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ONLY GOOD AT BEING BAD: PEREMPTORY CHALLENGES AND THE HOLMESIAN BAD GUY

By William H. Locke

“If you want to know the law and nothing else, you must look at it as a bad man”

– Oliver Wendell Holmes Jr.¹

INTRODUCTION

In November 1976, Yale defeated the Harvard football team 21-7 in front of 42,000 spectators in their home stadium. *The Boston Globe* called it a “nightmare” from which Harvard “never awoke.” Above the headline was a picture of the cornerback, Andrew Puopolo, a local from an Italian-American family in Jamaica Plain, with his head in his hands.² Three days later, Puopolo attended a team party in Boston’s notorious “Combat Zone,” culminating at the “Naked i” nightclub.³ After the party, he was pulled into a brawl with three men over a stolen wallet and was stabbed in the ensuing confusion.⁴ He survived for 31 days in the hospital before succumbing to his injuries.⁵ Three Black men were indicted for his murder — Edward Soares, Richard Allen and Leon Easterling.⁶ The case touched a nerve in a city already seething with racial tensions surrounding school desegregation.⁷ At trial, prosecutor Thomas Mundy used peremptory challenges to excuse 12 of 13 prospective Black jurors.⁸ The defense, meanwhile, used their own peremptories to excuse all 17 potential jurors with Italian last names.⁹ With one Black member and no Italians, that jury found Soares, Allen and Easterling guilty of murder. The defendants appealed, and the Supreme Judicial Court’s (SJC) decision in *Commonwealth v. Soares* granting them a new trial made Massachusetts among the first states to confront the challenge of eliminating racial discrimination in jury selection.¹⁰



William H. Locke is a recent graduate of Harvard Law School (Class of 2023) and incoming law clerk. Deepest thanks to Hon. John C. Cratsley (ret.), Prof. Barbara Berenson, Prof. Jack Corrigan and Hon. Robert L. Ullmann for their invaluable help and guidance in shaping this article. The views expressed are solely those of the author.

Throughout their history, peremptory challenges — the mechanism for excusing prospective jurors from a venire without cause — have been a refuge of discrimination, bias and strategic stereotyping. There is no constitutional guarantee for peremptories,¹¹ and they have never served the Sixth Amendment’s promise of trial “by an impartial jury” drawn from a fair cross-section of the community.¹² Instead, they have consistently been used as weapons for parties seeking to skew juries in their favor — fueling a battle that has resulted in the systematic exclusion of myriad social groups from jury service, particularly racial minorities. Indeed, reviewing courts have sometimes memorialized and upheld certain varieties of prejudice and stereotyping, even while seeking to avoid others.¹³ The Supreme Court and the SJC have repeatedly returned to the problem of their abuse.¹⁴ But none of the courts’ corrective measures have been able to adequately root out the discriminatory exercise of peremptory challenges.¹⁵ *Voir dire* in the United States has only become a more costly and protracted process,¹⁶ while significant discrimination

1. Oliver Wendell Holmes Jr., “The Path of the Law,” 10 HARV. L. REV. 457, 459 (1897).

2. Joe Concannon, “The nightmare was Harvard’s — it never awoke,” BOS. GLOBE, Nov. 16, 1976.

3. Stephanie Schorow, *Inside the Combat Zone*, 95 (2017).

4. Dante Ramos, “True Crime: Murder in the Combat Zone,” BOS. GLOBE, Aug. 29, 2016.

5. Alix M. Freedman, “Andrew Puopolo Dies; Memorial Fund Established,” HARV. CRIMSON, Jan. 3, 1977.

6. Schorow, *supra* note 3, at 99; *see also* *Commonwealth v. Soares*, 377 Mass. 461, 461 (1979).

7. Ramos, *supra* note 4; *see also* Stanley Forman, “The Soiling of Old Glory” (photograph), *in* AM. HERALD (1976) (winner of the Pulitzer Prize).

8. Schorow, *supra* note 3, at 55.

9. *Id.* at 99.

10. *Soares*, 377 Mass. at 485–93.

11. *Batson v. Kentucky*, 476 U.S. 79, 108 (Stevens, J., concurring) (“[T]he right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial.”).

12. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment.”).

13. Particularly in the context of religious affiliation, which is not protected in federal courts by *Batson*, and can sometimes be used as a proxy for national origin. *See, e.g., United States v. Clemmons*, 892 F.2d 1153, 1157, 1160 (3d Cir. 1989), *cert. denied* 496 U.S. 927 (1990) (Higginbotham, J., concurring) (permitting a prosecutor to excuse a “Hindu” juror because he did not appear to be Black based on the rationale that “Hindus tend, in my experience . . . to have feelings a good bit different than ours about all sorts of things . . . and I can be more certain with an American juror, and that was my primary reason for striking him.” (emphasis in the original)).

14. *See, e.g., Commonwealth v. Carter*, 488 Mass. 191, 192 (2021); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).

15. *See Morris B. Hoffman*, “Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective,” 64 U. CHI. L. REV. 809, 830–44 (1997) (describing the “long road” of fine-tuning peremptory challenges, without ever satisfactorily “fixing” them).

16. William T. Pizzi, “Curing the Disease but Killing the Patient,” 1987 SUP. CT. REV. 97, 155 (1987) (“If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*.”).

persists.¹⁷ For decades, academics and judges have called for peremptories' abolition,¹⁸ arguing that using the same strategies but expecting different results can only proliferate ineffectual rules.¹⁹ Nonetheless, peremptories have remained a "sticky default," defended by practitioners convinced of their value.²⁰

But that status quo is being shaken. In reckoning with the entrenched inequalities in our justice system, there has been a renewed conversation around peremptories as they have been identified as a refuge for discrimination, racism and disenfranchisement.²¹ Recognizing this rising tide, the Arizona Supreme Court, against the wishes of nearly every state bar association and its own investigatory committee,²² became the first to abolish peremptories in January 2022.²³ New York has considered their abolition in criminal cases.²⁴ In 2018, the Washington Supreme Court took a different approach, eliminating *Batson's* "purposeful discrimination" requirement by adopting an "objective observer" standard (the "Washington rule").²⁵ Under the Washington rule, judges must reject a peremptory if, in the totality of the circumstances, an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."²⁶ The court also adopted a number of presumptively invalid race-neutral rationales that are historically associated with discrimination, such as "living in a high-crime neighborhood" or "not being a native English speaker."²⁷

In Massachusetts, the SJC has said that "peremptory challenges themselves are not essential to the guarantee of a fair trial by an impartial jury" and noted that "some have advocated for their outright elimination."²⁸ Today, the Massachusetts Legislature is considering House Bill 2653, a reform act that would essentially mirror the direction taken by the Washington Supreme Court, including the objective observer standard and the same presumptively invalid reasons for a strike.²⁹ This article contends, however, that the Washington approach, despite its merits, is another move in the wrong direction due to its fundamental disregard for the inherent impossibility

of a system of nondiscriminatory peremptory challenges.

Among Justice Oliver Wendell Holmes Jr.'s most enduring insights was that the best way to look at the law is through the lens of the "bad man."³⁰ This pragmatic perspective discards the "moral ambitions" of a legal rule. Rather than focusing on the ideal scenario, this approach examines the potential limits that a bad actor may exploit within the rule, accounting for the consequences of violating it. In this context, a hypothetical bad actor would attempt to exclude jurors on the basis of prejudice or bias, both explicit and implicit. They would also weigh the potential penalties for their actions, including the risk of being caught and the consequences of enforcement. The Holmesian perspective does not assume the culpability of a particular party, either prosecutor or defendant; it simply recognizes that a hypothetical bad actor on either side will seek to infect the jury selection process in precisely the ways *Batson*, *Soares* and their progeny would prohibit.³¹ The "bad man" approach illuminates the realistic consequences of peremptories on jury selection — including effects on the parties, the potential jurors, and the perceived fairness of the trial system itself.³² For example, although cases like *Soares* and *Batson* might have some deterrent effect on parties unwilling to incur a judge's suspicion, such an effect is flimsy in the face of a motivated discriminatory party.

HD-2653, like the Washington rule, could have some positive impacts, but it embodies an intrinsically flawed approach because it fails to recognize its limits in the face of a Holmesian bad actor. Abolishing peremptories, though politically difficult, opens new avenues for reform that are not hindered by the same infirmities as merely proliferating ineffective regulations. To show the wisdom of abolishing peremptories, this article proceeds in three parts. Part I provides a historical overview of the development of juror challenges. Part II discusses the primary costs of maintaining peremptories. Part III explores options for potential reform, addresses key residual concerns, and proposes a set of changes for Massachusetts to adopt

17. Whitney DeCamp & Elise DeCamp, "It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors," 57 J. RES. CRIME & DELINQUENCY 3, 21 (2020) (finding Black venire-members to be 4.51 times as likely to be peremptorily excluded by prosecution challenges, and white venire-members to be 4.21 times as likely to be peremptorily removed by defense challenges).

18. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring); *Commonwealth v. Maldonado*, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (joined by Justices Greaney and Spina, "it is time to either abolish [peremptories] entirely, or restrict their use substantially."); *United States v. Chaney*, 53 M.J. 383, 386 (C.A.A.F. 2000) (Sullivan, J., concurring) ("[T]he military justice system should eliminate the peremptory challenge."); Akhil Reed Amar, "Reinventing Juries: Ten Suggested Reforms," 28 U.C. DAVIS L. REV. 1169, 1182–83 (1996) (recommending peremptories be eliminated); Hoffman, *supra* note 15.

19. Hoffman, *supra* note 15, at 840, 871 (describing proliferating protected classes as a "death knell" for peremptories).

20. Ela A. Leshem, "Jury Selection as Election: A New Framework for Peremptory Strikes," 128 YALE L.J. 2356, 2370–75 (2019).

21. Citing these concerns, the United Kingdom abolished peremptories as long ago as 1988, while Canada did so recently in 2019. See Hassan Kanu, "Arizona Breaks New Ground in Nixing Peremptory Challenges," REUTERS (Sept. 1, 2021), <https://reut.rs/3sMqtoV> [<https://perma.cc/3U44-WKGM>] (noting that both did so "without any chaos in the courts").

22. See, e.g., Petition of the State Bar of Arizona in Opposition to Proposed Rule Changes, No. R-21-0020 (April 30, 2021).

23. See generally Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, Ariz. Supreme Court,

No. R-21-0020 (Aug. 30, 2021). See also "Recent Ordinance, Arizona Supreme Court Abolishes Peremptory Strikes in Jury Selection," 135 HARV. L. REV. 2243 (2022).

24. N.Y. Senate Bill S6066, 2021–22 Legislative Session (N.Y. 2021).

25. See Wash. Ct. Gen. R. 37(a).

26. Wash. Ct. Gen. R. 37(e). An "objective observer" is a person who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." Wash. Ct. Gen. R. 37(f). This approach has since been followed by several other states, including California and Connecticut. See "Berkley Law School Death Penalty Clinic, *Batson* Reform: State by State," BERKLEY LAW ONLINE (May 17, 2022, 11:30 a.m.), <https://bit.ly/BatsonReformStatebyState> [<https://perma.cc/D445-XGLM>].

27. Wash. Ct. Gen. R. 37(h) (listing presumptively invalid reasons for exercising peremptories).

28. *Commonwealth v. Fernandes*, 487 Mass. 770, 776 n.6 (2021).

