Agreement on Rita’s behalf; 4) even if Salvatore lacked authority to sign the Arbitration Agreement at that time, Rita ratified Salvatore’s act; 5) the Arbitration Agreement bound Rita as a

64. Licata v. GGNSC Malden Dexter LLC, 466 Mass. 793 (2014).
65. Id. at 795.
66. Id. at 795-96.
67. Id. at 796.
68. Id. at 794.
69. Id.
71. Id. at 795.
72. Id.
73. Id. at 795-96.
third-party beneficiary; and 6) the doctrine of equitable estoppel precluded Salvatore from disavowing the Arbitration Agreement. The SJC addressed each of GGNSC’s arguments individually.

Authority under the health care proxy. Although Rita’s attending physician had not yet executed the requisite paperwork stating that Rita lacked the capacity to make or to communicate health care decisions, GGNSC argued that the transfer report, prepared while Rita was still a patient at the medical center and had not yet been transferred to GGNSC, activated the health care proxy because it included a diagnosis by her attending physician that Rita suffered from dementia of the Alzheimer type and noted that her insight and judgment were chronically impaired. GGNSC also argued that signing the Arbitration Agreement constituted a health care decision within the authority of a health care proxy.

The SJC concluded that the transfer report did not satisfy the statutory requirement — i.e., a determination in writing by the attending physician that the principal lacks capacity to make or to communicate health care decisions. Under G.L. c. 201D § 1, a patient lacks capacity if the patient lacks “the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.” Under Massachusetts law, notice that a principal lacks capacity to make health care decisions must be promptly given orally and in writing to the principal where there is any indication of the principal’s ability to comprehend such notice.

Here, the transfer report made no reference to Rita’s capacity or incapacity to make or communicate health care decisions. In addition, the transfer report suggested that Rita had some capacity which would enable her to understand a situation, such as notice that her health care proxy was to go into effect, and despite this determination, the physician did not give prompt oral and written notice of the determination to Rita. The court concluded that “treating a transfer report or similar medical record both as a determination of incapacity to make health care decisions and as notice to a principal and agent that a health care proxy is effectuated would create uncertainty about when the proxy has been triggered and deprive a principal of the opportunity to object to its activation.” Therefore, the SJC concluded that Rita’s health care proxy did not come into effect until the physician executed the “Documentation of Resident Incapacity Pursuant to Massachusetts Health Care Proxy Act [G.L. c.] 201D,” which was after Salvatore had signed the Arbitration Agreement.

In any event, the SJC also relied on its holding in Johnson v. Kindred Healthcare Inc. (discussed on page 86, and decided on the same day) that a health care agent’s decision to enter into an arbitration agreement is not a health care decision as that term is defined and used in the health care proxy statute. Therefore, even if the transfer report had satisfied the statutory requirements set forth in G.L. c. 201D, § 6, for determining incapacity of a patient, Salvatore would not have had authority as Rita’s health care agent to bind Rita to arbitration.

Authority as a “responsible party.” GGNSC argued that Salvatore was authorized to sign the arbitration agreement as Rita’s son and as the “responsible party” under G.L. c. 201D § 16. Massachusetts law provides that if a health care proxy has not been executed, a health care provider can rely upon the informed consent of responsible parties on behalf of incompetent or incapacitated patients to the extent permitted by law. The SJC concluded that given the fact that a health care agent’s authority to make health care decisions does not include the power to sign an arbitration agreement on the principal’s behalf, it would be unreasonable to recognize a wider scope of authority to a responsible party, who is not even designated or appointed by the principal. Therefore, even if Salvatore did qualify as a responsible party as defined under the relevant statute outlined herein, he did not have authority in this role to bind Rita to arbitration.

Apparent Authority. GGNSC argued that Salvatore’s act of
signing the arbitration agreement as an “authorized representative,” thereby certifying that he was duly authorized to execute the arbitration agreement, gave rise to Salvatore’s apparent authority that Rita consented to have the act done on her behalf. The SJC rejected this argument because only the words and conduct of the principal, and not those of the agent, are considered in determining the existence of apparent authority. 84

Ratification. GGNSC argued that Rita ratified Salvatore’s act of signing the Arbitration Agreement on her behalf. If an agent lacks actual authority to agree on behalf of the principal, the principal may still be bound if the principal acquiesces in the agent’s action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts. 85 Given that GGNSC provided no evidence that Rita had ever even learned of the Arbitration Agreement or that she willfully or deliberately ignored this fact, the SJC concluded that Rita never did or said anything which would constitute ratification of Salvatore’s act of signing the arbitration agreement.

Third-party beneficiary. GGNSC argued that the Arbitration Agreement bound Rita as a third-party beneficiary. However, there can be no third-party beneficiary in the absence of a contract. The court concluded that because there was no contract formed as a result of Salvatore’s lack of authority to sign the Arbitration Agreement, the third-party beneficiary doctrine did not apply. 86

Equitable estoppel. GGNSC argued that because Salvatore filed suit for breach of the admission agreement, he should be equitably estopped from denying that his claims were arbitrable. The court concluded that Salvatore’s complaint sought enforcement of the contract to provide services, which was distinct from the separate agreement binding the principal to arbitration, and thus no inequity resulted from denying enforcement of the Arbitration Agreement. 87

IV. THE SUPREME COURT’S DECISION IN KINDRED NURSING

The United States Supreme Court decided Kindred on May 15, 2017. 88 The case was on appeal from a consolidated Kentucky Supreme Court decision concerning the ability of two attorneys-in-fact to bind their principals to arbitrate disputes arising out of the principals’ stay in Kindred’s nursing facilities. 89

Janis Clark (Janis) and Beverly Wellner (Beverly) both held broad powers of attorney for their family members, Olive Clark (Olive) and Joe Wellner (Joe), respectively. 90 Janis’s power of attorney stated that she was empowered with “full power…to transact, handle, and dispose of all matters affecting [Olive] and/or [Olive’s] estate in any possible way, including the power to “draw, make and sign in my name any and all checks, promissory notes, contracts, deeds, or agreements.” 91 Beverly’s power of attorney stated that she had the authority on Joe’s behalf to make “contracts of every nature in relation to both real and personal property.” 92

Both Olive and Joe’s health failed, and they required admission into Kindred’s Winchester Centre (Kindred) in 2008. 93 Janis and Beverly completed all of the nursing facility’s admission paperwork under their broad powers of attorney. Kindred’s admission forms included an arbitration agreement, which provided that “[a]ny and all claims or controversies arising out of or in any way relating to … the resident’s stay at the facility” would be resolved through “binding arbitration.” 94

Olive and Joe died in 2009, and Janis and Beverly brought wrongful death suits on behalf of Olive and Joe’s estates, alleging that Kindred had delivered substandard care to Olive and Joe, which resulted in their deaths. 95 Kindred moved to dismiss the lawsuits, claiming that the disputes must be decided by binding arbitration pursuant to the arbitration agreements that Janis and Beverly had signed during Olive and Joe’s admissions to Kindred. 96

86. Licata, 466 Mass. at 803.
87. Id. at 804.
89. Id.
90. Id. at 1425.
91. Id.
93. Kindred, 137 S. Ct. at 1425.
94. Id.
96. Id.
court denied the motions to dismiss.

The Kentucky Supreme Court affirmed the lower court’s denial of Kindred’s motions to dismiss the lawsuits. The basis of the Kentucky Supreme Court’s decision was what has since been called the “clear-statement rule” — i.e., the principle that a power of attorney could not empower an agent to enter into an arbitration agreement on her principal’s behalf without specifically and clearly saying so. The Kentucky Supreme Court held:

In the cases before us we address the question of whether a person will be deemed to have waived fundamental constitutional rights when, in his stead, his attorney-in-fact signed a pre-dispute arbitration agreement. Our focus has been, and remains, upon the scope of the powers expressed in the power of attorney document, and whether those expressed powers are sufficient to supply the principal’s assent needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.

Upon review of these cases, we are convinced that the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power of attorney document in order for that authority to be vested in the attorney-in-fact. The need for specificity is all the more important when the affected fundamental rights include the right of access to the courts…, the right of appeal to a higher court…, and the right of trial by jury, which incidentally is the only thing that our Constitution commands us to “hold sacred.”

In other words, the Kentucky court believed that, in order to empower an agent to waive fundamental constitutional rights, the principal must make such empowerment crystal clear on the face of the document. Further explaining this idea, the Kentucky Supreme Court held:

We will not…infer from the principal’s silence or from a vague and general delegation of authority to “do whatever I might do,” that an attorney-in-fact is authorized to bargain away his principal’s rights of access to the courts and to a jury trial in future matters as yet not anticipated or even contemplated. A durable power of attorney document often exists long before a relationship with a nursing home is anticipated. It bears emphasis that the drafters of our Constitution deemed the right to a jury trial to be inviolate, a right that cannot be taken away; and, indeed, a right that is sacred, thus denoting that right and that right alone as a divine God-given right.

The Kentucky court found that Janis’s power of attorney was, on its face, broad enough to encompass signing arbitration agreements on behalf of Olive.

The countervailing policy against permitting agents to bargain away their principals’ fundamental constitutional rights nonetheless required, in the Kentucky Supreme Court’s view, that the arbitration agreement between Olive and Kindred be held invalid. Accordingly, the Kentucky Supreme Court affirmed the denial of Kindred’s motions to dismiss on the basis that the arbitration agreement never existed insofar as (i) Olive and Joe had never assented to its terms, and (ii) Janis and Beverly did not have capacity to enter into such an agreement on behalf of their principals.