29. MA H.D. 2653, 193rd Gen. Ct. (Mass. 2023), reproduced in App. B ("HD-2653").

30. Holmes, *supra* note 1, at 459.

31. Practitioners sometimes defend their use of stereotyping as a permissible method of serving their client, given the availability of peremptory challenges. See, e.g., Abbe Smith, "'Nice Work if You Can Get It': 'Ethical' Jury Selection in Criminal Defense," 67 FORDHAM L. REV. 523, 528–31 (1998). The Holmesian view avoids a unilateral approach, recognizing that strategic behavior can be expected from either party in an adversarial system.

32. See Barbara D. Underwood, "Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?," 92 COLUM. L. REV. 725, 760–74 (1992) (describing the many stakeholders affected by the use of peremptory challenges).

in conjunction with the abolition of peremptory challenges.

Moments of significant reform present opportunities to step back and assess how well our system represents the values we hope it does. They bring with them energy to undo “sticky defaults,” which have become entrenched, not by their value, but by their perniciousness and supposed advantages. Forty years ago, Justice Thurgood Marshall declared that the only way to end discrimination in peremptory challenges would be to abolish them entirely.³³ Time has proven him correct.³⁴ As we seize the historic moment, Massachusetts should lead the way toward a more equitable jury selection system.

I. HISTORY OF JUROR CHALLENGES

A. Early History

Peremptories were available at English common law as early as 1305.³⁵ Criminal defendants were generally allowed 35 challenges for any cause, while prosecutors could command an unlimited number of jurors to “stand aside.”³⁶ But for the first 400 years of their existence, they went almost entirely unused, and were usually reserved for those who personally knew a party or about the dispute.³⁷ There was no motive for parties to identify internal community divisions because venires were minimally diverse.³⁸ Jury pools were small and homogenous, comprising only property-owning, wealthy men.³⁹ William Blackstone wrote about peremptories as “full of . . . tenderness and humanity to prisoners,” locating the peremptory as an advantage for a criminal defendant.⁴⁰

American colonial courts, including in Massachusetts,⁴¹ imported juror challenges, but their disuse largely persisted⁴² along with the homogeneity of the jury pool.⁴³ After the Revolution, the Framers considered and rejected a constitutional provision for juror challenges, but scholars differ on whether these were likely peremptory or cause challenges.⁴⁴ James Madison specifically believed that “challenges” were essential to a fair trial, though he was likely

referring to cause challenges.⁴⁵ In Massachusetts, political representatives were explicitly concerned with cause challenges, not peremptories.⁴⁶

Congress codified criminal defendants’ rights to some peremptories in the Crimes Act of 1790 but did not include a parallel right for the prosecution.⁴⁷ Cause challenges, meanwhile, trace their modern origin to one of the first celebrity trials in America: the prosecution of Aaron Burr for treason in 1807.⁴⁸ Chief Justice John Marshall presided over Burr’s trial while “riding circuit” in Virginia, where he faced a jury pool tainted by the notoriety of Burr’s alleged crimes.⁴⁹ In response, Chief Justice Marshall departed from common-law norms and discarded the usual requirement of particularized, personal “ill will” to support a challenge. Instead, he expanded *voir dire* to identify and exclude jurors with “strong and deep impressions which will close the mind against the testimony that may be offered,” while accepting those with “light impressions which may fairly be supposed to yield to the testimony,” given that it would be “impossible” to find a juror “without any prepossessions whatever”⁵⁰ — almost exactly echoing a modern-day cause challenge.⁵¹ In other words, Marshall adapted jury *voir dire* to investigate broader opinions and backgrounds, aiming to ensure a fair and impartial jury.⁵² But this expansion for cause challenges increased the amount of information available to parties — and thus enabled the strategic use of peremptories based on that information.

B. Road to Swain v. Alabama

The effect of Chief Justice Marshall’s innovation predictably did not stop at cause challenges. Instead, it opened a door that Holmes’ bad man confidently strode through. As expanded *voir dire* rippled through early American courts, peremptories took on strategic importance. For the first time, attorneys had access to information that might suggest a partial juror based on group stereotypes or assumptions. Meanwhile, this information expansion collided with the

33. *Batson v. Kentucky*, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring) (concluding that ending racial discrimination in jury selection “can be accomplished only by eliminating peremptory challenges entirely”).

34. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 181–83 (S.D.N.Y. 1996) (“Time has proven Mr. Justice Marshall correct.”).

35. See Jon M. Van Dyke, “Peremptory Challenges Revisited,” 12 NAT’L BLACK L.J. 114, 118–19 (1992).

36. Hoffman, *supra* note 15, at 821–22 (The process of “standing aside” allowed English prosecutors to sideline an unlimited number of venire-members until every remaining venire-member had undergone *voir dire*. Only if the number of remaining jurors was insufficient to seat a jury after a defendant had exercised their peremptories could the stood-aside jurors be recalled. For all practical purposes, this granted the government an unlimited number of peremptory exclusions of prospective jurors).

37. *Id.* at 15.

38. *Id.* at 15.

39. *Id.* at 27.

40. 4 William Blackstone, *Commentaries* *346.

41. See Edgar J. McManus, *Law and Liberty in Early New England* 99 (1993) (citing a 1623 New Plymouth court order).

42. See Van Dyke, *supra* note 35, at 119.

43. See April J. Anderson, “Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in

Practitioners’ Trial Manuals,” 16 STAN. J. C.R. & C.L. 1, 27 (2020); see also Thomas W. Frampton, “For Cause: Rethinking Racial Exclusion and the American Jury,” 118 MICH. L. REV. 785, 825 (2020).

44. Compare Hoffman, *supra* note 15, at 824 n.80, with Valerie P. Hans & Neil Vidmar, *Judging the Jury* 37 (1986).

45. Hoffman, *supra* note 15, at 823–25.

46. Christopher Gore, Address at the Massachusetts Ratifying Convention (Jan. 30, 1788), in *The Complete Bill of Rights*, 419, 421 (Neil Cogan ed., 1997) (“The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.”).

47. Van Dyke, *supra* note 35, at 120.

48. Anderson, *supra* note 43, at 20; see also Joel Richard Paul, Without Precedent: John Marshall and his times 282–96 (2018).

49. See Joel Richard Paul, Without Precedent 282–96 (2019); see also discussion *infra* Section III.A.1.

50. *United States v. Burr*, 25 F. Cas. 55, 58 (C.C.D. Va. 1807).

51. See, e.g., Mass. Super. Ct. R. 6(h)(ii) (explaining that a cause challenge may be supported by a showing that “in light of the information or viewpoint expressed [during *voir dire*], the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial”).

52. See Anderson, *supra* note 43, at 20 (“Th[e] rule invited — indeed required — another novelty, careful inquiry into the juror’s opinions.”).

period of Reconstruction, during which diversity of jury pools grew rapidly as federal laws prohibited racial exclusion.⁵³ The first Black citizens to sit on an American jury did so in Worcester, Massachusetts, in 1860.⁵⁴ The convergence of these two innovations meant that at the very moment that peremptories were taking on strategic importance, the jury pool was diversifying.

As *voir dire* expanded, 19th-century trial practice guides began to dispense advice on how to use peremptories to manipulate jury partiality, playing on stereotypes of race, national origin, religion, political associations, and occupation.⁵⁵ Peremptory challenges evolved from a rare occurrence to a defining aspect of the American trial system, with no doubt that they were being used to achieve tactical objectives rather than impartiality. Their perceived benefits were so substantial that states rapidly began to adopt the English tradition of “standing aside” jurors, granting prosecutors the ability to use peremptories. Massachusetts allowed prosecutors peremptories in 1869,⁵⁶ while the Supreme Court endorsed the government’s ability to peremptorily challenge jurors in 1887.⁵⁷ By contrast, the United Kingdom did not experience the same evolution in expanded *voir dire*, and peremptories continued to go largely unused by both prosecutors and defendants before eventually being abolished in 1988.⁵⁸

Throughout this period and into the 20th century, Black jurors, female jurors and a host of other groups were routinely and systematically excluded from juries, often by peremptory challenges — a move one observer called “the last best tool of Jim Crow.”⁵⁹ In 1880, the Supreme Court held that the complete peremptory exclusion of all available Black jurors based on race violated the 14th Amendment but did not provide any mechanism for a party to challenge a strike as discriminatory in the future.⁶⁰

Eighty-five years later, in *Swain v. Alabama*, the Supreme Court attempted for the first time to create a constitutional remedy for racially discriminatory peremptories but required a showing of a prosecutor’s persistent exclusion of Black jurors across multiple cases to establish a violation of equal protection.⁶¹ Writing for the Supreme Court, Justice Byron White reasoned that a peremptory’s “essential nature” was that its reasoning goes unstated.⁶² He argued that if peremptories were opened to case-by-case analysis, the only possible outcome would be that the “judgment underlying each challenge

would be subject to scrutiny for reasonableness and sincerity. A great many uses of the challenge would be banned.”⁶³

The *Swain* standard was impossible to apply, given the difficulty of tracking a prosecutor’s jury selection habits across cases, and it proved “the subject of almost universal and often scathing criticism.”⁶⁴ Holmes’ bad actors had no functional barrier preventing abuse. But *Swain* was critical for two reasons. First, it fortified the peremptory as a “necessary part of trial by jury.”⁶⁵ By taking this route, the Supreme Court chose to preserve peremptories over the equal protection rights of both defendants and veniremembers.⁶⁶ Second, the Supreme Court reassigned usual justifications supporting peremptories *for defendants* to the government, similarly cementing the right of prosecutorial challenges.⁶⁷

C. Soares, Batson and Their Progeny

Fourteen years after *Swain*, the SJC heard Edward Soares and his co-defendants’ appeal. The court granted the defendants a new trial, radically departing from *Swain* by finding that the trial prosecutor’s use of peremptories at this trial *alone* had violated the defendants’ rights to a jury drawn from a fair cross-section of the community.⁶⁸ They held that the “exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual’s membership in the group, contravenes the requirement inherent in [the Massachusetts Constitution’s Declaration of Rights].”⁶⁹ Soares showed exceptional foresight in two ways. First, the SJC recognized the inherent value of a diverse jury, embracing the “commingling of ideas *and biases*” as a goal itself.⁷⁰ Still, it limited the protected groups to “sex, race, color, creed or national origin.”⁷¹ Second, it explicitly rejected the “Canceling-out Hypothesis,”⁷² reasoning that:

The party identified with the majority can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available. The result is a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced.⁷³

53. Alexis Hoag, “An Unbroken Thread: African American Exclusion from Jury Service, Past and Present,” 81 LA. L. REV. 55, 59 (2020).

54. Albert W. Alschuler & Andrew G. Deiss, “A Brief History of Criminal Jury in the United States,” 61 U. CHI. L. REV. 867, 884 (1994).

55. Anderson, *supra* note 43, at 32–55.

56. See Van Dyke, *supra* note 35, at 120 n.38.

57. See *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (noting that prosecutors needed the ability to peremptorily challenge jurors due to the “mixed population” of large cities and the unwillingness of wealthier citizens to participate in jury duty).

58. See Judith Heinz, “Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada,” 16 LOY. L.A. INT’L & COMP. L. REV. 201 (1993).

59. See Hoffman, *supra* note 15, at 827.

60. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); see also Hoag, *supra* note 53, at 62 (calling the decision “aspirational at best”).

61. 380 U.S. 202, 221 (1965).

62. *Id.* at 220.

63. *Id.* at 222.

64. *McCray v. New York*, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting) (citations omitted).

65. *Swain*, 380 U.S. at 219; see also Barbara Allen Babcock, “*Voir Dire*: Preserving Its Wonderful Power,” 27 STAN. L. REV. 545, 555 (1975).