In a relatively short decision, the Supreme Court emphatically overturned the Kentucky Supreme Court’s clear-statement rule. The Supreme Court began by noting that “[t]he FAA…pre-empts any

97. Id.
98. Extendicare Homes Inc., 478 S.W.3d at 313.
100. Extendicare Homes Inc., 478 S.W.3d at 327-28 (emphasis in original), citing Ky. Const. § 7.
101. Id. at 329 (emphasis in original).
102. Id. at 326-27.
103. Id. at 330. The Kentucky Supreme Court did not think that Beverly’s power of attorney was broad enough to encompass signing arbitration agreements. Id. at 326. Regardless of whether the power of attorney documents gave the attorneys-in-fact the implied authority to enter arbitration agreements, the Kentucky Supreme Court found that a power of attorney must explicitly grant such authority in order for an arbitration agreement signed by an agent to be valid. Id. at 313.
104. Extendicare Homes Inc. v. Whisman, 478 S.W.3d 306, 330 (Ky. 2015) (“It follows that there are specific and concise grounds as exist at law or in equity, applicable to the formation of contracts generally, for establishing the invalidity of the … arbitration agreements at issue because each of them was signed by an agent lacking his principal’s authority to bargain away fundamental constitutional rights.”) Specifically, the Kentucky court pointed to “[t]he fundamental principle of contract formation is that to create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract.” Id. at 321 (internal quotations omitted).
state rule discriminating on its face against arbitration...[and] [t]he Act also displaces any rule that covertly accomplishes the same objective....”105 The Supreme Court referred to the FAA as establishing an “equal-treatment principle” insofar as “[a] court may invalidate an arbitration agreement based on generally accepted contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”106 The genesis of the Supreme Court’s “equal-treatment principle” was Section 2 of the FAA, which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”107

According to the Supreme Court, the Kentucky court’s invalidation of the Kindred arbitration agreements ran afoul of the “equal-treatment” principle set out in the FAA.108 The Kentucky court’s “clear-statement” rule was “too tailor-made to arbitration agreements — subjecting them, by virtue of their defining trait, to uncommon barrier — to survive the FAA’s edict against singling out those contracts for disfavored treatment.”109 By requiring powers of attorney to include specific language empowering attorneys-in-fact to enter arbitration agreements, the Kentucky Supreme Court exhibited the “kind of hostility to arbitration that led Congress to enact the FAA.”110

Janis and Beverly attempted to classify the Kentucky “clear-statement” rule as a proper exercise of a state court’s power to make law relating to contract formation.111 According to this argument, “States have free rein to decide — irrespective of the FAA’s equal-footing principle — whether … [arbitration] contracts are validly created in the first instance.”112 But the Supreme Court saw the danger in this argument — if states are permitted to regulate the formation of arbitration contracts without restraint, then it would be “trivially easy for States to undermine the [FAA] — indeed, to wholly defeat it.”113 In rejecting Janis and Beverly’s argument, the Supreme Court held that “[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.”114

The Supreme Court reversed the portion of the Kentucky court’s ruling with respect to Olive’s estate and directed the court to en force the arbitration agreement in that case.115 The portion of the Kentucky court’s ruling pertaining to Joe’s estate, however, was vacated and remanded.116 The disparate treatment of the two parties is attributable to the Kentucky court’s finding that Olive’s power of attorney would have given Janis the authority to enter into an arbitration agreement on Olive’s behalf, but for the clear-statement rule.117 By contrast, the Kentucky court found that Joe’s power of attorney did not grant Beverly the authority to enter into arbitration agreements on Joe’s behalf.118 The Supreme Court directed that the Kentucky court on remand “determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney.”119

V. RECENT REGULATORY DEVELOPMENTS

Under regulations promulgated by the attorney general pursuant to the Massachusetts Consumer Protection Act, nursing homes in Massachusetts cannot make signing an arbitration agreement mandatory for admission to the facility.120 However, as cases indicate, nursing homes in Massachusetts can, and often do, include voluntary arbitration agreements with their admission papers.

In October 2016, as part of the Reform of Requirements for Long-Term Care Facilities Final Rule,121 the Centers for Medicaid and Medicare Service (CMS) finalized a rule that banned nursing homes and assisted living facilities who participate in Medicare or Medicaid from offering pre-dispute arbitration agreements that bind residents to arbitration to resolve any disputes that may arise between a resident or their representative and the nursing home

105. Kindred, 137 S. Ct. at 1426.
106. Id. (internal quotations omitted).
109. Id. at 1427.
110. Id. at 1427-28 (quotations and citations omitted).
111. Id. at 1428-29.
112. Id. at 1428.
113. Id.
115. Id. at 1429.
116. Id.
117. Id.
118. Id.
119. Id. The Kentucky Supreme Court revisited the Wellner power of attorney on remand and held that “...[O]ur conclusion that the Wellner POA was insufficient to vest Beverly Wellner with the power to execute a pre-dispute arbitration agreement as part of Joe Wellner’s admission to a nursing home was wholly independent of the clear statement rule decreed by the United States Supreme Court.” Kindred Nursing Ctrs. L.P. v. Wellner, 533 S.W.3d 189, 194 (2017). As this article went to press, a petition for certiorari was pending (Docket No. 17-1318) and scheduled for consideration at the Supreme Court’s conference on Sept. 24, 2018.
120. See 940 CMR 4.00 (2018).
121. See 81 Fed. Reg. 68688 (Oct. 4, 2016) (amending 42 CFR 483.70 (n)).
facility. This rule, proposed under the Obama administration, prohibited federal funding for nursing homes that offered arbitration agreements before a dispute between the parties arose, and, made it clear that nursing home facilities could not require residents to enter into arbitration agreements as a condition upon admission. The rule was set for implementation in November 2016, although a case filed by the American Health Care Association and a group of nursing homes challenging this rule was filed and a preliminary injunction was issued stopping CMS from enforcing the arbitration ban. 

In January 2017, CMS filed an appeal from the injunction. In June 2017, instead of filing a brief for its appeal, CMS, now under the Trump administration, withdrew its appeal and instead released a proposed rule reversing the ban on arbitration clauses in nursing home contracts, stating that “a policy change regarding pre-dispute arbitration will achieve a better balance between the advantages and disadvantages of pre-dispute arbitration for residents and their providers.” CMS went on to say that it “now believes that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the costs and expense of litigation.”

The new proposed rule removes the 2016 proposal under § 483.70(n)(1) that prohibited pre-dispute arbitration agreements and removes the 2016 proposal under § 483.70(n)(2)(iii) that attempted to ban a nursing home’s ability to require its patients to sign an arbitration agreement as a condition of admission. Under the current proposed rule, the provider must explain the arbitration agreement to the patient or his or her agent in a form and manner that the patient understands, in a language the patient understands, and the patient or his or her agent must acknowledge that he or she understands the agreement. All agreements must be in plain language, and, if signing the agreement for binding arbitration is a condition of admission into the facility, the language of the agreement must be in plain writing and in the admission contract. The facility must also post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

The new proposed rule from CMS came on the heels of the Kindred decision. The American Bar Association, however, has asked that this new proposed rule by CMS not be implemented, stating that:

While Kindred clearly prohibits singling out arbitration agreements for disfavored treatment, nothing in the court’s reasoning or under the terms of the Federal Arbitration Act require singling out arbitration agreements for favored treatment. Yet, that is exactly what CMS is doing by its proposed total embrace of mandatory pre-dispute arbitration provisions in admissions contracts.

The federal regulatory battle can be expected to continue.

VI. IMPACT OF KINDRED ON MASSACHUSETTS LAW AND SOME POST-KINDRED ISSUES FOR POTENTIAL FURTHER LITIGATION

Kindred sends a strong message to state courts that the FAA prohibits discrimination against the formation or enforcement of pre-dispute arbitration agreements in nursing home contracts. This confirms and reinforces the trend in recent Supreme Court jurisprudence. In 2012, the Supreme Court issued a per curiam decision in Marmet Health Care Ctr. Inc. v. Brown. The Supreme Court’s decision in Marmet vacated a decision of the Supreme Court of Appeals of West Virginia, which had invalidated three arbitration agreements on the basis of West Virginia’s public policy against the enforcement of pre-dispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes.

A. Status of Massachusetts Law Set Forth in Miller

123. Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, Centers for Medicare & Medicaid Services (CMS), HHS, 82 FR 26649, June 8, 2017.
124. Id.
125. Id.
128. Id. at 533.
Kindred reaffirms Miller’s holding that voluntary arbitration agreements between a nursing home resident and a nursing home facility are enforceable if residents or their authorized agents sign an agreement to arbitrate, as long as there was no fraud, duress, or unconscionability involved in entering the arbitration agreement.129

B. Status of Massachusetts Health Care Proxies

The SJC’s Licata and Johnson decisions focused on a health care agent’s ability to bind a principal to arbitration.130 Both cases concluded that, in Massachusetts, a health care agent does not have the authority to bind a principal to arbitration because such an act does not involve a “health care decision” for purposes of the health care statute. The SJC has stated that its “reading of the health care proxy statute comports with the FAA’s directive to place arbitration agreements ‘on an equal footing with other contracts.’”131 Because of the unique and limited nature of health care proxies in Massachusetts and their clear distinction from powers of attorney, the authors are of the view that Kindred does not require the SJC to reconsider its holdings in Licata and Johnson. In Licata and Johnson (supra, Part III), the SJC was called upon to analyze whether a health care agent can bind a principal to arbitration. Because the issue in Kindred was whether or not an attorney-in-fact could bind a principal to arbitration, the decisions in Licata and Johnson are not inconsistent with the decision in Kindred.

C. Status of Massachusetts Durable Powers of Attorney

Faced with the SJC’s holdings in Licata and Johnson, anecdotal evidence points to a default trend whereby nursing home facilities have the resident’s attorney-in-fact — and not his health care agent — sign an arbitration agreement if the resident lacks the capacity to do so. There has yet to be a Massachusetts state case holding specifically that an attorney-in-fact has authority to bind a principal to arbitration,132 but Kindred would indicate that such a holding is on the horizon. In a post-Kindred world, powers granted to the attorney-in-fact, such as “to make and enter into contracts of all kinds,” are likely to be interpreted as giving the attorney-in-fact the power to do just that: to enter into a contract of any kind, including an arbitration agreement. Kindred should strengthen the understanding among nursing home facilities and attorneys in Massachusetts that optional nursing home arbitration agreements are generally enforceable when executed by attorneys-in-fact with broad authority.

D. Conflicts of Laws Issues

If a Massachusetts resident signs a health care proxy and a power of attorney in Massachusetts, then moves and changes domicile to Florida for retirement and admission to a nursing facility, how do the Massachusetts incapacity documents fare in Florida when it comes to that state’s laws on arbitration agreements in the nursing facility setting? The issue of an agent’s authority to bind a principal to arbitration has received different treatment in different jurisdictions across the country. Each state has developed its own body of case law and as a result, there is ambiguity nationwide as to: (i) whether an agent can bind a principal to arbitration upon admission to a nursing facility; and (ii) if so, which type of agent can do so.133 Kindred should provide some certainty on this front, insofar as the Supreme Court made clear its frustration with state courts’ hostility towards arbitration agreements. Due to nuances in state court decisions and the different types of incapacity-related agency relationships that are available in different states, however, practitioners should be aware...
of possible differences across jurisdictions. The authors venture no conclusions on the choice-of-law issues that may be involved.

E. Status of Mandatory or Optional Arbitration Agreements

As the law currently stands in Massachusetts, under the Massachusetts Consumer Protection Act regulations promulgated by the attorney general, nursing homes in Massachusetts cannot make signing an arbitration agreement mandatory for admission to the facility.\(^{134}\) Would the \textit{Kindred} court have struck down this regulation as hostile towards arbitration agreements and contrary to the FAA? Further, would the proposed federal regulations have any impact on Massachusetts law or regulations with respect to mandatory nursing home arbitration agreements?

Would the use of mandatory arbitration agreements for admission to a nursing facility fall under the duress or unconscionability exception to validly executed arbitration agreements or some other consumer protection provisions of Massachusetts law? Often, agents are so caught up in admitting their parent, spouse or relative to a facility that, when faced with copious amounts of paperwork upon admission, they do not always read or fully understand each document before signing. Nevertheless, according to \textit{Miller} and \textit{Kindred}, unless fraud, duress or unconscionability is established, the arbitration agreement is valid. The validity of an arbitration agreement signed under such circumstances will depend upon a case-by-case analysis of the particular facts. Faced with this risk (or for other business reasons), a nursing home might prefer to continue to offer voluntary and optional arbitration agreements with its admission papers.

F. Arbitration of Wrongful Death Claims

On March 31, 2018, less than a year after the \textit{Kindred} opinion, Judge Douglas P. Woodlock of the United States District Court for the District of Massachusetts handed down a decision in \textit{GGNSC Chestnut Hill LLC v. Schrader}.\(^{135}\) Applying what he viewed as the dictates of \textit{Kindred} and deciding an open question under Massachusetts law,\(^{136}\) Judge Woodlock held that an arbitration agreement signed on behalf of a nursing home patient by her daughter acting under a durable power of attorney was binding on the executor of the estate with respect to wrongful death claims brought on behalf of statutory beneficiaries who were not parties to the arbitration agreement.\(^{137}\) \textit{Schrader} leaves no doubt that issues remain for litigation despite \textit{Kindred}.\(^{138}\)

In 2013, Jackalyn Schrader (Jackalyn) admitted her mother, Emma Schrader (Emma), to Gold Living Center Heathwood (Heathwood) in Chestnut Hill, Massachusetts.\(^{139}\) Among many documents signed by Jackalyn as Emma’s attorney-in-fact was an arbitration agreement.\(^{140}\) The arbitration agreement was optional and had two separate signature lines: one to accept and one to decline the agreement.\(^{141}\) The nursing home’s administration coordinator, however, only highlighted the section below the signature line that indicated acceptance of the agreement. In bold capital letters at the top of the first page of the arbitration agreement was a statement that read “this agreement is not a condition of admission or continued residency in the facility. This agreement governs important legal rights. Please read it carefully and in its entirety before signing.”\(^{142}\) The court analyzed the validity of the arbitration agreement, whether the agreement was unconscionable, and whether a pre-admission arbitration agreement requires arbitration of wrongful death claims.

Jackalyn argued that there was no “meeting of the minds,” insofar as significant, material terms were still being negotiated.\(^{143}\) Judge Woodlock concluded that Jackalyn’s failure to read or understand the agreement did not free her from its obligations, and there was no evidence that Jackalyn did not assent to the terms of the arbitration agreement. Therefore, a valid contractual agreement to arbitrate arbitration proceedings to resolve employment disputes between the parties provides additional evidence that litigation of disputes over arbitration agreements can be expected to continue.

\(^{134}\) See 940 CMR 4.00 (2018).


\(^{136}\) Indeed, a question expressly reserved by the court in 2014 in \textit{Johnson}, 466 Mass. at 779 n.14.


\(^{138}\) See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (a 5-4 decision regarding contracts between employers and employees providing for individualized arbitration proceedings to resolve employment disputes between the parties) provides additional evidence that litigation of disputes over arbitration agreements can be expected to continue.


\(^{140}\) \textit{Id.} at *9.

\(^{141}\) \textit{Id.}

\(^{142}\) \textit{Id.} at *10.

\(^{143}\) \textit{Id.} at 11.
Jackalyn also argued that the arbitration agreement was unconscionable. The court reasoned that the arbitration agreement clearly indicated in bold-face capital letters that the agreement was not mandatory for continued care, and the agreement also stated at the top of the page that the document should be read carefully. Furthermore, the agreement provided a 30-day revocation period in which Jackalyn could have sent written notice of her wish to revoke acceptance of the agreement. The court also stated that the administration coordinator’s act of only highlighting one signature line did not amount to undue influence, and that there was no duty for Heathwood to explain the terms of the agreement to Jackalyn. The court therefore concluded that the arbitration agreement was not unconscionable.

Finally, the court considered whether the wrongful death claim fell within the scope of the arbitration agreement. The agreement provided, in relevant part, that the term “Resident” applied to:

the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, including any next of kin, guardian, executor, administrator, legal representative, or heir of the Resident, and any person who has executed this Agreement on the Resident’s behalf.

Jackalyn argued that the wrongful death claim could not be arbitrated because the wrongful death beneficiaries were not parties to the arbitration agreement. The judge stated that, based on the cases cited to him, he believed that “Massachusetts courts have not squarely decided whether a Massachusetts wrongful death claim is covered by a decedent’s arbitration agreement and that other jurisdictions are divided on the question.” Undertaking the required analysis of what the SJC would do when confronted with the question, Judge Woodlock concluded that Massachusetts law has more recently moved towards interpreting wrongful death claims as derivative of the decedent’s cause of action, an interpretation supporting the contention that the arbitration agreement must be enforced against the plaintiff statutory beneficiaries to the same extent that it would have been enforced against Emma had she survived.

Citing to *Kindred* and *Marmet*, the judge reasoned that he: must honor the consistent treatment by the Supreme Court of the United States of arguably special objections to arbitration contracts, in the nursing home context, where it repeatedly held in recent decisions that state laws that ‘impede the ability … to enter into arbitration agreements… flout the FAA’s command to place those agreements on an equal footing with all other contracts.’

Commenting that a “compelling argument can be made that treating arbitration agreements as without force in the wrongful death context has the indirect but practical effect of singling out arbitration agreements for special treatment[,]” the judge concluded that the arbitration agreement signed by Jackalyn must be enforced and precluded a wrongful death suit in the Superior Court of Massachusetts.

G. Potential Future Litigation

Litigation over arbitration agreements in the nursing home context and otherwise shows little sign of receding. Lawyers who practice in the field can be expected to apply their ingenuity to the prospect of post-*Kindred* litigation. Will we see increased use of arbitration agreements within nursing home settings? Will the industry be emboldened to insist on mandatory arbitration as many other consumer service industries currently do? Will principals and attorneys-in-fact start seeing pre-dispute arbitration agreements in hospital admissions paperwork and doctor’s offices? What impact will the duties of loyalty and to act in the best interests of one’s principal have on the willingness of authorized agents to sign such agreements? Where a patient is incapacitated and does not have a

144. *Id.* at *12.
146. *Id.*
147. *Id.*
148. *Id.* at *15.
149. *Id.* at *15-16.
150. *Id.* at *16.
152. See, e.g., Noonan v. Staples Inc., 556 F.3d 20, 32 (1st Cir. 2009).
153. Schrader at *19.
155. *Id.* at *24, quoting Kindred, 137 S. Ct. at 1429.
156. *Id.* at *24.
157. Judge Woodlock’s prediction about how the SJC will interpret the wrongful death statute does not resolve the issue for other litigants. Ultimately, the SJC has the final word on the interpretation of the state statute, see, e.g., Murdock v. City of Memphis, 87 U.S. 590 (1875), and under the Rooker-Feldman doctrine, the SJC’s view of the impact of federal law on the statute is reviewable only by the United States Supreme Court. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).
158. See Cullinan v. Uber Technologies, Inc., Docket No. 16-2023 (June 25, 2018) (online arbitration agreement not conspicuous and class action lawsuit by customers may proceed in federal court).
power of attorney in place, will guardians and conservators who are appointed by a court be deemed to have authority to sign arbitration agreements on behalf of the patient? What impact will fiduciary duties have on their willingness to do so? If a patient has signed a durable power of attorney, carefully drafted by a retained attorney, but signs another boilerplate power of attorney within a nursing home admissions package, which document governs? Would it make a difference if the earlier document prohibited the agent from signing an arbitration agreement? Only time will tell the full implications of *Kindred* on an agent’s ability to bind a principal to arbitration in the health care setting and beyond.

**VII. Lessons to Be Drawn From *Kindred* by Massachusetts Practitioners**

Estate planners, elder law attorneys, and general practitioners who draft wills and the like, can all draw one unmistakable lesson from *Kindred*: statutory health care proxies and powers of attorney are important components of any estate plan and decisions made thereunder may have an ultimate impact on dispute resolution. The die may be cast before professional executors and trustees even enter the picture.

These documents are often signed long before admittance to a nursing facility becomes a reality, and thus, the topic of binding a principal to arbitration upon admission to a nursing home facility may not have been discussed, especially when other estate planning considerations are at the forefront of the meeting. But counsel should make an effort to facilitate a discussion about the principal’s wishes with respect to nursing home arbitration agreements while the principal is still competent and of sound mind.

Most standard general powers of attorney grant the agent broad authority to sign and enter into contracts on behalf of the principal. Counsel should make it a practice to alert clients to the fact that their attorneys-in-fact may very well have the authority to bind the clients to pre-dispute arbitration. If a principal does not want his or her attorney-in-fact to have such authority, he or she should specifically exclude such authority in the power of attorney. Indeed, counsel may wish to use a form that specifically requires such an election to be made. Agents who are appointed as attorneys-in-fact should be educated about the implications of entering into arbitration agreements on behalf of the principal upon admission to a nursing home facility.