66. See Kenneth B. Nunn, “Rights Held Hostage: Race, Ideology and the Peremptory Challenge,” 64 HARV. C.R.-C.L. L. REV. 63, 89 (1993).

67. See Babcock, *supra* note 65, at 555.

68. *Commonwealth v. Soares*, 377 Mass. 461, 478–83 (1979).

69. *Id.* at 488.

70. *Id.* at 487 (emphasis added).

71. Mass. Const. art. I, amended by art. CVI (1976); *Soares*, 377 Mass. at 488–89.

72. The “Canceling-out Hypothesis” posits that even if both parties seek to use peremptories to obtain a jury biased in their favor, such strategic action will theoretically be “canceled-out” by the opposition’s same strategic behavior. See Van Dyke, *supra* note 35, at 116.

73. *Soares*, 377 Mass. at 488 (also characterizing the Canceling-out Hypothesis as “doomed to failure”).

The SJC laid out a three-part test for identifying impermissibly discriminatory peremptories, which closely mirrors the one adopted by the Supreme Court almost a decade later in *Batson v. Kentucky*.⁷⁴ That now-familiar framework requires: first, an objector shows a “prima facie case of discrimination”;⁷⁵ second, the burden shifts to the proponent of the peremptory to state neutral reasons; third, the court makes a credibility determination deciding whether discrimination had occurred.⁷⁶ Courts have clarified that “a defendant may rely on ‘all relevant circumstances’ to raise an inference of purposeful discrimination.”⁷⁷ *Batson* and *Soares* diverged, however, in their underlying rationales. *Soares* mainly relied on the SJC’s finding that discriminatory peremptories violated Article 12 of the Massachusetts Declaration of Rights by failing to provide a jury drawn from a fair cross-section of the community.⁷⁸ In so holding, the SJC side-stepped whether the Sixth or 14th amendments to the U.S. Constitution would apply and avoided confrontation with *Swain*. Conversely, *Batson* rested principally on the idea that equal protection under the 14th Amendment guarantees a jury selected without discriminatory challenges.⁷⁹ The Supreme Court overruled the evidentiary burden of *Swain* requiring a pattern of purposeful discrimination as inconsistent with equal protection.⁸⁰ The essential effect of both cases, however, was to provide a mechanism for evaluating and addressing discriminatory challenges. The framework has since been approved for disputing strikes regardless of the defendant’s race or that of the prospective juror,⁸¹ on the basis of sex,⁸² and for private litigants in civil actions.⁸³ It also applies to criminal defendants’ use of peremptories.⁸⁴ Massachusetts courts have continued expanding protected classes;⁸⁵ most recently, the SJC extended the framework

to prohibit discriminatory strikes based on a juror’s sexual orientation.⁸⁶

Even at the time *Batson* was decided, Justice Thurgood Marshall argued that the framework would not succeed at eliminating insidious discrimination. Concurring in the judgment, Justice Marshall said that though it was a “historic step,” the only way to end racial discrimination in jury selection would be to abolish peremptories altogether.⁸⁷ He noted two key concerns. First, parties could easily state facially neutral reasons for dismissing jurors, regardless of their true motives. Second, many discriminatory strikes were based on “unconscious racism,” which no amount of procedural review could ever prevent.⁸⁸ Justice Marshall recognized the same pragmatic concerns as Holmes — any standard, however lofty, is meaningful only if it can genuinely constrain the behavior of a bad actor. Ten years later, Judge Constance Baker Motley agreed with Justice Marshall, holding that the *Batson* standard served only as a “cloak for discrimination” and peremptories “per se violate equal protection.”⁸⁹ Several justices in Massachusetts have likewise found *Soares-Batson* unworkable in practice and have suggested they would prefer their complete abolition.⁹⁰ In the meantime, the framework’s practical application has proved incredibly inconsistent.⁹¹ Indeed, the same genre of trial guides that counseled stereotyping and systematic exclusion in the 19th century pivoted to provide pretextual reasons to overcome the *Batson* system.⁹² Holmes’ bad man is almost equally free to continue unchecked, strategically discriminating against jurors while stating neutral reasons for doing so.

There is a consensus among scholars that *Batson* has not posed a sufficient barrier to discrimination in exercising peremptories.⁹³

74. 476 U.S. 79 (1986).

75. Courts have effectively eliminated this step. See *Commonwealth v. Sanchez*, 485 Mass. 491, 511 (2020) (reflecting the federal standard allowing consideration of the “totality of the relevant facts giv[ing] rise to an inference of discriminatory purpose”).

76. *Batson*, 476 U.S. at 97–98; *Commonwealth v. Soares*, 377 Mass. 461, 489–92 (1979).

77. *Miller-El v. Cockrell*, 537 U.S. 322, 240 (2003) (emphasis added); see also *Sanchez*, 485 Mass. at 511 (adopting the same standard).

78. *Soares*, 377 Mass. at 488.

79. *Batson*, 476 U.S. at 86 (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”). Some commentators have suggested that the Supreme Court would have been better served founding the prohibition on discriminatory peremptories in the Sixth Amendment. See, e.g., Tania Tetlow, “Solving *Batson*,” 56 WM. & MARY L. REV. 1859, 1902–20 (2015).

80. *Batson*, 476 U.S. at 80.

81. See *Powers v. Ohio*, 111 S. Ct. 1364, 1168 (1991); *Holland v. Illinois*, 493 U.S. 474, 477 (1990).

82. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

83. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

84. *Georgia v. McCollum*, 505 U.S. 42 (1992). The Supreme Court’s holding was made possible because of a certified interlocutory appeal on a denial of a prosecutor’s request for a prophylactic order preventing three white defendants from excusing Black prospective jurors. Although defense attorneys may be constrained by the existing standard and the trial court judge, defense-side challenges are largely insulated from appellate review.

85. See *Commonwealth v. Jordan*, 439 Mass. 47 (2003) (white males and Black females); *Commonwealth v. Fryar*, 414 Mass. 732 (1993) (discrete community

groups); *Commonwealth v. Suarez*, 59 Mass. App. Ct. 111 (2003) (national origin); *Commonwealth v. Burns*, 43 Mass. App. Ct. 263 (1997) (perceived religious affiliations); and *Commonwealth v. Fruchtmann*, 418 Mass. 8 (1994) (employment).

86. *Commonwealth v. Carter*, 488 Mass. 191, 192 (2021).

87. *Batson v. Kentucky*, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

88. *Id.* at 105–06. “Unconscious racism” has frequently been equated to modern critiques regarding “implicit bias.” See, e.g., Mark W. Bennett, “Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated *Voir Dire*, The Failed Promise of *Batson*, and Proposed Solutions,” 4 HARV. L. & POL’Y REV. 149, 166–67 (2010).

89. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996).

90. See *Commonwealth v. Maldonado*, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (joined by Justices Greaney and Spina, noting, “it is all too often impossible to establish whether a peremptory challenge has been exercised for an improper reason,” declaring it “time to either abolish them entirely, or to restrict their use substantially”); *Commonwealth v. Calderon*, 431 Mass. 21, 29 (2000) (Lynch, J., dissenting) (suggesting that “rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives, we abolish them entirely.”).

91. Compare *Commonwealth v. Scott*, 463 Mass. 561 (2012) (finding no error in trial judge’s determination of no discriminatory purpose because some seated jurors were Black), with *Commonwealth v. Robertson*, 480 Mass. 383 (2018) (finding error on the same facts).

92. See Equal Justice Initiative (EJI), “Illegal Racial Discrimination in Jury Selection: A Continuing Legacy,” 34–45 (2010) (describing trial prosecutor training programs on making ostensibly neutral peremptories to avoid *Batson* challenges).

93. See Savanna R. Leak, “Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution,” 111 J. CRIM. L. & CRIMINOLOGY 273, 293–96 (2020). See generally EJI, *supra* note 92.

Nationwide, a tiny fraction of *Batson* appeals are successful.⁹⁴ Massachusetts has seen more successful *Soares-Batson* appeals than elsewhere,⁹⁵ which is largely attributable to the SJC's practice of granting a new trial when a trial judge erroneously fails to find a *prima facie* case of discrimination, rather than remanding the case for a hearing on whether there was a race-neutral reason for the challenged peremptory, as is customary in the federal courts.⁹⁶ But this case-by-case method of enforcing the prohibition on discrimination in peremptory challenges has come at the great cost of years of litigation and imprisonment for those defendants wrongly convicted. Moreover, even after such an investment of time and resources, the continued provision of peremptory challenges allows a bad actor to simply change technique, and does not prevent them entirely.

II. THE COST OF PEREMPTORY CHALLENGES

A. Moral Confusion

Jury selection sits at a nexus of issues in the justice system.⁹⁷ It involves an array of rights and principles that often overlap, conflict with each other, and interact in intricate ways. In a process that is already filled with tension, peremptory challenges are particularly detrimental. They introduce moral ambiguity to the system by creating an additional layer of complexity that transforms what could be a clear hierarchy of priorities into a confusing maze of contradictions. Abolishing peremptory challenges would bring back moral certainty to the jury selection process.

Peremptories themselves can be a tool for parties to select their jury, as Justice White articulated in *Swain*,⁹⁸ or a weapon to achieve discriminatory partiality, which motivated the *Soares-Batson* line of cases.⁹⁹ Attorneys, meanwhile, are caught between duties to clients in challenging jurors believed to be unfriendly and their responsibilities to the court in curtailing those challenges if they are founded on impermissible stereotypes.¹⁰⁰ These dilemmas lead to understandable moral confusion, or even rejection.¹⁰¹ In one famous example, Jack McMahon, a former Philadelphia homicide prosecutor, stated in a prosecution training video on jury selection that the law was that

the object of jury selection “is to get a competent, fair, and impartial jury. Well, that’s ridiculous . . . You’re there to win . . . and the only way you’re going to do your best is to get jurors that are as unfair and more likely to convict than anybody else in that room.”¹⁰² When attorneys do act impermissibly, courts want to provide a remedy, but providing it demands an impossible reconstruction of advocates’ internal processes.¹⁰³ The public nature of a trial embodies a desire for accountability and a principle that “sunlight is the best disinfectant,”¹⁰⁴ but peremptories provide a means for hidden strategies.

The fundamental understanding of how and why parties are protected from discriminatory peremptories is muddled. Courts have disagreed over whether to prioritize the rights of litigants, as *Soares* does,¹⁰⁵ or those of prospective jurors, like *Batson*¹⁰⁶ and *Edmondson*,¹⁰⁷ or sometimes a combination of the two.¹⁰⁸ Likewise, juries serve multiple functions. On the one hand, jurors are democratic representatives of the community, which would suggest the system should prioritize achieving a diverse cross-section of public life. On the other, they are neutral factfinders, so selection should prioritize impartiality over diversity. Jurors are at once entrusted with exceptional power in judgment but distrusted in *voir dire*.¹⁰⁹ In the eyes of the community, representative juries can enhance legitimacy, but biased juries can detract from it.¹¹⁰

Returning to basic principles illustrates how peremptories undermine the jury system’s institutional values. In holding that peremptory challenges per se violate equal protection, Judge Motley said this confusion of principles “illustrate[s] the bedeviling problems associated with peremptory challenges which, by their very nature, invite corruption of the judicial process.”¹¹¹ Within that corruption, Holmes’ bad actors strategize for their own perceived advantages.