**Conclusion**

In light of the Supreme Court decision in *Kindred*, there are fewer legal impediments to pre-dispute, binding arbitration agreements contained in nursing home admissions paperwork given to prospective residents or their agents. *Kindred* concluded that such agreements should be enforced when executed by a resident’s attorney-in-fact if the scope of a validly executed power of attorney reasonably encompasses the authority to enter into arbitration agreements — and that states cannot single out arbitration agreements for hostile treatment, even in the context of incapacity-related agency relationships. Given well-established federal and state policy favoring enforcement of arbitration agreements and recent decisions echoing that policy, estate planners should educate clients, both those who are executing powers of attorney and those who are appointed as agents under a power of attorney, about the potential advantages and disadvantages of executing an arbitration agreement, and authorized agents should read and consider any arbitration agreement thoroughly before signing.

159. Note that unless certain specific conditions are met, “(n)o guardian shall have the authority to admit an incapacitated person to a nursing facility, except upon a specific finding by the court that such admission is in the incapacitated person’s best interest.” See Mass. Gen. Laws c. 190B, § 5-309(g) (2017).
Criminal Law: Narrowing the Scope of Massachusetts General Laws c. 268, § 13B’s Prohibition on Misleading a Police Officer


In Commonwealth v. Tejeda,¹ the Supreme Judicial Court (SJC) held that destroying evidence in order to impede an investigation does not constitute the crime of misleading a police officer in violation of Massachusetts General Laws (G.L.) c. 268, § 13B.² Although the decision provides further clarification of that provision of Section 13B, it appears to conflict with one of the main objectives of the statute. It also casts confusion as to what charges can be brought under Massachusetts law against a person who destroys evidence with the intent to interfere with an investigation.

I. THE FACTS

In Tejeda, the defendant walked to where a police officer was placing a man into custody for possession of heroin, picked up a packet of what appeared to be heroin that the man had dropped, and ingested it.³ The police were unable to recover the bag and its contents.⁴

The defendant was charged with misleading a police officer, in violation of G.L. c. 268, § 13B.⁵ A judge of the Boston Municipal Court dismissed the count, from which the commonwealth appealed.⁶ The Appeals Court vacated the order of dismissal, holding that the defendant’s conduct constituted misleading a police officer as intended in Section 13B.⁷ Concluding otherwise on further appellate review, the SJC affirmed the order of dismissal.⁸

The SJC’s ruling was the latest in a series of opinions in which the court has struggled to define the scope of the misleading a police officer provision of G.L. c. 268, § 13B. To place the court’s decision in Tejeda into context, a brief background of the court’s prior interpretations of this provision is in order.

II. THE COURT’S INTERPRETATION OF “MISLEADING”

When the legislature added “misleading a police officer” to other prohibited conduct in G.L. c. 268, § 13B in 2006, it did not define “misleading.”⁹ When the SJC was first called upon to define the term “misleading” in Commonwealth v. Figueroa,¹⁰ it adopted the definition of misleading as set out in 18 U.S.C. 1515(a)(3):

(A) knowingly making a false statement; (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity; (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or (E) knowingly using a trick, scheme, or device with intent to mislead.¹¹

Applying that definition, the court held that Figueroa’s statement to his parole officer that GPS data showing that he had left his house without authorization was due to a “glitch” was “misleading” because he had intentionally concealed his visit to an apartment where children lived in violation of his parole conditions.¹² In Commonwealth v. Morse,¹³ the court expanded on the definition that it had adopted in Figueroa. In Morse, officers, in the course

2. The author represented the commonwealth in Tejeda before the Appeals Court and the Supreme Judicial Court. The views expressed herein are solely those of the author.
4. Id.
5. Id. at 817.
6. Id. at 817-18.
11. Id. at 371-72.
12. Id. at 372-373.
of investigating a fatal accident involving a boat that the defendant had been piloting, asked the defendant whether he had consumed any substance that could have impaired his ability to operate his boat. The defendant’s answer — “no” — was later contradicted, and he was charged with misleading police in violation of G.L. c. 268, § 13B. In interpreting “misleads,” the court noted that each aspect of the working definition of “misleads” adopted in Figueroa suggests a “knowing or intentional act calculated to lead another person astray.” Because there was “no evidence of affirmative misdirection on the defendant’s part” by answering “no” to the officer’s question, the court held that the defendant’s conduct was not misleading.

Two years later, the court again revisited the definition of “misleading” in Commonwealth v. Paquette. In Paquette, the defendant lied to police about the extent of his observations of a fight that had happened at his house. Noting that the working definition of “misleading” adopted in Figueroa had “inherent limitations” (because, apart from “knowingly making a false statement,” each of the enumerated categories uses the word “mislead” or “misleading” without defining that word), the court took the opportunity “to clarify further the meaning of ‘misleads’ as it appears in Section 13B.”

Looking to common definitions of the word, the court held that, for a false statement to police to be misleading, the fact finder need not only find that the statement was false, but that it reasonably could have led law enforcement officers to pursue a materially different course in their investigation from one they otherwise would have pursued because it sent them in the wrong direction, i.e., a “wild goose chase.”

Thus, by the time that the SJC considered Tejeda, a framework had emerged by which to assess whether a statement to officers was misleading within the context of Section 13B. Tejeda, however, was the first case in that evolution in which the court considered whether physical conduct was misleading as that term is used in § 13B. To answer that question, the court drew on the requirements set out in Morse and Paquette. For physical conduct to constitute misleading conduct within the confines of Section 13B, the SJC held, it must have been intended to create a false impression in the mind of another that was reasonably likely to lead the investigation in a materially different, or wrong, direction. Because the defendant’s act of swallowing the packet in full view of the officer was not an attempt to deceive the officer as to where the packet went, and because the conduct did not lead the officers on a “wild goose chase,” the court held that the defendant’s conduct of destroying evidence did not constitute misleading conduct.

With its decision in Tejeda, the court provided further clarification as to the type of conduct that may constitute misleading a police investigation in violation of G.L. c. 268, § 13B. That is a good thing. And, in endeavoring to provide a more concrete definition of “misleading” the court sensibly looked to the common usage of that word. Missing from the court’s interpretation, however, was an account of the legislature’s intent in expanding Section 13B to make it illegal to mislead a police officer.


As originally enacted in 1969, G.L. c. 268, § 13B was “rather obviously, to protect witnesses from being bullied or harried so that they [did] not become reluctant to testify or to give truthful evidence in investigatory or judicial proceedings.” By 2006, however, a “new wave” of gang violence, witness intimidation, and hesitancy to cooperate with police had become a serious impediment to effective prosecution of gang members and street violence. Consequently, the legislature amended Section 13B by adopting many of the recommendations made by the Senate Joint Committee on Public Safety and gave law enforcement agents increased tools that would allow for more effective prosecution of gang and street crimes. In addition to enlarging the definition of the means of intimidation, the class of victims, and the kinds of criminal proceedings covered by the statute, the 2006 amendment made it a crime to directly or indirectly mislead a police officer with the intent to impede an investigation. As the SJC succinctly observed in Morse, when the legislature amended Section 13B in 2006, it intended to protect police officers from misleading conduct committed with the intent to obstruct a criminal investigation.

Rather than consider this statutory history in Tejeda, the court looked solely to the common usage of “misleading.” To be sure, by not defining “misleading,” the legislature invited differing meanings of its statute. The legislature, however, had its reasons for doing so. First, the 2006 amendment was intended to criminalize mislead conduct committed with the intent to obstruct a criminal investigation.

14. Id. at 362-64.
15. Id. at 363-64.
16. Id. at 361.
17. Id. at 372.
18. Id. at 374-75.
20. Id. at 794-96.
21. Id. at 799-800.
22. Id. at 800-01.
24. Id. at 820.
25. Id.
29. Id., see also Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 534 (2010) (“The means of intimidation, the class of victims, and the kinds of criminal proceedings covered by the statute were all enlarged” by St. 2006, c. 48, § 3).
30. Morse, 468 Mass. at 370, quoting Rivera, 76 Mass. App. Ct. at 534 (“The overall purpose and effect of the amendment [which, in part, criminalized misleading conduct] was [] to expand the scope of the statute to address heightened concerns with witness intimidation and its interference with the successful prosecution of gang members and other street violence.”).
31. Id. at 368-69.
interpretations.  Nevertheless, this statutory history provides valuable context for how the legislature intended to use the term “misleading.” Because the 2006 amendment was designed to provide law enforcement with tools to combat actions designed to thwart investigations and prosecutions, it is unlikely that the legislature intended to proscribe those instances where a person intends to send an investigator on a “wild goose chase”—but not those more common instances where a person destroys evidence, as in Tejeda. Rather, it would appear more consistent with the overall aim of the 2006 amendment that the legislature intended to proscribe affirmative acts (such as destroying evidence) that foreclose one avenue of investigation and force the investigator to resort to other means of investigation.

Moreover, the framework that the SJC established in Morse and Paquette (and which it applied in Tejeda) to address whether a statement is “misleading” is ill-suited to an affirmative act like destroying evidence with the intent to interfere with an investigation. Answering “no” to an investigator’s question (as in Morse) or not cooperating with an investigation (as in Paquette) did not involve an affirmative act designed to impede an investigation. Because the 2006 amendment did not criminalize non-compliance with an investigation, the actions in these cases did not appear to clash with the intent underlying the 2006 amendment. Destroying evidence with the intent to impede an investigation, however, appears to fall squarely within the type of conduct the legislature sought to proscribe. The court’s determination that the facts of Tejeda were similar to those of Morse and Paquette and the court’s reliance on its rationale in those cases added to an outcome that appears to have undercut the legislature’s intent.

While the SJC did not take the legislature’s intent into account in its decision in Tejeda, the Appeals Court did. The Appeals Court, applying the definition the court adopted in Figueroa, concluded that the defendant’s conduct was a “trick [done] with intent to mislead,” as it was “a mischiefous act designed to outwit the police by preventing them from seizing the evidence” and, ultimately, preventing the police from using it in pursuance of their investigation. In reaching this conclusion, the Appeals Court looked to the 2006 expansion of Section 13B and concluded that the legislature intended to “arm law enforcement officers with additional tools to combat deliberate interference with criminal investigations and prosecutions.” Those tools, the Appeals Court determined, included the ability to prosecute those who frustrate criminal investigations by destroying evidence. That the SJC and the Appeals Court reached differing conclusions as to the meaning of “misleading” is an example of courts wrestling with statutory language that is narrower than the intent of the statute would suggest. Where, however, a court’s primary duty in interpreting a statute is “to effectuate the intent of the legislature in enacting it,” the context in which the misleading provision was added to Section 13B, suggests that the Appeals Court more successfully effectuated the purpose of the law than did the SJC.

IV. IMPLICATIONS OF TEJEDA

The SJC’s decision in Tejeda exposes at least two problems. The first problem is an artificial inconsistency. Now, although two individuals may act with an intent to interfere with a police investigation, slight deviations in how they accomplish that goal will determine whether their conduct violates Section 13B. For example, suppose an individual who commits a crime that is captured on video thereafter alters the video file by changing the color of his clothing. Altering the video so as to portray a perpetrator wearing different colored clothing than the defendant had been wearing at the time he committed the crime would violate Section 13B, as the conduct is designed to send investigators on a materially different course, i.e., looking for an individual wearing the altered clothing. An individual, however, who simply destroys the video file has not violated Section 13B. Given the context in which the misleading provision was added, it seems unlikely that the legislature intended to proscribe such a narrow category of behavior while permitting more pervasive behavior, such as destroying evidence, to go unchecked.

The second problem is uncertainty. With the SJC’s declaration that destroying evidence with the intent to interfere with an investigation is not a crime under G.L. c. 268, § 13B, it is now unclear what crime a person who commits such an act should be charged with. “There is no general obstruction of justice statute in Massachusetts, as there is in the Federal system and in a number of other states.” Instead, there is a patchwork of statutes that establish various “crimes against public justice” and “crimes against public peace.” One such statute is G.L. c. 268, § 13E, which prohibits the destruction of a record, document, or other object with the intent to impair the record, document, or other object’s integrity or availability for use in an official proceeding. In Tejeda, the SJC noted in dicta that the defendant’s conduct “may have been prohibited by G.L. c. 268, § 13E, which criminalizes, among other things, the destruction of objects with the intent of interfering with criminal proceedings.” The SJC, however, has yet to decide the scope

32. For example, the Merriam-Webster dictionary defines “mislead” as “to lead in a wrong direction or into a mistaken action often by deliberate deceit;” “to lead astray.”
35. Id. at 629-30.
36. Id.
39. Id. As part of that patchwork, for example, a defendant may be prosecuted as an accessory after the fact of a crime if he or she destroys evidence with the intent of aiding “the principal felon or accessory before the fact” in avoiding criminal liability, see Mass. Gen. Laws. c. 274, § 4; for willfully obstructing, interfering, or hindering a fire fighter in lawful performance of his duties, see Mass. Gen. Laws. c. 268, § 32A; for the use of a disguise in order to obstruct, intimidate, or hinder a police officer in the lawful performance of his duties, see Mass. Gen. Laws. c. 268, § 34; or for destroying a record, document, or other object with the intent to impair the record, document, or other object’s integrity or availability for use in an official proceeding, see Mass. Gen. Laws. c. 268, § 13E.
41. As of the writing of this comment, there are only two published appellate cases from Massachusetts in which Mass. Gen. Laws. c. 268, § 13E was charged. See Commonwealth v. Cotto, 471 Mass. 97 (2015); Commonwealth v. Ware, 471 Mass. 85 (2015). Neither case discussed the scope of § 13E.

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of Section 13E.\textsuperscript{41} Although that section was enacted in 2009 as a
cog in a broader effort to improve the laws relating to campaign
finance, ethics, and lobbying,\textsuperscript{42} Section 13E does not appear to be
limited solely to the destruction of documents relating to violations of
campaign finance, ethics, or lobbying laws. Rather, it appears
that the legislature intended Section 13E to be applied broadly to
the destruction of records, documents, or other objects with the in-
tent of interfering with a variety of “official proceedings,” including
criminal proceedings.\textsuperscript{43}

Nevertheless, the intent elements of Sections 13B and 13E ap-
ppear to differ: the language of Section 13E is directed at the offender
who destroys evidence with the intent to prevent its use in an official
proceeding, whereas Section 13B is directed at (among others) the
offender who misleads with the intent to interfere with a criminal
investigation. While there may be instances where an offender acts
with the intent to impede a criminal investigation and an official
proceeding, not all offenders will have such dual intent. Thus, even
if the court concludes in a subsequent case that Section 13E prohi-
bits destroying evidence with the intent to interfere with a criminal
proceeding, it may not reach the offender who merely destroys evi-
dence with the intent to interfere with an investigation.

Given the court’s decision in \textit{Tejeda} and the uncertainty sur-
rrounding Section 13E, investigators and prosecutors will doubtless
turn to the common law. Here, too, even though it appears likely
that interfering with a police officer is a common law crime,\textsuperscript{44} that
conclusion remains an unsettled point. Although interfering with
a police officer is recognized in the Massachusetts District Court
Complaint Language Manual as a chargeable common law crime,\textsuperscript{45}
neither the SJC nor the Appeals Court has ever recognized such a
crime in a published opinion.\textsuperscript{46} The upshot is that, until the SJC
provides more definitive guidance as to the scope of Section 13E or
recognizes interfering with a police officer as a common law offense,
the question of whether a person who destroys evidence in order to
interfere with an investigation can be charged with either crime
remains in legal limbo.

\section{V. Conclusion}

A tenet of statutory construction is to interpret a statute accord-
ing to the “intent of the legislature ascertained from all its words
construed by the ordinary and approved usage of the language, con-
sidered in connection with the cause of its enactment, the mischief
or imperfection to be remedied and the main object to be accom-
plished, to the end that the purpose of its framers may be effectu-
ated.”\textsuperscript{47} It is also a tenet of statutory construction that a court should
not interpret a word in a way that would frustrate the legislature’s
intent.\textsuperscript{48} In this case, the SJC, tasked with the difficult job of inter-
preting a word that the legislature could have easily defined (but
did not), interpreted the “misleading” provision in Section 13B in a
way that appears inconsistent with the intent underlying the 2006
amendment to Section 13B. For this reason, the legislature should
go back to the drawing board where, hopefully, \textit{Tejeda} will serve to
promote clear and plain statutory language.

— Zachary Hillman

\textsuperscript{42} See St. 2009, c. 28.

\textsuperscript{43} See “Governor’s Task Force on Public Integrity: Report and Recommenda-
tions,” 31-32 (Jan. 6, 2009).

(evidence sufficed to prove that the defendant committed common law offense of
interfering with a police officer). As early as 1634, English law recognized
that interference with a law enforcement officer was a criminal offense. See Shef-
feld’s Case, Clayt. 10, 10-11 (1634). Several other jurisdictions also recognize
interference with a law enforcement officer as a common law crime. See City of
Englewood v. Hammes, 671 P.2d 947, 952 (Colo. 1983); State v. Kirven, 309
S.E.2d 749, 749-50 (S.C. Ct. App. 1983); Pope v. State, 528 S.W.2d 54, 56-57
(Ten. Crim. App. 1975); People v. Krum, 132 N.W.2d 69, 71-72 (Mich. 1965);
Roddy v. Finnegan, 43 Md. 490, 505 (1876); see also R. Perkins, \textit{Criminal Law},
495-97, 2d ed. (1969) (“one of the most common forms of obstruction of justice
involves interference with a public officer in the discharge of his official duty”);
J. Miller, \textit{Handbook of Criminal Law}, 461 (1934) (“Any willful obstruction of
justice by resisting an officer who is endeavoring to perform his official duty is
a misdemeanor at common law”). Massachusetts has long recognized common
law crimes, even when not previously defined or made punishable by statute. See
Commonwealth v. Flagg, 135 Mass. 545, 549 (1883). \textit{But see} Molly Ryan Stre-
horn, “Interfering with a Police Officer: A Common Law Offense,” 20, MASS.
LAWYERS J., 7 at 16 (March 2013).

\textsuperscript{45} See Commonwealth of Massachusetts Administrative Office of the Dis-
trict Court, “District Court Complaint Language Manual” (May 23, 2018),
www.mass.gov/courts/docs/courts-and-judges/courts/district-court/com-
plaintmanual-glc190.pdf.

\textsuperscript{46} See Cocroft v. Smith, 95 F. Supp. 3d 119, 126 (D. Mass. 2015) (concluding
that, after an “exhaustive search,” there was no published Massachusetts case
recognizing interference with a police officer as a common law crime); see also
“obstruction of justice” approach to statutory crime of accessory after the fact);
Commonwealth v. Triplett, 426 Mass. 26, 28-29 (1997) (acknowledging com-
mon law crime of obstruction of justice, but holding that, when the charge is
that the defendant interfered with a witness, the defendant must have intended
to interfere with the witness’ testimony before a judicial hearing); Common-
dant’s wiping of fingerprints from a knife constituted crime of accessory after
the fact, court declined to consider whether “obstruction of justice” existed as a
common law crime in Massachusetts).

\textsuperscript{47} Moreover, even were the court to so recognize such a crime, it is doubtful
that a violation of the common law offense carries with it the same deterrent
effect that a violation of § 13B has; a violation of § 13B carries a sentence of up
to 10 years in state prison, whereas a violation of common law carries a sentence
according to the nature of the crime as conforms to common usage and practice
in the commonwealth. See MASS. GEN. LAWS, c. 279, § 5


\textsuperscript{49} Watros v. Greater Lynn Mental Health & Retardation Ass’n., 421 Mass.
Criminal Law: Flight is Not Consciousness of Guilt


If an individual on the street breaks into a run and flees after a police officer gives an order to stop, many people might intuitively presume that the person running must be guilty of some form of criminal activity. In other words, such flight from law enforcement is an obvious indication of consciousness of guilt. After all, why else would an individual run from the police? As the Bible states in Proverbs 28:1, “The wicked flee when no man pursueth: but the righteous are bold as a lion.”

In *Commonwealth v. Warren,* however, the Massachusetts Supreme Judicial Court (SJC) ruled counter to this presumption. Reviewing a judgment of a divided Appeals Court, the SJC held instead that flight from the police, without additional supporting factors, does not rise to the level of reasonable suspicion for a threshold inquiry. This is particularly so if the suspect is a minority because fear of racial profiling is a legitimate concern.