Though incomplete, this list of competing priorities demonstrates the fine line that courts must strike in selecting a jury. Peremptory challenges confound rather than clarify that line. If their gravitational force were removed, balance could be restored to the system. The incentive structure would reward discovering actual impartiality rather than strategizing over base stereotypes.¹¹² Attorney duties and responsibilities would become uniform and reliable. Jury

94. Kenneth J. Melilli, “*Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges,” 71 NOTRE DAME L. REV. 447, 469–70 (1996) (finding a steep drop in challenges between *Batson* Step 1 and Step 3 and a small number of successful *Batson* appeals).

95. See, e.g., Commonwealth v. Carter, 488 Mass. 191 (2021); Commonwealth v. Sanchez, 485 Mass. 491 (2020); Commonwealth v. Jones, 477 Mass. 307 (2017); Commonwealth v. Robertson, 480 Mass. 383 (2018).

96. See *Sanchez*, 485 Mass. at 501–02.

97. See Tetlow, *supra* note 79, at 1870–89; Hoffman, *supra* note 15, at 853–70.

98. See *Swain v. Alabama*, 380 U.S. 202, 220–22 (1965).

99. See Underwood, *supra* note 32, at 762; see also Charles J. Ogletree, “Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges,” 31 AM. CRIM. L. REV. 1099, 1137–51 (1994).

100. Caren Myers Morrison, “Negotiating Peremptory Challenges,” 104 J. CRIM. L. & CRIMINOLOGY 1, 34–37 (2014) (“Another *Batson* weakness is that it systematically underestimates the professional motivations of attorneys. Trial lawyers, faced with the choice between protecting their clients’ interests and upholding some vague constitutional mandate, routinely choose the former.”).

101. See Smith, *supra* note 31, at 531 (claiming “it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with” *Batson*); Robin Charlow, “Tolerating Deception

and Discrimination After *Batson*,” 50 STAN L. REV. 9, 63 (1997) (noting “strikes based on race or sex are at least understandable — and sometimes even morally warranted — as a means to secure justice . . .”).

102. Morrison, *supra* note 100, at 35 n.173.

103. See *id.* at 37–42.

104. See generally Ronald F. Wright et al., “The Jury Sunshine Project: Jury Selection Data as a Political Issue,” 2018 U. ILL. L. REV. 1407 (2018).

105. See Commonwealth v. Soares, 377 Mass. 461, 485–89 (1979).

106. 476 U.S. 79, 85–68 (1986).

107. 500 U.S. 614, 628–29 (1991).

108. Underwood, *supra* note 32, at 725–28.

109. Hoffman, *supra* note 15, at 854–59 (“[T]he American strain of peremptory challenges conveys to jurors a cynical and wholly exaggerated view of the extent to which we are teeming with perjurers and bigots, especially considering the great confidence we repose in jurors the moment they are seated and sworn, and the even greater, almost unassailable, confidence we repose in their ultimate judgment.”).

110. See Amar, *supra* note 18, at 1182.

111. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).

112. See Underwood, *supra* note 32, at 728–50.

representation would reflect the community from which it is drawn, while tests of impartiality could be based on public reasoning rather than hidden strategies, as cause challenges do not produce the same skewing effects as peremptories.¹¹³ Neither party could suffer or benefit from strategic action. In criminal cases, truly cross-sectional juries might make unanimous decisions more difficult to achieve, but their decisions will more accurately reflect the judgment of the community they represent, rather than a selected subset of it.

B. Inevitable Discriminatory Outcomes

Even if peremptories did not cause moral confusion, the discriminatory cost of maintaining them would be prohibitive. *Soares, Batson* and their progeny recognized an essential fault in allowing racial or other discrimination to occur under the guise of justice. The Supreme Court and SJC have repeatedly said that even a single peremptory based on a juror's group affiliation is unacceptable.¹¹⁴ Though some critics stress that impartiality, not diversity, is the overriding goal of jury selection,¹¹⁵ jury diversity itself improves impartial decision-making.¹¹⁶ Discriminatory exclusion artificially skews that decision process.¹¹⁷

Party decisions that a given individual is partial by themselves cannot explain the disproportionate exclusion of minority populations through peremptories.¹¹⁸ Indeed, the regular use of peremptories against certain groups is especially striking because cause challenges *also* disproportionately affect those groups, particularly young Black men, because of neighborhood crime, family connections, and community police presence.¹¹⁹ There is an enormous body of literature discussing the discriminatory exercise of peremptories, both historically and today.¹²⁰ But to evaluate the wisdom of retaining or abolishing them, it helps to focus on two key areas: first, understanding the empirical data on peremptories' effects today, and, second, using the available research to determine whether the

problem of discrimination is an inevitable feature, rather than a bug, of peremptory challenges.

Several characteristics of jury *voir dire*, especially peremptories, make them difficult to study empirically. Data on prospective juror characteristics is incomplete or nonexistent.¹²¹ Because peremptories are exercised without explanation in the absence of a *Soares-Batson* objection, it is difficult to measure their broader impact. By comparison, although cause challenges can be used in a discriminatory manner, it is easier to track and correct their misuse because they require more information on the record to support a factual finding.¹²² Despite practitioner intuition to the contrary, it is nearly impossible to measure the impact peremptories have on case outcomes, given the difficulty of simulating identical trial conditions for multiple juries equally invested in rendering an actual verdict.¹²³

One of the most comprehensive studies on the effects of peremptories followed 317 capital murder cases in Philadelphia over 16 years.¹²⁴ Conducted between 1981 and 1997, the research included cases from before and after the *Batson* standard became law.¹²⁵ The results indicated a widespread and stable practice of discrimination based on race and sex. Prosecutors disproportionately struck Black jurors, and defense counsel disproportionately struck white jurors.¹²⁶ Researchers noted, however, that each side's target population was defined by a complex combination of age, race and gender.¹²⁷ The fact that both sides were engaged in discrimination did not cancel each other out, primarily because the prosecution's "target population" was notably smaller than that of the defense-side target population, meaning that an equal allocation of peremptories disproportionately favored the prosecution.¹²⁸ They exposed that measured race-based peremptories declined by only 2% after *Batson*.¹²⁹ The study concluded that the only solution to result in a "proportional representation of all subgroups" would be eliminating the peremptory entirely in favor of cause challenges.¹³⁰

113. See David C. Baldus et al., "The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis," 3 U. PA. J. CONST. L. 4, 120 (2001) (noting that a jury composed of a random subset of the venire minus those challenged for cause "very closely approximate[d] a system of random selection").

114. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) ("In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many . . . Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process."); *Commonwealth v. Kozubal*, 488 Mass. 575, 580 (2021) ("The issue is not whether there is a pattern of improper challenges, but whether a single challenge is based impermissibly on a juror's membership in a protected group.")

115. See, e.g., Tetlow, *supra* note 79, at 1871–78.

116. Samuel R. Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations," 90 J. PERS. SOC. PSYCH. 597, 598–600 (2006) (collecting research demonstrating racial diversity is likely to lead to improved group performance in decision-making).

117. See *id.* at 609–10.

118. See Baldus, *supra* note 113, at 121–30.

119. See Frampton, *supra* note 43, at 786–91 (explaining that cause challenges also disproportionately exclude Black citizens based on their "qualifications").

120. See Thomas W. Frampton, "The Jim Crow Jury," 71 VAND. L. REV. 1593, 1620–35 (2018); see also Annie Sloan, "What to do about *Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection," 108 CAL. L. REV. 233, 237–41 (2020) (collecting research regarding discriminatory uses of peremptory challenges).

121. See Wright et al., *supra* note 104, at 1442.

122. See Tetlow, *supra* note 79, at 1935–37.

123. See Hans Zeisel & Shari S. Diamond, "The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court," 30 STAN. L. REV. 491, 499–501 (1978) (discussing experiment creating two "shadow juries" to measure peremptory effectiveness).

124. Baldus, *supra* note 113.

125. *Id.* at 73–77.

126. *Id.* at 55–73.

127. *Id.* at 125.

128. *Id.*

129. *Id.* at 123.

130. Baldus, *supra* note 113, at 121.

Other smaller studies have corroborated the Philadelphia findings.¹³¹ In clinical settings, researchers have tested subjects role-playing attorneys in fabricated trials.¹³² They found that “explicit warnings about the proscription on using [stereotyping] not only failed to attenuate [bias] but led participants to provide even more elaborate justifications for their decisions.”¹³³ Even divorced from real-life data, statistical modeling suggests that *any* system using peremptories will skew juries away from impartiality.¹³⁴

Studies measuring implicit biases have made it abundantly clear that, even if every attorney were closely studying their own decision-making, they *themselves* would likely be unable to discern whether they were using a peremptory on a permissible or impermissible basis.¹³⁵ Because of its invisible nature, commentators have recognized that there is implicit bias at play in every courtroom.¹³⁶ It is impossible to know whether attorneys rely on legal stereotypes about tendencies to acquit or convict, some of which are statistically supported, or whether they act from more deep-seated animus.¹³⁷ However, reliance on “social category information,” such as race, gender or occupation, has been conclusively demonstrated to affect conscious or unconscious judgments in countless social settings. It is unlikely that jury *voir dire* is the exception.¹³⁸ In fact, allowing peremptory challenges in *voir dire* invites *exceptionally* “noisy” decision-making,¹³⁹ as attorney cognitive limits are pushed toward reliance on faulty reasoning and stereotyping without the “noise reducing” guardrail of articulating a reasonable cause to challenge.¹⁴⁰

Every empirical study conducted on peremptory challenges to date has agreed with Justice Thurgood Marshall that the only reliable way to prevent discriminatory peremptories would be to ban them entirely because discrimination is an endemic feature of their use.¹⁴¹ The result of not doing so will remain juries selected on the back of discrimination. The “bad man” here is not only overt discrimination; he can just as easily be the limits of human cognition, conscious or unconscious, and act on the system’s incentives, avoid detection, and almost always avoid redress.

C. No Measurable Benefits

At a fundamental level, practitioners cling to peremptory challenges based on the belief that they can reliably discern jurors who will be biased against their client or toward their opposition — the practice would be difficult to justify otherwise. But there are almost no scientific grounds for that belief. Peremptories are often “predicated on ‘seat-of-the-pants instincts’ that may be ‘crudely stereotypical’ and in many cases are ‘hopelessly mistaken.’”¹⁴² The “effectiveness hypothesis” is often considered alongside “discriminatory outcomes” because there is some truth to certain legal stereotypes, particularly in average tendencies to be partial to defendants or the prosecution.¹⁴³ But *Soares-Batson* instructs parties that they may not rely on such a discriminatory crutch. For peremptories to be acceptable, therefore, attorneys’ “instincts” must rely on some capacity for discerning a juror’s bias, not on their implicit or explicit biases. But psychological science makes clear that no such stand-alone capacity exists.

Hans Zeisel and Shai Seidman Diamond conducted one of few major studies on the effectiveness of attorneys’ abilities to spot and eliminate biases from prospective jurors in 1978.¹⁴⁴ Their experiment was conducted on 12 criminal trials in the U.S. District Court for the Northern District of Illinois, spread across several different types of federal criminal litigation.¹⁴⁵ Researchers formed two “shadow juries”: the first composed of the prospective jurors who had been peremptorily excluded, and the second from a random selection of the remaining unselected venire-members (termed the “English jury,” as it was seated without *voir dire*).¹⁴⁶ These shadow juries then sat in the front rows of the spectator seats in each of the 12 cases (except for some in which researchers could not secure enough volunteers).¹⁴⁷ The experiment was somewhat limited by the relatively low number of cases examined and the secretive nature of jury deliberations.¹⁴⁸ The “peremptory jury” also did not have the benefit of deliberations, as the experimenters only measured their “pre-deliberation votes.”¹⁴⁹

131. See, e.g., DeCamp & DeCamp *supra* note 17, at 21 (finding significant disparities between prosecution-side treatment of Black prospective jurors and defense-side treatment of white prospective jurors); Mary R. Rose, “The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,” 23 LAW & HUM. BEHAV. 695, 698–99 (1999) (analyzing demographic data on jurors peremptorily excused in one county to find that 71% of the peremptorily challenged Black jurors were removed by the prosecution, while the defense removed 81% of the challenged white jurors).