In *Warren,* police officer Luis Anjos, on patrol in a marked cruiser, responded to the scene of a breaking and entering of a home by three individuals in Roxbury. Upon interviewing the victims, he learned that one of the suspects was a black male wearing a red hoodie, another was a black male wearing a black hoodie, and a third black male wore “dark clothing.” The victim reported that they stole a backpack, a computer and five baseball hats.

Officer Anjos searched for approximately 15 minutes within a four- or five-block radius of the crime and, perhaps because the temperature was particularly cold on that December night, saw no pedestrians at all out on those streets. He drove back toward the station and, on his way, at approximately a mile from the scene of the crime, he saw two black males walking past some basketball courts near a park wearing dark clothing, one a dark-colored hoodie. Neither carried a backpack and Officer Anjos did not recognize them from any previous encounters.

The officer had a hunch that these two individuals might be involved since they fit a “general description” and they were at some proximity to the crime, so he decided to “figure out who they were and where they were coming from and possibly do [a field interrogation observation (FIO)].” He rolled down the passenger’s side window of his cruiser and yelled, “Hey guys, wait a minute.” They made eye contact with the officer and jogged away into the park in the opposite direction. Officer Anjos radioed dispatch noting the location of the suspects.

Two other officers saw the described suspects leaving the other side of the park. The individuals’ hands were out of their pockets and there were no evident bulges in their clothes to indicate the possibility of contraband or a concealed firearm. They were only 15 feet away from the officers on Dale Street. One of the officers said, “Hey, fellas.” The first suspect stood still while the second suspect, the defendant Jimmy Warren, ran up the hill and back into the park. He was ordered to stop, but did not. The officers saw him clutching the right side of his pants, which indicated to the police officers that he might be armed.

Warren ran out of the park, up the street and was in the back yard of a nearby home on Wakullah Street when one of the police officers drew his firearm, pointed it at Warren, shouted at him several times to show his hands and “get down, get down, get down.” Warren moved slowly, which the police interpreted as a sign of lack of cooperation and, after a brief struggle, arrested him. The officers searched Warren but did not find any firearms or contraband. However, one of the officers recovered a Walther .22 firearm in the

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5. Id. at 539-40.
6. Id. at 531-32.
7. Id.
8. Id. at 532.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
16. Id. at 533.
17. Id.
18. Id.
19. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.
front yard of the Wakullah Street house.\textsuperscript{26} Warren was charged and later convicted of unlawful possession of that firearm.\textsuperscript{27}

Prior to trial, a motion to suppress was filed asserting that, at no point prior to his seizure, did there exist reasonable suspicion that Warren was involved in criminal activity.\textsuperscript{28} Accordingly, there would be no legal justification for the stop or threshold inquiry.\textsuperscript{29} The trial court denied the motion to suppress.\textsuperscript{30} Importantly, the commonwealth had conceded that, at the moment when the second police officer ordered the defendant to stop running and pursued him onto Wakullah Street, a seizure occurred, thus implicating the protections of the state and federal constitutions.\textsuperscript{31}

It is well established in Massachusetts that a police officer is warranted in making “a threshold inquiry where suspicious conduct gives the officer reason to suspect that a person has committed, is committing, or is about to commit a crime.”\textsuperscript{32} Such action must be “based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer’s experience. A mere hunch is not enough. Simple good faith on the part of the officer is not enough. The test is an objective one.”\textsuperscript{33}

The motion judge had ruled that reasonable suspicion existed for the investigatory stop of Warren.\textsuperscript{34} The judge reasoned that the two suspects matched the description of those sought for the breaking and entering; they were stopped only a mile away from the crime scene; they were the only individuals seen on the street on that very cold evening; they ran from the police officers; and the officers observed Warren act in a way consistent with possible possession of a firearm when he clutched the side of his pants as he ran.\textsuperscript{35}

The SJC appraised the trial judge’s analysis in light of the understanding that “a combination of factors that are each innocent when contemplated individually may, when taken together, amount to the requisite reasonable belief”\textsuperscript{36} that a person has committed, is committing, or will commit a particular crime.\textsuperscript{37} Here it considered the following components to determine whether alone or together, they constituted a reasonable suspicion:

1. **Behavior suggestive of a firearm**

The SJC quickly dismissed, without analysis, the lower court’s finding that Warren’s grabbing at the side of his pants while running from the officers contributed to the existence of reasonable suspicion because the judge also found that this behavior occurred only after Warren was ordered to stop.\textsuperscript{38} Therefore, that behavior could not have entered into the calculus in support of that stop.\textsuperscript{39}

2. **Description of the suspects**

Since the victim gave only a very generalized description of three black suspects, the police only knew that two of the suspects wore “dark clothing” and the third wore a “red hoodie.”\textsuperscript{40} No further physical description, such as height, weight, distinguishing marks, skin tone or facial characteristics, was included. Such a generalized, non-distinctive description could fit almost any black male in Roxbury wearing a hoodie.\textsuperscript{41} Here, Warren was one of two men, not three; he did not wear a red hoodie; was not carrying a backpack; and was not initially seen by the police committing any criminal behavior.\textsuperscript{42} Indeed, he was simply walking.\textsuperscript{43}

The police officer was apparently acting on a hunch when he called Warren over.\textsuperscript{44} The police officer essentially conceded this when he noted that the purpose of the stop was “to figure out who they were and where they were coming from and possibly do an FIO.”\textsuperscript{45}

Therefore, without any apparent objective indication that Warren was in the act of committing any criminal activity, and no other indication that he matched anything more than the most generalized of descriptions, his physical characteristics did nothing to assist the police in arriving at a reasonable suspicion that he had committed a crime.\textsuperscript{46} Indeed, based on such an anodyne physical description, Warren had as much of a right to walk a Boston street without interference as anyone else.\textsuperscript{47} There was simply no good reason to stop him.

3. **Proximity to the crime scene**

Warren was stopped a mile away from the location of the crime and approximately 25 minutes after it was reported.\textsuperscript{48} While proximity is an important criterion, without knowing in which particular direction the perpetrators were headed, they could have easily traveled on foot more than two miles from the crime in any direction.\textsuperscript{49} Indeed, the suspects, even on foot, could have been within

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26. Id.
28. Id. at 531.
29. Id.
30. Id.
31. Id. at 534.
34. Warren, 475 Mass. at 534.
35. Id. at 534-35.
37. Id.
39. Id.
40. Id. at 535.
41. Id.
42. Id. at 536.
43. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 536-537.
a 12-mile radius area that included several Boston neighborhoods, including Roxbury, Dorchester or Jamaica Plain. There was simply too little detail as to where the suspects might be. Therefore, the court ruled that the location and timing of the stop were:

no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator’s path of flight was mere conjecture. Although the police appropriately began their investigation with the information available to them, this lack of detail made it less likely that a sighting of potential suspects could be elevated beyond the level of a hunch or speculation.

In addition, the court reasoned that, if the perpetrators of the crime had, indeed, been headed toward Dale Street where Warren and his companion were stopped, they would have reached that location long before the actual stop. The court concluded that “[i]t thus, where the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus.”

4. Lack of other pedestrians

According to Officer Anjos, after he interviewed the victim for approximately 15 minutes, he drove up and down streets within a four- or five-block radius of the crime location and saw no one on the streets. He then drove back in the direction of the police station. The SJC held this to be of negligible worth given the passage of time and the “narrow geographical scope” of the hunt for the perpetrators.

Given the period of time that had elapsed, the perpetrators could easily have traveled a considerable distance past the vicinity where Warren was first spotted by the time the officer even began his search. The court concluded that, therefore, Warren’s presence far from the location of the crime given the time that had passed does nothing to add to a reasonable suspicion that he had anything to do with any crime.

5. Flight

The court quickly and succinctly dispatched the above four factors as inadequate grounds for reasonable suspicion of a crime that justified a stop of Warren. Indeed, after that, the court expended the lion’s share of its analysis on an additional consideration — whether an individual’s flight from the police constitutes reasonable suspicion?

The court prefaced its reasoning by establishing that evasive action may be taken into consideration during an encounter with the police in determining the existence of reasonable suspicion, but not in the absence of any other supporting information. Evasive conduct alone does not rise to the level of reasonable suspicion that a crime has been, will be or is being committed. The court held that, “[w]ere the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the [flight or the abandonment of potential evidence] justifying the suspicion.”

Indeed, “[n]either evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support the reasonable suspicion necessary to justify a stop and frisk.” However, again, in combination with other factors, any of these considerations may properly be used as a building block to arrive at reasonable suspicion.

Importantly, while observing that flight could be relevant in a reasonable suspicion analysis when considered in concert with other facts, the court added two “cautionary notes” concerning the weight given to a consideration of flight. Each merits some discussion.

First, the court noted what it referred to as an “irony.” On the one hand, it reiterated that a person has the absolute right to choose either to speak or not to speak with a police officer. Even if a person breaks eye contact with and refuses to answer an officer’s questions, that alone cannot serve as a basis for a search. It is significant that the court made no distinction between someone courteously declining to talk to the police and someone actually breaking into a run in the opposite direction. On the other hand, because flight can be considered inculpatory, there are times when an “effort to

51. Id.
52. Id. at 536.
53. Id. at 537.
54. Id.
55. Id. at 537-38.
57. Id.
58. Id. at 537.
59. Id. at 538.
60. Id.
63. Mercado, 422 Mass. at 371.
65. Id.
66. Id.
67. Id.
dodge further contact with the police was significant” enough to
determine reasonable suspicion.68 The court cited Commonwealth v.
Sykes where, among other factors, the defendant’s abandonment of a
bicycle “in an effort to dodge further contact with police was sig-
nificant.”69 The court held that:

Where a suspect is under no obligation to respond to a
police officer’s inquiry, we are of the view that flight to
avoid that contact should be given little, if any, weight
as a factor probative of reasonable suspicion. Other-
wise, our long-standing jurisprudence establishing the
boundary between consensual and obligatory police
encounters will be seriously undermined.70

Therefore, the court concluded that Warren’s flight after being
called over by Officer Anjos, with no additional factors, contributes
nothing to a calculation of appropriate factors that would add up to
reasonable suspicion.71

The SJC could have stopped at that point. However, it went fur-
ther by adding its second “cautionary note.” Here, the court stated
that, where evidence of racial profiling exists and the suspect is, in
fact, a minority, this information must be added to the calculus in
determining whether flight is justifiable, and therefore constitutes
even less of a basis for reasonable suspicion of criminal activity.72