132. See Michael I. Norton et al., “Bias in Jury Selection: Justifying Prohibited Peremptory Challenges,” 20 J. BEHAV. DECISION MAKING. 467, 474–75 (2007).

133. *Id.* at 475.

134. See Francis X. Flanagan, “Peremptory Challenges and Jury Selection,” 58 J. L. ECON. 385, 405 (2015) (describing peremptory challenges as inevitably skewing away from impartiality based on statistical analysis); Joshua Revesz, “Ideological Imbalance and the Peremptory Challenge,” 125 YALE L.J. 2535, 2548–49 (2016) (describing the inevitable ideological skew of juries if both sides are allowed peremptory challenges).

135. Bennett, *supra* note 88, at 149–50.

136. Jerry Kang et al., “Implicit Bias in the Courtroom,” 59 UCLA L. REV. 1124, 1126, 1186 (2012).

137. Samuel R. Sommers & Michael I. Norton, “Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate,” 63 AM. PSYCH.

527, 531 (2008) (identifying certain legal stereotypes as statistically supported).
138. *Id.* at 530–32.

139. See Daniel Kahneman, Olivier Sibony, Cass Sunstein, *Noise: A Flaw in Human Judgment*, 161–75 (2021) (discussing biases as unwanted and uncontrollable variability in decision-making and outlining multiple areas of their influence in legal contexts).

140. Antony Page, “*Batson’s* Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge,” 85 B.U. L. REV. 155, 180–204 (2005).

141. *Id.* at 245–46 (noting that “unconscious, automatic stereotype use and the difficulty in eradicating it, even among those who are not of a mind to discriminate,” is an inherent part of peremptories and a “powerful reason” to eliminate them).

142. Raymond J. Broderick, “Why the Peremptory Challenge Should Be Abolished,” 65 TEMPLE L. REV. 369, 410–11 (1992) (citations omitted).

143. See Sommers & Norton, *supra* note 137, at 531.

144. See generally Zeisel & Diamond, *supra* note 123.

145. *Id.* at 492–95.

146. *Id.* at 498.

147. *Id.* at 499.

148. See *id.* at 495–506.

149. *Id.* at 498.

Zeisel and Diamond concluded that “on the whole, the *voir dire* as conducted in [those] trials did not provide sufficient information for attorneys to identify prejudiced jurors.”¹⁵⁰ As a matter of average performance, prosecutors’ exercises of peremptories had no net effect on jury bias, whereas defense attorneys had a minimal effect.¹⁵¹ The researchers themselves pointed out, however, that this average data was nearly meaningless because the fluctuations around them were so large while the sample size was so small.¹⁵² In other words, it was impossible to say those averages were anything more than luck. Some commentators have made much of the apparent influence that defense attorneys seemed to have on outcomes but ignored that those effects could not be reliably traced to any lawyer’s measurable or reliable skill.¹⁵³ Were the purported benefits of challenges the result of any particular skill on the part of the advocates, it would likely appear somewhere in the data collected.

It is a human limitation that we are not skilled at discerning lies more accurately than flipping a coin.¹⁵⁴ Other studies have highlighted that attorneys do not have any more skill at detecting untruths in prospective jurors.¹⁵⁵ Even if an attorney spots bias, and they are correct, one moderate success does not indicate that the same attorney can spot more extreme forms of the same bias, undermining the idea that there is a firm grasp of a venire-member’s state of mind.¹⁵⁶ Considering these limitations, it is unlikely that attorneys are suddenly capable of making reliable determinations of a juror’s character in the *voir dire* context. More likely, they are sometimes lucky and otherwise rely on impermissible stereotypes.

III. PATHS TO REFORM

This article advocates eliminating the peremptory challenge in Massachusetts and exclusively relying on cause challenges to achieve jury impartiality. Still, as discussed in this Part, for that change to work, there must be several necessary supporting changes to the jury selection system and cause challenges.

A. Options for Change

(1) *Washington’s Approach*. Rather than wholly eliminating peremptory challenges, Washington opted to increase the regulation of their use. The Washington Supreme Court’s primary aim was the same as the Arizona Supreme Court’s — to eliminate the unfair exclusion of jurors based on protected classes.¹⁵⁷ The Washington approach is best summarized as (1) codifying circumstances for judges

to consider in accepting a peremptory; (2) allowing for rejecting a strike if an objective observer *could* view race or ethnicity as a basis for it; (3) listing presumptively invalid reasons for a strike; and (4) requiring corroboration of any peremptories based on juror conduct, such as eating, sleeping or general demeanor.¹⁵⁸ The “objective observer” standard is a particular innovation in that it significantly broadens the judge’s inquiry; judges must now consider not only their own view of the proffered reason for the strike but also whether it *could* be regarded as a pretext for race under *any* objectively reasonable view.¹⁵⁹ The judicial task is made more manageable by presumptively invalid reasons for a challenge based on historically pre-textual reasons for strikes based on race or ethnicity, such as living in a high-crime neighborhood, receiving state benefits, or not being a native English speaker.¹⁶⁰ Washington’s approach is replicated in HD-2653, now under consideration in Massachusetts.¹⁶¹

This change in court rules cannot achieve its goals for three reasons. First, it relies on the same untenable assumptions of *Soares-Batson* that a participant even *can* assess the implicit or explicit biases of themselves or anyone else, a problem that will continue shielding discriminatory actors, intentional or not, as long as peremptories are permissible. Second, enumerating presumptively invalid reasons for challenges will do no more to prevent abuse of peremptories than has *Batson*, instead cataloguing reasons attorneys will avoid saying out loud.¹⁶² In other words, “[n]o doubt Washington litigators will set aside ‘Handy Race-Neutral Explanations’ they may have heretofore employed, but will they not concoct others?”¹⁶³ Third, the “objective observer” standard only reposes more discretion in the trial judge given that “anything is possible” and could “virtually result in the denial of every peremptory challenge exercised” to which there is an objection.¹⁶⁴ While this might be a higher bar on the judge’s discretion, it does not fundamentally alter the underlying power dynamic at the heart of the peremptory problem. Returning to the “bad man” analogy, a judge who might be unwilling to make a finding of a discriminatory peremptory is not disabled, only delayed.

Washington’s approach, though laudable, fails to effect meaningful change. Instead, these oversight procedures are better applied to an improved standard of cause challenges.

(2) *Expanding Cause Challenges*. The most common change commentators offer in exchange for eliminating peremptories is to expand the permissible types of cause challenges.¹⁶⁵ Lowering the

150. See Zeisel & Diamond, *supra* note 123, at 528.

151. *Id.* at 517.

152. *Id.*

153. See Ogletree, *supra* note 99, at 1146; Tetlow, *supra* note 79, at 1931.

154. See generally Charles F. Bond & Bella M. DePaulo, “Accuracy of Deception Judgments,” 10 PERS. SOC. PSYCH. REV. 214 (2006).

155. Paul V. Olczak et al., “Attorneys’ Lay Psychology and Its Effectiveness in Selecting Jurors: Three Empirical Studies,” 6 J. SOC. BEHAV. & PERS. 431 (1991); Glenn F. Ross, “The Selection of Jurors in the Higher Courts of Queensland,” 15 AUSTL. PSYCH. 351, 357 (1980).

156. Johnson & Haney, *supra* note 113, at 498 (explaining that, although attorneys generally challenged jurors whose bias scores indicated they would disfavor them, they did not identify other jurors who were *more* biased against their side

and failed to excuse them despite having challenges remaining).

157. Wash. Ct. Gen. R. 37(a)(1).

158. *Id.*

159. Sloan, *supra* note 120, at 256.

160. Wash. Ct. Gen. R. 37(h).

161. MA H.D. 2653, 193rd Gen. Ct. (Mass. 2023), reproduced in Appendix.

162. See Anderson, *supra* note 43, at 59–60.

163. *Id.* (citation omitted).

164. Sloan, *supra* note 120, at 257 (describing the reactions of several Washington trial judges to the objective observer standard).

165. See Leshem, *supra* note 20, at 2371 n.71 (discussing how an expanded set of strikes for cause could function).

standard required for cause challenges can emphasize that, rather than requiring a definitive showing of bias, a court can use “all its observations”¹⁶⁶ to determine whether a juror may be fair. Following the American Bar Association’s guidance, this could only require a “reasonable doubt” as to their partiality, with a rebuttable presumption toward sustaining a cause challenge.¹⁶⁷ Judges could participate more actively in *voir dire*, particularly as they are incentivized to discover grounds to sustain or overrule cause challenges. All parties are also aligned in the effort to achieve impartiality rather than strategic partiality.¹⁶⁸ It is possible that expanding the cause challenge would also lead to a more substantial appellate review of denials of cause challenges.¹⁶⁹ Such an expansion, however, would be offset by the parallel reduction in the review of peremptory challenges, which currently provide a substantial basis of appeals. It would also refocus appellate review of jury selection procedures onto cause challenges, with the added benefit of stated reasons and a reviewable record, and focus on improving that single system, which harbors its own problems of discrimination and bias.¹⁷⁰

(3) *Safety Valve Challenges*. A final option, not currently under consideration by any states, is using a safety valve mechanism to reduce the reliance on a judicial finding to remove a prospective juror. Such a safety valve could involve the consent of both parties to remove a juror for cause, overcoming a judge’s finding of indifference. In such a system, the parties would articulate their agreed grounds for their cause challenge on the record and their joint stipulation that the juror should be removed.

Were courts to allow such a form of challenge, there would need to be a decision on what review method would be used to prevent discriminatory abuse of the procedure. One possibility could be an immediate review by the trial judge of the joint stipulation for discriminatory motives. Another might be relying on the adversarial process to assume that parties will not stipulate to such a removal unless it is in both of their interests. Although the circumstance of two attorneys agreeing that a juror should be removed, against the decision of a judge, would be unusual, it would at least provide a rare procedure to reduce the single point of failure vested in the trial

judge. Implementation would require greater consideration, but as a preliminary solution, such a method would at least reduce or remove some of the issues inherent in peremptory challenges.

B. Remaining Problems

(1) *Pretrial publicity*. Jury pools tainted by previous knowledge of a case have become increasingly common in the internet age.¹⁷¹ In high-profile trials, from Aaron Burr to Dzhokhar Tsarnaev, courts have had to grapple with how much weight to give that prior knowledge in considering a prospective juror’s ability to be fair and impartial — a determination that generally falls to the trial judge.¹⁷² This problem has been further exacerbated by misinformation muddying that tainted pool.¹⁷³ Peremptory challenges may offer a way to mitigate the impacts of those media influences when they do not rise to the level that would support a cause challenge. But as Chief Justice Marshall found over 200 years ago, this concern is likely best addressed by expanded cause challenges rather than questionably effective, certainly discriminatory, peremptories. In high-profile cases, the rebuttable presumption of cause could extend to a juror’s media exposure before serving.