The court relied upon a recent Boston Police Department study
authenticating a pattern of racial profiling of black males in the city
of Boston.73 The study found that, based on field interrogation and
observation figures and other information assembled by the Boston
Police, black males in the city of Boston were more likely to be pur-
sued for police-civilian encounters, such as stops, frisks, searches,
observations and interrogations.74 Black men were also disproportion-
ally targeted for repeat police encounters.75 The court concluded
that:

We do not eliminate flight as a factor in the reasonable
suspicion analysis whenever a black male is the sub-
ject of an investigatory stop. However, in such circum-
stances, flight is not necessarily probative of a suspect’s
state of mind or consciousness of guilt. Rather, the
finding that black males in Boston are disproportionate-
ately and repeatedly targeted for FIO encounters sugg-
sists a reason for flight totally unrelated to conscious-
ness of guilt. Such an individual, when approached
by the police, might just as easily be motivated by the
desire to avoid the recurring indignity of being racially
profiled as by the desire to hide criminal activity. Given
this reality for black males in the city of Boston, a judge
should, in appropriate cases, consider the report’s find-
ings in weighing flight as a factor in the reasonable sus-
picion calculus.76

The decision in Warren may, indeed, be a landmark ruling that
potentially could affect future search and seizure law beyond the is-


68. Id. at 538-539.
71. Id.
72. Id. at 539-40. Indeed, here, the court explicitly endorsed the studies relied
on by the dissenters in the Appeals Court’s earlier decision affirming the denial
of Warren’s motion to suppress.
73. Boston Police Commissioner Announces Field Interrogation and Observa-
tion (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-
commissioner-announces-field-interrogation-and-observation-fio-study-results
[https://perma.cc/H9RJ-RHNB].
74. Warren, 475 Mass. at 539-40.
75. Id. at 540.
76. Id.

— Peter T. Elikann

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**Book Review**

*Sex and the Constitution*

by Geoffrey R. Stone (Liveright Publishing Corp., A Division of W. W. Norton & Co.) 2017, 668 pages (including endnotes and index)

We are in the midst of a constitutional revolution. It is a revolution that has tested the most fundamental values of the American people and has shaken constitutional law to its roots. It has bitterly divided citizens, politicians and judges. It is a battle that has dominated politics, inflamed religious passions, and challenged Americans to rethink and re-examine their positions on issues they once thought settled. It is a story that has never before been told in its full sweep. And, best of all, it is about sex.¹

That is how Geoffrey R. Stone begins *Sex and the Constitution*, his richly detailed and highly readable exploration of sexual behavior, attitudes about sex and the consequences of those attitudes from Greek and Roman times to the present day. And a sweeping exploration it is. Stone, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago, is the author of several critically acclaimed books that focus on the durability of free speech principles when tested by real or imagined crises. *Sex and the Constitution*, 10 years in the making, is perhaps his most ambitious undertaking, but, over the course of 500 pages of smoothly flowing prose, its ambition is fully realized.

Title notwithstanding, the constitution does not make an appearance until about halfway through the book. That is appropriate, for the story Stone has to tell is as much about millennia of social tugs and pulls on all things sexual as it is about the intersection of sex and the constitution. The tugs and pulls we see today reflect centuries of multi-dimensional struggle over the appropriate role of religion and civil society in regulating sexual behavior, erotica, contraception and abortion, and the deep-seated and persistent cultural influences that struggle produced. An understanding of those influences and their origin is enormously helpful in understanding the constitutional battles of the last 50 years and the difficulty of their resolution.

Stone begins with the Greeks and Romans, our earliest cultural influencers. As he tells it, sexual activity was largely unburdened by social restraints — indeed by any restraints at all — in Greek and Roman times. While women, particularly married women, were somewhat more reserved, Greek men engaged in sexual activity of all kinds and dimensions. Various forms of birth control were commonly practiced and abortion, at least before quickening, was a common occurrence.² The Romans, though they regarded the Greeks as degenerates, were about as freewheeling and were equally unrestrained in their writings and artistic depictions of sexual pleasure.

The spread of Christianity dramatically reined in those uninhibited attitudes and activities. During the 4th century, St. Augustine “crystallized the early Christian understanding of sex and ... in so doing, ultimately helped shape traditional American views of sexuality more than a millennium later.”³ In Augustine’s view, the intensity of sexual pleasure was “definitive proof that human nature had fallen.”⁴ Although sexual intercourse was necessary for procreation, Augustine nonetheless viewed it as evil and sinful. As a result, children were born into sin. Augustinian doctrine expanded over the years so that by the Middle Ages the church prohibited contraception based on its view that procreative necessity was the sole justification for the sinful act of intercourse. While abortion within 40 days of conception was also sinful, it was less sinful than contraception. Neither, however, was treated as a crime by secular law.

2. Stone, supra note 1, at 5-8. Those who are interested in a discussion and contemporaneous sample of the Greek approach can usefully visit the exhibit titled “Dionysus and the Symposium” in Gallery 215B at Boston’s Museum of Fine Arts.
3. Stone, supra note 1, at 17.
4. Stone, supra note 1, at 18.
Same-sex sex, having no procreational potential was, of course, viewed as sinful in the Christian tradition but was typically untouched by secular law until about the 11th century. Then, as the Inquisition picked up steam during the 12th century, sexual activity between men became a capital offense under laws enacted throughout Europe and was accompanied by particularly painful forms of execution. Same-sex intercourse involving women was viewed more benignly until the 13th century when the church began to regard it as a form of witchcraft for which burning at the stake was the appropriate punishment.

Led by Martin Luther in the early 16th century, the Reformation produced a different view of sex and its role in human relations. In the reformers’ view, heterosexual intercourse, at least within marriage, was a natural and important component of human life and was not simply a mechanism for producing offspring. Condemnation of same-sex intercourse and sexual activity outside of marriage remained. Of more lasting importance, though, was Luther’s belief that the role of the church was to encourage voluntary compliance with Christian principles and that coercion should be left to the state. At the same time, he encouraged the state to prohibit and punish “prostitution, fornication, adultery and other sexual immoralties, explaining that if a state ‘wishes to be Christian’ it should punish such behavior in order to maintain an orderly society.”

Luther’s view that the state should have a role in regulation of sexual behavior and that the role was related to preservation of an “orderly” Christian society had profound implications, many of which remain with us today.

Luther’s approach did not immediately catch on in England. After Henry VIII repudiated the authority of the Catholic Church in the early 16th century, both the Church of England and common-law courts took a relaxed view of the role sexual contact might appropriately play in interpersonal relations. The Church of England still regarded sexual contact outside of marriage as sinful, but the sin no longer carried with it the thunderous condemnations that existed before the Reformation. The civil courts limited their concern with sexual matters to activity that occurred in a public setting, involved children or the use of force or that involved certain forms of sodomy. Except for a brief period of Puritan restraint under Oliver Cromwell, the result was a wide-open and enthusiastic embrace of broad sexual liberty.

Our Puritan ancestors fled from all that. When they arrived in New England in the early 17th century, they brought with them a strict moral code that rejected the relaxed sexual standards then prevailing in English society. But they could not keep the world at bay and, as commerce between the old and new world flourished, casual sex became easily available to sailors and residents of rapidly proliferating New England coastal towns.

Toward the end of the 18th century, when delegates gathered in Philadelphia to begin work on a new constitution, organized religion no longer held the sway it had held in early colonial times. Indeed, by that time formal church membership had declined to between 10 and 20 percent of all Americans. More important, particularly for the notion that the founders created a Christian nation, the primary framers of the constitution were deists who believed that “principles of public morality should be discovered through the exercise of reason” and that those principles were rooted in an obligation to “do good to one’s fellow man,” not in an obligation to follow Christian revelation or the rules Christian revelation engendered.

By the end of the 18th century, however, the impact of the Industrial Revolution, the French Revolution and the deep social and political divisions of the 1790s, including the bitterly contested election of Thomas Jefferson in 1800, produced a movement that historians call the “Second Great Awakening.” At its heart, the movement rejected deism and rested on a belief that morality was “necessary for Republican government and that Christianity [was] necessary for morality.” The movement proceeded with ever greater demands that the state codify and enforce Christian principles, at least as those principles were defined by movement leaders. Consequences included prosecutions for blasphemy, including a successful prosecution in Massachusetts in which then Chief Justice Lemuel Shaw opined that the guarantees of free speech and religious liberty in the Massachusetts Declaration of Rights did “not protect individuals who ‘disparage the Supreme Being’.”

While movement leaders were divided on the question of whether Christian principles countenanced slavery, it did not take them

5. Stone, supra note 1, at 45.
7. Stone, supra note 1, at 157.
8. Stone, supra note 1, at 142.
9. Commonwealth v. Kneeland, 37 Mass. 206, 220 (1838). One hundred fourteen years later, the Supreme Court of the United States finally ruled that the First Amendment prohibited suppression of blasphemous or sacrilegious speech in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952.).
long to coalesce around condemnation of sexual liberties and published descriptions of sexual activity that were often accompanied by drawings and engravings quite clearly portraying scenes the writings described. In 1821, the Supreme Judicial Court, again leading the way, upheld a common-law obscenity conviction of a man named Peter Holmes for publishing Memoirs of a Woman of Pleasure, a novel that spared few details about the amorous exploits of its heroine, Fanny Hill.10

The Second Great Awakening essentially burned itself out by 1840 leaving behind an upsurge in prostitution, pornographic literature, photographs and periodicals, typically in urban areas. That upsurge produced its own reaction, soon led by Anthony Comstock who, supported by the YMCA in New York City, formed and led the City’s “Committee for the Suppression of Vice” until his death in 1873. Comstock’s view of “vice” was broad. Among other things, he believed that almost anything touching on sexual activity of any variety required suppression.

Comstock’s views and energy soon attracted congressional support and, in 1873, President Ulysses Grant signed into law a broad ban on “obscene, lewd, lascivious or filthy” items of any kind or description, albeit without any guidance as to the meaning of “lewd, lascivious or filthy.”11 The legislation was a little more specific when it came to obscenity and expressly included in that category “print and pictorial erotica, contraceptives, abortifacients, information about contraception or abortion, sexual implements and toys, and advertisements for any of them.”12 The law came to be known popularly as the Comstock Act and was replicated in numerous “Little Comstock” acts passed by state legislatures.