(2) *Juror alienation*. William Blackstone posited a delicate balancing act between sufficiently questioning a venire-member on their biases to establish grounds for a cause challenge while not alienating that juror if a judge denies the challenge.¹⁷⁴ In this view, peremptories provide an escape hatch to remove a juror alienated by *voir dire* and a failed challenge for cause.¹⁷⁵ While this fear is at least plausible, there is a balance to be struck between expansive *voir dire* and the benefits provided by peremptories.¹⁷⁶ Rather than excusing peremptories’ failures for a minimal gain, reforms should focus on better methods of acquiring information over a person’s potential partiality, which would support *cause challenges*, not peremptories. For example, using juror questionnaires or an enhanced judge-led portion of *voir dire* could reduce the burden on questioning attorneys, but not produce the same theoretical alienation. Similarly, the ill-effects of a failed cause challenge could be alleviated by standardizing the practice of hearing cause challenges outside the presence of the venire.

166. Massachusetts Superior Court Rule 6(h)(i).

167. Am. Jury Project, *Principles for Juries and Jury Trials*, A.B.A. 14 (2005).

168. See Morrison, *supra* note 100, at 7 (detailing a proposal where “any [peremptory challenge] would be the product of mutual consent . . . [i]f the parties failed to reach an agreement, they would end up with the first twelve jurors on the panel”).

169. Sloan, *supra* note 120, at 263 n.200 (“Expanded appellate review of for-cause challenges would likely occur because in a world without peremptory challenges, the trial judge would become the sole gatekeeper of juror bias. If a trial judge found that a prospective juror’s biases did not meet the threshold of a for-cause challenge, the juror would end up sitting on the jury. If the opposing party raised the juror-bias issue on appeal, the appellate court would have to decide if the trial court was correct in finding that the juror was impartial enough to serve.”).

170. See Frampton, *supra* note 43, at 788–90 (introducing the idea that “challenges for cause are treated as an afterthought” compared to peremptories, and that qualifying jurors for service under the for-cause framework similarly operates to exclude Black jurors); see also People v. Suarez, 10 Cal. 5th 116, 194 (2020) (Liu, J., concurring) (“[T]here is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors, which may result in juries with higher levels of implicit bias.”).

171. Adam Liptak, “Finding Untainted Jurors in the Age of the Internet,” N.Y.

TIMES, Feb. 28, 2010.

172. See United States v. Tsarnaev, 142 S. Ct. 1024, 1034 (2022); see also Skillington v. United States, 561 U.S. 358, 381 (2010).

173. See Jack Nelson, “The More Things Change, the More They Stay the Same: Pretrial Publicity and the Perils of Misinformation,” VILL. L. REV. BLOG (Mar. 14, 2022), <https://www.villanovawlawreview.com/post/1361-the-more-things-change-the-more-they-stay-the-same-pretrial-publicity-and-the-perils-of-misinformation>.

174. “[U]pon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.” Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting 4 William Blackstone, Commentaries *353).

175. See Coburn R. Beck, “The Current State of the Peremptory Challenge,” 39 WM. & MARY L. REV. 961, 998 (1998).

176. Disparate aggressive questioning based on stereotypes is another area where biases tend to emerge, see Page, *supra* note 140, at 215–21 (discussing the discriminatory outcomes of “selective search” for certain juror’s biases); the Supreme Court has found evidence of disparate questioning to be grounds for a *Batson* challenge, see Miller-El v. Dretke, 545 U.S. 231, 249 (2005).

(3) *The “Nonparticipant” Juror.* Some prospective jurors pose a different challenge: they do not appear able or willing to sit on a jury in the first instance. This concern can sometimes be problematic, mainly if it relies on certain cultural norms associated with discrete community groups.¹⁷⁷ But crediting the idea that some veniremembers would generally disrupt or refuse to participate in the trial process, there is an ongoing concern about how to treat them. As it stands, peremptories can help in removing them. But taking that route only heightens unfairness by opening the process up to hidden discriminatory abuse and unfairly burdening one party over another. A cleaner solution in such cases would be to rely on a “safety valve” procedure, depending on the mutual consent of both parties, eliminating the potential for strategic advantage, either with or without the permission of a judge. The Washington rule and HD-2653 include a provision that allows for parties to challenge jurors based on their “conduct,” such as sleeping, eating, inattention, or demeanor, but recognize that such bases for peremptories have historically been linked to discrimination in jury selection.¹⁷⁸ The rules provide for a special procedure for making a challenge based on conduct, requiring adequate notice and corroboration of the behavior in question by both parties and the judge.¹⁷⁹ Given this high bar, the same basic principles could be reconsidered as a type of cause challenge, rather than one located in the peremptory framework.

(4) *Judicial Mistakes.* Perhaps the root concern around eliminating peremptories is that judges make mistakes in evaluating cause challenges.¹⁸⁰ Trial judges have considerable discretion over whether an actual cause exists. As with any other issue involving discretion, their decisions are open to biases, prejudices, and other preconceptions.¹⁸¹ In this light, peremptories can help circumvent and correct those judicial mistakes.

The obvious response is that judges are called upon to make discretionary judgments every day. Their findings for cause are reviewable and recorded. Unlike attorneys, they are not directly incentivized and duty-bound to represent the interests of a particular party. Meanwhile, peremptories permit attorneys to make unreviewable mistakes, while also allowing judges to avoid the accountability inherent in ruling on cause challenges.¹⁸² The better solution to reduce errors is to force the logic of an excusal onto the record and provide alternative means for correction, such as installing a “safety valve,” or by reducing the standard required to support a cause challenge by updating judicial ethical guidelines on jury selection.

C. Proposals for Development

Given these considerations, this article proposes the following reforms to the Massachusetts jury selection system: (1) eliminate peremptory challenges from jury selection;¹⁸³ (2) expand cause challenges to permit excusal based on a “reasonable doubt” as to a veniremember’s impartiality;¹⁸⁴ (3) allow the cause removal of jurors by mutual consent of the parties;¹⁸⁵ (4) codify a judicial presumption toward sustaining cause challenges, provided reasonable grounds are stated on the record, which may be rebutted sua sponte or by an opposing party.¹⁸⁶ Taken together, this raft of reforms would reduce the system’s existing vulnerability to strategic action, provide flexibility to select a fair and impartial jury, and respect the goal of obtaining a fair cross-section of the community. These reforms would not eliminate the potential abuse of jury selection procedures, but they would go a long way to reducing its potential for discrimination and inequitable outcomes.

CONCLUSION

The Naked i and the Combat Zone are gone today. The wave of outrage sparked by Andrew Puopolo’s murder terminated the experiment of Boston’s adult entertainment district.¹⁸⁷ When Soares and his co-defendants returned to the Superior Court for their new trial, Soares and Allen were acquitted of all charges.¹⁸⁸ Some historians have wondered whether the brutal shooting of a 15-year-old Black football player by three white teenagers on the field in Jamaica Plain a week before jury selection might have impacted the verdict.¹⁸⁹ All of the participants of the Soares story have passed away,¹⁹⁰ but the impact of their case on the legal system of Massachusetts has continued to resonate.

No method of jury selection will ever be cost-neutral. Every legal rule represents a choice of preferring one balancing act over another, and all ultimately have some undesirable outcomes. Eliminating peremptory challenges is no different. Doing so will inescapably reduce parties’ control over their own proceedings, put greater burdens on trial judges, and increase the desire of parties to seek reasons to excuse jurors they perceive as unfriendly for cause. But that choice is the better of two evils because it clarifies what the law is. Holmes’ bad man, deprived of peremptories but faced with enhanced cause challenges and expanded *voir dire*, might have some options, but strategizing in the shadows, sowing moral confusion, and surrendering to implicit discrimination would not be open to him. Justice Holmes once warned, “[i]f you have no doubt of your

177. See, e.g., Julia C. Maddera, “Batson in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression,” 116 COLUM. L. REV. 195, 231–32 (2016) (peremptories for demeanor could disproportionately affect those with nonconforming gender expressions).

178. Wash. Ct. Gen. R. 37(i).

179. *Id.*

180. See, e.g., Ogletree, *supra* note 99, at 1147 (“My justification for the continued existence of defense peremptories rests entirely on the need for a hedge against judicial mistakes in evaluating potential jurors and reasons for striking them, and against consequent denials of what ought to have been valid expanded-for-cause strikes.”).

181. See Frampton, *supra* note 43, at 815–21.

182. Hoffman, *supra* note 15, at 159 (“[Peremptories] have made all of us lazy

— judges included — when it comes to challenges for cause.”).

183. Amending: Mass. G.L. ch. 234A § 67B, Mass. R. Evid. 1116, Mass. R. Crim. P. 20, Mass. R. Civ. P. 47.

184. Amending Mass. G.L. ch. 234A § 67A.

185. Amending Mass. G.L. ch. 234A § 67B.

186. Amending Mass. G.L. ch. 234A § 67A.

187. See Ramos, *supra* note 4.

188. Easterling admitted stabbing Andy Puopolo on the witness stand and was sentenced to 18–20 years for manslaughter. Alan Sheehan, “1 guilty, 2 freed in Puopolo case,” BOS. GLOBE, Nov. 22, 1979.

189. See Schorow, *supra* note 3, at 100–01.

190. Schorow, *supra* note 3, at 101.

premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition.”¹⁹¹ Peremptory challenges are an example of doubting neither power nor premises. Judicial decisions time and again claim to have the power to curb pernicious discrimination with ever-heightening standards, while so many participants in the system harbor the unshakable premise that they serve a valuable role in jury selection. This article has sought to show that we have great cause to doubt both that power and that premise. The best escape from the trap is also the simplest: abolish peremptory challenges.

APPENDIX

MASSACHUSETTS HOUSE DOCKET 2653

An Act addressing racial disparity in jury selection.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Chapter 234A of the General Laws is hereby amended by striking in clause 7 in lines 50 and 51 the following language:—“has been convicted of a felony within the past seven years or”.

Section 2. Chapter 234A of the General Laws is hereby amended by inserting after Section 67d the following section:—

Section 67e: Improper Peremptory Challenge

- a) In all jury trials, a party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.
- b) Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.
- c) The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

- d) In making its determination, the circumstances the court should consider include, but are not limited to, the following:
 - 1) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
 - 2) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
 - 3) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
 - 4) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
 - 5) whether a reason might be disproportionately associated with a race or ethnicity;
 - 6) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.
- e) The following reasons are presumptively invalid reasons for a peremptory challenge:
 - 1) having prior contact with law enforcement officers;
 - 2) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
 - 3) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
 - 4) living in a high-crime neighborhood;
 - 5) having a child outside of marriage;
 - 6) receiving state benefits; and
 - 7) not being a native English speaker.
- f) If any challenge is based on the prospective juror’s conduct (i.e. sleeping; inattentive; staring or failing to make eye contact; exhibiting a problematic attitude, body language, or demeanor; or providing unintelligent or confused answers), that conduct must be corroborated by the judge or opposing counsel or the reason shall be considered invalid.

191. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

CASE COMMENT

Massachusetts Ballot Questions — Recent Decisions

Colpack v. Att’y Gen., 489 Mass. 810 (2022)

El Koussa v. Att’y Gen., 489 Mass. 823 (2022)

Clark v. Att’y Gen., 489 Mass. 840 (2022)

Anderson v. Att’y Gen., 490 Mass. 26 (2022)

Comm. to Protect Access to Quality Dental Care v. Sec’y of the Commonwealth, 490 Mass. 1008 (2022)

Every two years, with very few exceptions, when Massachusetts voters go to the polls for a statewide election, they are asked not only to elect candidates for various offices but also to vote on one or more questions that have been placed on the ballot by registered voters like themselves or by the legislature. The specific mechanisms by which the questions are put on the ballot — initiative petitions, referenda or legislative amendments — may differ, but the questions all have the potential to shape Massachusetts law and affect many of us in significant ways. Casinos, medical and recreational marijuana, ranked-choice voting, transgender rights, physician-assisted end-of-life, sick time for employees, and patient-to-nurse staffing limits, along with sales taxes, use taxes and gas taxes, have been among the many important subjects faced by Massachusetts voters in ballot questions in recent elections.

From 2000 to 2020, there were, on average, three ballot questions each election cycle. Other proposed questions were left on the proverbial cutting-room floor, perhaps failing to obtain certification by the attorney general as being compliant with the various Massachusetts constitutional prerequisites, failing to attract the requisite number of signatures to make their way onto the ballot, or being rejected by the Supreme Judicial Court (SJC) as not constitutionally ballot worthy.

The most recent election in November 2022 was no exception. There were four questions on the ballot — two initiative petitions and one referendum put there by voters, and one constitutional amendment proposed by the legislature. In the course of making their way onto the ballot, three of the questions raised legal issues that were decided by the SJC in four opinions. One other potential

ballot matter that had been certified by the attorney general was rejected by the court and thus did not appear on the ballot. There were, in all, five decisions by the court. This comment briefly examines those decisions, with particular emphasis on three of the decisions that raised a common issue: whether the questions involved in those cases contained “only subjects . . . which are related or which are mutually dependent,” as required by art. 48, The Initiative, II, § 3, of the Amendments to the Massachusetts Constitution, as amended by art. 74 of the Amendments.

INCOME SURTAX ON HIGH EARNERS

In *Anderson v. Attorney General*,¹ the SJC addressed a ballot matter that was essentially identical to a matter addressed in a 2018 case with the same name:² a proposal to amend the Massachusetts Constitution to authorize an additional tax of 4% on annual taxable income above \$1,000,000 (to be adjusted annually for cost-of-living increases). The revenue generated by the new tax was to be used, subject to appropriation by the legislature, “[t]o provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges, and public transportation.”³ In *Anderson I*, this measure was voter-initiated and certified by the attorney general for inclusion on the ballot. The court rejected the attorney general’s certification, however, keeping the measure off the 2018 ballot. The court held, in a split opinion, that the measure failed the art. 48 requirement that initiative amendments contain “only subjects . . . which are related or which are mutually dependent.”⁴

1. *Anderson v. Att’y Gen. (Anderson II)*, 490 Mass. 26 (2022).

2. *Anderson v. Att’y Gen. (Anderson I)*, 479 Mass. 780 (2018).

3. *Anderson II*, 490 Mass. at 29-30.

4. *Anderson I*, 479 Mass. at 781, 794-800.

In *Anderson II*, the court was no longer faced with a relatedness issue. This is because the proposed constitutional amendment in 2022, although textually almost identical to the earlier measure, was initiated in the legislature, not by registered voters in an initiative petition, and therefore was not subject to the relatedness requirement, certification by the attorney general, or the many other requirements for voter-initiated petitions.⁵ Rather, the principal issue in *Anderson II* was whether the attorney general's summary of the legislative amendment was sufficiently fair. The court had little difficulty in concluding that it was. The plaintiffs, opponents of the amendment, argued that the summary was misleading by suggesting to voters that the revenue generated from the new tax, once appropriated, would necessarily increase overall annual spending on education and transportation when, in fact, that was not guaranteed.⁶ Relying on earlier decisions in *Gilligan v. Attorney General*⁷ and *Associated Industries of Mass., Inc. v. Attorney General*,⁸ which involved similar "specific appropriation" language in attorney general summaries, the court held that the summary in this case was adequate. The court explained that the summary closely tracked the language of the proposed amendment and was not required to include an explanation of or opinion on the type of theoretical scenario envisioned by the plaintiffs.⁹

The decision in *Anderson II* is unremarkable. Indeed, given the deference customarily afforded to the attorney general when reviewing her summaries,¹⁰ it would have been remarkable if the court had kept an otherwise proper question off the ballot because of alleged imperfections like this in the summary.¹¹

DENTAL INSURANCE REFORM

Two of the ballot question cases in 2022 — *Clark v. Attorney General*¹² and *Committee to Protect Access to Quality Dental Care v. Secretary of the Commonwealth*¹³ — involved an initiative petition that proposed a new statute regulating dental benefit plans. There were two main components of the proposal. First, the statute would authorize the commissioner of insurance to "review and approve dental benefit policies, rate changes, and plan profitability as

reflected by a medical loss ratio,"¹⁴ and presumptively to disapprove a carrier's rates unless three financial criteria were met.¹⁵ The most widely publicized and discussed of these criteria was that the proportion of premiums directed toward patient care, i.e., the medical loss ratio, be at least 83%.¹⁶ The second major component of the new law would require carriers to file detailed statements annually with the Division of Insurance, which would have the power to hold public hearings and issue public reports concerning certain financial aspects of a carrier's business.¹⁷

The single issue presented in *Clark* was whether the two main components of the measure were related for purposes of art. 48. The relatedness requirement has been a recurring issue for the last several elections. And despite the court's repeated pronouncement of certain well-established general principles that set the standards for measuring relatedness, accurately predicting whether two or more subjects within a given petition are related can sometimes be elusive.

The court in *Clark* began by citing some of the established principles: two or more subjects can be included within the same petition, but, when that is done, art. 48 requires that they be "related" or "mutually dependent"; there is no single bright-line test for measuring relatedness; there ought to be a "common purpose to which each subject . . . can reasonably be said to be germane"; a mere "marginal relationship" will not do; and the relatedness requirement must not be applied too broadly, for at some high level of abstraction, all things can be seen as generally related, nor applied too strictly, so as to essentially reduce initiative petitions to single subjects, which would be against the intentions of the drafters of art. 48.¹⁸

With these principles in mind, the court found that the components of the proposed law were sufficiently related. The first component, as described above, "would establish much of the regulatory framework within which the commissioner is to carry out the duty of regulating dental benefit plans";¹⁹ and the second component, though calling for carriers to provide financial information regarding all lines of their business (not just dental plans), established a disclosure program that would provide the commissioner with

5. *Anderson II*, 490 Mass. at 27-28, 29. Compare MASS. CONST. amend. art. XLVIII, Init., Pt. 2 (amended by art. LXXIV), with MASS. CONST. amend. art. XLVIII, Init., Pt. 4 (amended by art. LXXXI).

6. *Anderson II*, 490 Mass. at 32.

7. *Gilligan v. Att'y Gen.*, 413 Mass. 14 (1992).

8. *Assoc. Indus. of Mass., Inc. v. Att'y Gen.*, 413 Mass. 1 (1992).

9. *Anderson II*, 490 Mass. at 33-34.

10. *Id.* at 31-32 (citations omitted) (discussing considerations of fairness, completeness and conciseness for summaries: "[g]iven the balancing act required, as well as the fact that the Attorney General is a 'constitutional officer with an assigned constitutional duty,' we give deference to the Attorney General's exercise of discretion in crafting a summary . . . and 'will not substitute our judgment for that of the Attorney General's over a 'matter of degree'").

11. *Cf. Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310 (1951) (invalidating

new statute created by successful initiative petition, after the fact, on basis of constitutionally deficient summary).

12. *Clark v. Att'y Gen.*, 489 Mass. 840 (2022).

13. *Comm. to Protect Access to Quality Dental Care v. Sec'y of the Commonwealth*, 490 Mass. 1008 (2022).

14. *Clark*, 489 Mass. at 842.

15. *Id.* at 842-43.

16. *Id.*

17. *Id.* at 843-44.

18. *Id.* at 844-45 (citations omitted). Moreover, in contrast to the deference the court gives the attorney general when it reviews her summaries, it gives no deference when it reviews her certification decisions; it reviews those determinations *de novo*. *Id.* at 844.

19. *Id.* at 845.

information vital to carrying out his regulatory duties, including the ability to “detect potential accounting abuses by carriers who may attempt, for example, to transfer overhead expenses from their dental insurance lines to other insurance lines.”²⁰ Interestingly, the court did not say that the second component was *necessary* to accomplish the first; that degree of relatedness is not required. Rather, the court said, “[t]hat the [proponents] chose to propose such a broad mechanism for monitoring compliance is not fatal to the measure.”²¹ The court thus concluded that there was a relationship between these components sufficient to satisfy art. 48. The unifying theme, according to the court, was providing the commissioner with authority, and with appropriate means to effectuate his authority, to regulate dental benefit plans with an eye toward ensuring patient care and safety while reining in costs.

The second case involving the dental plan question concerned the “for” statement provided by the proponents for inclusion in the secretary of the commonwealth’s voter information guide. The plaintiffs in *Committee to Protect Access to Quality Dental Care*²² claimed that the statement contained false and misleading information regarding one particular carrier. (The “for” statement said, among other things, that this carrier “paid executive bonuses, commissions, and payments to affiliates of \$382 million, while only paying \$177 million for patient care,” and that a yes vote on the question “would eliminate this inequity.”) The court, in a rescript opinion, ordered that the complaint be dismissed, holding that certiorari relief was unavailable to the plaintiffs because the process by which “for” and “against” statements are included in the guide is neither judicial nor quasi-judicial;²³ that the statute governing these statements — G.L. c. 54, § 54 — does not permit the secretary to amend the statements written by the proponents and opponents, respectively, and does not provide a private remedy;²⁴ that these statements “unquestionably [are] political speech,” not subject to prior restraint absent extraordinary circumstances;²⁵ and that such statements are privileged and therefore cannot be the basis for a defamation claim.²⁶

Although these were, technically, novel issues in Massachusetts, the court dispatched them easily. Two questions quickly come to

mind, however. First, will the court’s decision embolden proponents and opponents in future elections to make more extreme statements, with impunity, for and against ballot measures? Second, if that happens, is there *anything* the secretary or opposing parties can do to control it?

ALCOHOL LICENSES

Last year’s third ballot question involved licensing of retail alcohol sales for off-premises consumption. It, too, raised the related subjects requirement of art. 48. Specifically, this voter-initiated question would increase the combined number of “all alcohol” and “wine and beer” licenses that could be held by any one retailer, cap the number of “all alcohol” licenses per retailer, eliminate self-checkouts for alcohol sales, permit out-of-state driver’s licenses as proof of age, and change the formula for calculating fines.²⁷

The court began its analysis in *Colpack v. Attorney General* with a thorough exposition of the applicable legal principles and a summary of the existing case law.²⁸ The court then held that the measure’s various provisions had “sufficient similarity and operational relatedness among [them] . . . to permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy.”²⁹ The court relied heavily on *Weiner v. Attorney General*,³⁰ a case from the 2020 election cycle that likewise involved an initiative petition affecting retail alcohol sales and a relatedness challenge. As in *Weiner*, the fact that some of the measure’s provisions liberalized the availability of alcohol licenses while other provisions increased restrictions on sales was not dispositive. The court found these provisions to complement, not contradict, one another.³¹ The changes were “intended to modernize alcohol sales in the Commonwealth and to make purchases more convenient,” on the one hand, and simultaneously “serve to moderate the effect of these changes” and “mitigate the risk of increased sales to underage drinkers,” on the other hand.³² The various provisions thus were described by the court at various points as “operationally related,” part of an “integrated scheme” and “logically related.” The relatedness requirement, as the court noted, does not require “a perfect fit.”³³

20. *Id.* at 846-47.