Between passage of the Comstock Act and 1957, when the Supreme Court issued the first of its many obscenity decisions, significant social pushback arose against many of the Comstock Act’s prohibitions. In 1914, for example, Margaret Sanger, who had been trained as a nurse and was a feminist of “unfailing charm, fierce determination and persuasive wit,”13 coined the term “birth control” and began a campaign to make contraceptives and information about contraception freely available. Although she was arrested and convicted of violating the act, and despite the act’s strong support by the Catholic Church, popular support for the availability of contraceptives and information about contraception proliferated.

Later, public opinion about same-sex sex began to change and to weaken the widespread support statutes barring that activity had enjoyed. In 1961, the American Law Institute published its new Model Penal Code in which it called for elimination of all criminal prohibitions against consensual sodomy and said that “such matters are best left to religious, educational and other social influences.”14

Eight years later, in the now famous Stonewall incident, patrons of a gay bar in Greenwich Village forcefully repulsed one of the more or less routine raids mounted on gay bars by the New York City Police Department. The patrons’ resistance and widespread support of their resistance galvanized gay-rights activity throughout the nation. In turn, that visible and vocal support also galvanized gay-rights opponents.

During the same era, popular support began to appear for modifying the complete ban on abortion found in many state statutes. Again, the American Law Institute took an early position. In its 1962 Model Penal Code, the institute “called on states to legalize therapeutic abortions whenever two or more doctors agreed that there was a ‘substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother,’ that ‘the child will be born with a grave physical or mental defect,’ or that ‘the pregnancy resulted from rape, incest or other felonious intercourse.’”15 Publication of the updated code led several states to replace statutes containing complete bans on abortion with those that embodied the institute’s approach.

Despite changes in public opinion, the legal framework remained essentially the framework the Comstock laws had created. Then, in 1957 and beginning with obscenity, the Supreme Court of the United States entered the sexual fray. In Roth v. United States,16 Samuel Roth, invoking the First Amendment, asked the court to reverse his conviction for distributing a series of sexually explicit publications in violation of the federal Comstock Act. Writing for the court, Justice William Brennan, joined by four other justices, said that although the First Amendment protected all ideas “having even the slightest redeeming social importance,” obscenity had no

10. Commonwealth v. Holmes, 17 Mass. 336 (1821). Memoirs probably holds the world’s record for long-running official condemnation. In 1748, John Cleland, the author of Memoirs, was prosecuted in London for publishing and distributing the book. Cleland did not contest the Crown’s claim that Memoirs was obscene, but asserted that he was living in poverty and needed to write a saleable book that would lift him from its privations. The court resolved the case by awarding Cleland an annual pension of £100 on the condition that he write no more novels of like kind. Two hundred seventeen years later and 144 years after Commonwealth v. Holmes, the SJC again ruled that the book was obscene, this time under a Massachusetts statute that allowed suppression of obscene materials. Attorney General v. A Book Named John Cleland’s Memoirs of a Woman of Pleasure, 349 Mass. 69 (1965). That decision was appealed to the Supreme Court, which decided that the First Amendment prohibited suppression of the book. A Book Named John Cleland’s Memoirs of a Woman of Pleasure v. Attorney General of Com. Of Mass., 383 U.S. 413 (1966). With that decision and after more than 200 years, Memoirs was finally free.
11. Stone, supra note 1, at 159.
12. Stone, supra note 1, at 159.
13. Stone, supra note 1, at 194.
15. Stone, supra note 1, at 371.
such importance and thus was unprotected.\textsuperscript{17} He went on to say that a work was obscene if, judged as a whole, “to the average person, applying contemporary community standards, the dominant theme ... appeals to the prurient interest.”\textsuperscript{18} A prurient interest, in turn, was one that produced “lustful thoughts” or “lascivious longings.”\textsuperscript{19}

But that formulation raised more questions than it answered, for the premises underlying the court’s attempts at constitutional interpretation in the area of obscenity were far from clear. What, for example, was the source of the idea that “redeeming social importance” marks the dividing line between speech that is protected by the First Amendment and speech that is not? Why, if the First Amendment, like the others, is designed to provide counter-majoritarian rights, do community standards separate protected speech from speech that has no protection? And why are “lustful thoughts” or “lascivious longings” thoughts and desires the state has the right to suppress? In sum, what fundamental principle or principles provided the constitutional framework within which the court was seeking to work?

Stone’s account of the cases that followed over the next 16 years describes the court’s largely unsuccessful struggle to answer that question. Almost inevitably, the absence of a common philosophical framework led the justices to begin reviewing “every obscenity conviction in the nation in order to determine whether the work at issue was or was not obscene,”\textsuperscript{20} although, when it came to films, many of the justices delegated the reviewing task to their law clerks.

Ultimately, perhaps the closest the court got to identifying a fundamental principle was Chief Justice Warren Burger’s opinion in \textit{Paris Adult Theater I v. Slaton}.\textsuperscript{21} In that case, the principal question was whether the state had the right to ban or otherwise censor “obscene” materials displayed in a theatre that only admitted consenting adults.\textsuperscript{22} Writing for a 5-4 majority, Chief Justice Burger said that the state did have that right “to make . . . a judgement that a public exhibition of obscene material” could jeopardize the state’s ability “to maintain a decent society.”\textsuperscript{23} Whether consciously or not, that standard reached back centuries to Martin Luther’s view that any state that “wishes to be Christian” could and should punish sexual immorality in order to maintain “an orderly society.”\textsuperscript{24} Justice Brennan, now dissenting from the path the majority was taking, said as much when he observed that prohibiting consenting adults from viewing obscene materials was based solely on unprovable assumptions about “morality, sex and religion.”\textsuperscript{25}

Except for situations that involve child pornography and live sex shows, prosecutors today have largely abandoned obscenity prosecutions. Stone attributes their diminished prosecutorial energy to the rise of the internet where “consenting adults can see pretty much anything and everything they can possibly imagine.”\textsuperscript{26} From the standpoint of free speech, he continues, “we have seen a revolution in the realm of sexual expression.”\textsuperscript{27} Even the Framers, who were much more open to sexuality than their descendants who lived under the thumb of Anthony Comstock, would be stunned.\textsuperscript{28}

Free and ready access to almost anything one can possibly imagine has produced its own problems and one surely cannot underestimate their magnitude.\textsuperscript{29} Nevertheless, it has relieved the courts from attempting to define the boundaries of free expression in an area where the Supreme Court’s 16-year struggle has shown that it is impossible to formulate portable, objective and neutral principles, thus requiring each judge to measure every book, film or photo subjectively on the basis of his or her own essentially moral framework.

Stone replicates his careful and illuminating discussion of the Supreme Court’s evolving positions on obscenity in his treatment of the court’s approach to contraception, abortion, homosexuality and gay marriage. In each area, he looks not only at the issues the court faced, but the context in which those issues arose and the historical backdrop against which they were arrayed. The result is a deeper insight and understanding of the court’s decisions for those

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17. \textit{Id.} at 484.
18. \textit{Id.} at 489.
19. Stone, \textit{supra} note 1, at 274-75.
20. Stone, \textit{supra} note 1, at 284.
22. \textit{Id.} at 49
23. \textit{Id.} at 69.
24. Stone, \textit{supra} note 1, at 45.
27. Stone, \textit{supra} note 1, at 340
who are generally familiar with them and an accessible, thoughtful introduction to the cases, the justices who made the decisions and the considerations they brought to bear in making them for those who encounter the cases for the first time.

From the outset, though, it is clear that Stone is not simply a disinterested storyteller. He has a point of view and, while he is careful to let the reader know when he is advancing his own opinion and when he is presenting what his research has shown to be historical facts, he is not shy about letting the reader know what he thinks.

Consider, for example, his treatment of the dissents in Obergefell v. Hodges, the 2015 case in which the court held that the 14th Amendment requires states to allow same-sex couples to marry and also requires each state to recognize same-sex marriages that occur in other states. Justice Kennedy’s majority opinion drew vitriolic dissents from Justices Scalia and Thomas, dissent that Stone flayed with almost equal energy. In their indignation over the very idea of same-sex marriage, he said, the dissenters had let “their fury [get] the better of them” and produced responses to the majority opinion that proceeded “not in a calm, measured, dispassionate, professional manner, but in a fit of pique.”

Energy expended, Stone outlined a dissent that would have been more firmly grounded in existing precedent before explaining why he felt that Justice Kennedy and the majority were nonetheless correct.

Among the many attractive features of this engaging book are the interesting tidbits with which Stone repeatedly sprinkles his narrative. For example, Lewis Powell, the courtly justice from Virginia, once told one of his law clerks that he did not think he had ever met a gay person, not realizing that the clerk to whom he was talking was gay. Warren Burger dawdled in writing his concurring opinion in Roe v. Wade, which was announced the day after Richard Nixon’s 1973 inauguration, so that Nixon would not be embarrassed before his ceremonial installation by the fact that three of his appointees to the court — himself, Justice Powell and Justice Harry Blackmun — all supported the majority result.

Samuel Roth, the defendant in Roth v. United States “was a character.” Born in the Carpathian Mountains in Eastern Europe, he emigrated to the United States as a child and grew up in tenements in the lower East Side to spend most of his adult life jousting with authorities over all manner of obscene materials. Some were classics but many more were not.

Margaret Sanger staged the “First American Birth Control Conference” at the Plaza Hotel in New York City in 1921. On the final night of the three-day conference, New York City police, urged on by Catholic Archbishop Patrick J. Hayes, raided the conference, arrested Sanger, dragged her off of the stage where she was speaking and marched her down the street to the nearby police station followed by hundreds of conference goers singing “My Country, ‘Tis of Thee.” There are many more.

The result of all this is a fascinating, readable, richly annotated volume that would enrich the library of anyone who seeks to understand the origin of the profound cultural and legal issues that currently divide us. In a jacket blurb, Lawrence Tribe called Sex and the Constitution a “masterpiece [that] is the rarest of combinations: a page-turner that is also a magisterial fount of wisdom.” That combination is extremely difficult to achieve but Stone has clearly done it.

— James F. McHugh

31. See Id. at 2608, 2626.
32. Stone, supra note 1, at 516-517.
33. Stone, supra note 1, at 269.
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