21. *Id.* at 846.

22. *Comm. to Protect Access to Quality Dental Care v. Sec’y of the Commonwealth*, 490 Mass. 1008 (2022).

23. *Id.* at 1009-10.

24. *Id.* at 1010.

25. *Id.*

26. *Id.* at 1010-11.

27. *Colpack v. Att’y Gen.*, 489 Mass. 810, 811-12 (2022).

28. *Id.* at 814-18.

29. *Id.* at 819.

30. *Weiner v. Att’y Gen.*, 484 Mass. 687 (2020).

31. *Colpack*, 489 Mass. at 819-20.

32. *Id.* at 818-19.

33. *Id.* at 820.

The decision in *Colpack* hews closely to the decision two years earlier in *Weiner*. Despite differences between the measures in these two cases, the court found the similarities to be persuasive and hence reached the same result (agreeing with the attorney general’s certification of the petition). The decision thus comes as no great surprise in light of *Weiner*, and it breaks no new ground in the related subjects field.

“NETWORK COMPANIES” AND “APP-BASED DRIVERS”

Finally, the court decided one case involving a question that did not ultimately find its way onto the ballot, *El Koussa v. Attorney General*.³⁴ The proposed question in this case concerned the relationship between app-based rideshare and delivery networks and certain of their drivers. The attorney general certified that the petition was proper for placement on the ballot,³⁵ including that it contained only related subjects for purposes of art. 48. The plaintiffs challenged both the attorney general’s certification and her summary of the measure. The court held that the petition did not comply with the related subjects requirement, and therefore, the question could *not* appear on the ballot.³⁶

The petition would have added a new chapter to the General Laws, titled “Relationship Between Network Companies and App-Based Drivers Act.”³⁷ The stated objective of the measure was “to define and regulate the contract-based relationship between network companies [i.e., the rideshare and delivery app companies] and app-based drivers as independent contractors with required minimum compensation and benefits standards that will operate uniformly throughout the commonwealth, guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work.”³⁸ The measure provided that an app-based driver,³⁹ “[n]otwithstanding any other law to the contrary . . . shall be deemed to be an independent contractor and not an employee or agent for all purposes with respect to his or her relationship with the network company.”⁴⁰ The proposed new chapter laid out provisions comprehensively addressing a guaranteed earnings floor for the drivers, a health care stipend,

sick time, family and medical leave, and occupational accident insurance.⁴¹ The final three sections addressed contract formation and termination, interpretation, and the new chapter’s effective date.⁴² The penultimate section, titled “Interpretation of this chapter,” provided as follows:⁴³

“(a) This chapter shall govern the contract-based civil relationship between network-companies and app-based drivers.

“(b) Notwithstanding any general or special law to the contrary, compliance with the provisions of this chapter shall not be interpreted or applied, either directly or indirectly, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, and any party seeking to establish that a person is not an app-based driver bears the burden of proof.

“(c) Nothing in this Act shall be construed to impair any contracts in existence as of its effective date.”

Despite the fact that the chapter, as a whole, focused on defining the relationship between companies and drivers for contractual purposes, and had as its expressly stated purpose codifying the independent contractor relationship with specific benefits attached, the court nevertheless accepted the plaintiffs’ argument that subsection (b) above, separate and apart from the other provisions, had the potential to limit the companies’ tort liability vis-a-vis individuals who might be injured by negligent drivers.⁴⁴ The court thus read *two* policy objectives into the statute, which it then proceeded to hold were unrelated.

In reading the statute this way, the court rejected what had been the attorney general’s understanding in certifying the petition that the measure, “read plainly and consistently with [its] purpose and text as a whole . . . [is] limited to the ‘contract-based relationship between network companies and app-based drivers,’ and would not regulate private tort lawsuits”⁴⁵ — in other words, that the measure

34. *El Koussa v. Att’y Gen.*, 489 Mass. 823 (2022).

35. There were, in fact, two largely identical petitions involved in this case. *See id.* at 825-26. They are treated as one for purposes of this comment.

36. *Id.* at 824-25.

37. Brief of Appellees the Attorney General and Secretary of Commonwealth at 76, *El Koussa v. Att’y Gen.*, 489 Mass. 823 (2022) (No. SJC-13237).

38. *Id.*

39. Drivers whose work schedules are unilaterally prescribed by the companies or who are required to accept specific service requests, restricted from performing services for other network companies, or restricted from working in other

occupations were excluded from the definition of “app-based drivers.” *See El Koussa*, 489 Mass. at 825 n.5.

40. Brief of Appellees the Attorney General and Secretary of Commonwealth at 76, *El Koussa v. Att’y Gen.*, 489 Mass. 823 (2022) (No. SJC-13237).

41. *Id.* at 79-85.

42. *Id.* at 85-87.

43. *Id.* at 86.

44. *El Koussa*, 489 Mass. at 825-26, 831-36.

45. Brief of Appellees the Attorney General and Secretary of Commonwealth at 34, *El Koussa v. Att’y Gen.*, 489 Mass. 823 (2022) (No. SJC-13237).

was about contractual relationships, not tort liability, and that any potential impact on the latter, if indeed there was one, would be at most a secondary effect of the former. Rather, the court thought it saw hidden in subsection (b) something potentially different altogether from the rest of the measure and apparently thought it needed to protect the voters from having to vote on it in a single ballot measure along with the provisions defining the contractual relationship between the companies and drivers.

The court's approach in *El Koussa* is interesting in several ways, all of which have potential implications for future ballot question cases where relatedness is at issue. First, there is the court's willingness to engage at this juncture in interpreting the proposed new law at a very fine level. Historically, the court has been reluctant at the ballot question juncture to get into the weeds of how specifically a law might be interpreted and applied if it passed, whether for purposes of relatedness or otherwise.⁴⁶

Second, although we will never know, it is not at all certain that the court would have reached the same result if the law had passed and the same issue (the meaning of subsection [b]) was being litigated in the context of a tort lawsuit. Then, applying the usual canons of construction, the court might well have concluded from the language, history and stated intent of the new law that it did not limit tort liability for the network companies; in that context, subsection (b) might have been read harmoniously with all the other provisions, instead of being seen as a rogue section affecting tort liability in an otherwise comprehensive plan to define contract relationships.⁴⁷

Third, the court obviously was worried that voters might not understand the potential ramifications of the measure on tort liability when they cast their votes. Query, however, whether that is truly a *relatedness* concern. Conceivably, the same concern, i.e., that voters might not appreciate all the potential effects of a measure, could just as easily arise in a single-subject petition. It is a concern that the court historically has left to the campaign process — where the voters are informed by the attorney general's summary, the "for" and "against" statements written by the proponents and opponents

of the measure, advertising, and public debate on both sides, not by keeping a proposed question off the ballot on relatedness grounds. Here, in contrast, the court appears to have used the established relatedness principle against hitching an unpopular policy to an unrelated popular policy in a single petition — something the drafters of art. 48 clearly sought to avoid — to conclude that different possible consequences in a single petition, one of which might not be fully appreciated by voters, are *ipso facto* unrelated.

The final observation is that the court appears to have gone to new lengths to conclude that a petition contained two unrelated subjects. Suppose a future measure simply said that "app-based drivers shall be independent contractors for all purposes under Massachusetts law." That seems to be a single subject under traditional relatedness analysis, although it would have contract, tort, and maybe other consequences. Would the court similarly be persuaded by an argument like the one made in *El Koussa*: that a detailed legal analysis shows there could be multiple consequences in different areas; that voters might not appreciate all the different consequences; that voters might like some consequences but not others; and therefore, there are actually multiple subjects within that single measure that fail the relatedness requirement of art. 48?

These observations are not meant to criticize the court. They are intended only to ask whether the court's approach in *El Koussa* is indicative of a new approach as to how the court will analyze relatedness issues going forward, which would be different in some ways from what it has done in the past.

A FINAL THOUGHT ON THE STATE OF RELATEDNESS

Relatedness under art. 48 has been a recurring issue in ballot question cases, especially in recent years. In the last four election cycles, 2016 to 2022, there have been nine cases decided by the SJC involving relatedness challenges. In three of them — exactly one third — the court disagreed with the attorney general's assessment on the issue.⁴⁸ It seems that relatedness, like beauty, is in the eye of the beholder, and between the attorney general and the court, there is a noticeable level of disagreement on what is and is not related.

— Neal Quenzer

46. See, e.g., *Abdow v. Att'y Gen.*, 468 Mass. 478, 507-08 (2014); *Carney v. Att'y Gen.*, 451 Mass. 803, 820-21 (2008); *Mazzone v. Att'y Gen.*, 432 Mass. 515, 532 (2000); *Gilligan v. Att'y Gen.*, 413 Mass. 14, 20 (1992); *Assoc. Indus. of Mass., Inc. v. Sec'y of the Commonwealth*, 413 Mass. 1, 11 (1992); *Bowe v. Sec'y of the Commonwealth*, 320 Mass. 230, 247 (1946). *Accord*, *Oberlies v. Att'y Gen.*, 479 Mass. 823, 834-35 (2018).

47. Interestingly, the court in *El Koussa* said that "any residual doubts about the meaning of an obscurely drafted petition must be resolved against the

proponents of such a petition." *El Koussa*, 489 Mass. at 834. Yet it is not clear that reading subsection (b) as potentially limiting tort liability was in fact against the interests of the proponents. It appears the court may have been suggesting that, going forward, any perceived ambiguities in the drafting of a petition will be construed against relatedness (or whatever other art. 48 requirement is being litigated).

48. See *El Koussa*, *Anderson I* and *Gray v. Att'y Gen.*, 474 Mass. 638 (2016).

BOOK REVIEW

Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment

By Brad Snyder (Norton Publishing) 2022, 979 Pages

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Center*,¹ renouncing a federal constitutional right to abortion, triggered a flurry of controversy. In addition to abolishing a previously recognized constitutional right, the decision caused the American public (including lawyers, scholars and even some judges) to examine the role of the courts generally, and the Supreme Court in particular, in our society. How much weight should the court pull in the balance of powers with the executive and legislative branches? What is the proper balance between the states and the national government when applying the federal Constitution? Should we rely on the Supreme Court to protect civil rights? Or should protection of rights be delegated to the other branches? To put it bluntly, what role should the court play in a democracy?²

With perfect timing, Professor Brad Snyder of the Georgetown University Law Center has joined the conversation. In *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment*,³ Professor Snyder has written a comprehensive and detailed biography of Justice Felix Frankfurter, an early champion of progressive economic and social welfare who abhorred what he viewed as the Supreme Court's activist propensities. A student of democracy, Frankfurter endorsed judicial restraint, even at the expense of social justice. In the wake of *Dobbs* and in anticipation of other potentially regressive decisions in cases involving affirmative action, civil rights, and church-state separation, Justice Frankfurter's philosophy is gaining more attention. Long relegated to the fringes as the champion of an obsolete worldview and the recalcitrant villain on the Warren court, Felix Frankfurter is enjoying something of a renaissance.

Frankfurter's North Star was judicial restraint. Although a leading economic liberal in the early 20th century before he joined the court, he embodied small "c" conservative principles. Bound by an unquestioned faith in the democratic process, he believed that change should come through elected officials: the legislature and

the executive. He deferred to their decisions and hesitated to overrule them. He viewed courts as inherently and dangerously autocratic. He believed that when courts decide cases, they should do so slowly and incrementally, and they should adhere to precedent. He deferred to the states and opposed federal court interference in state affairs. If nothing else, Felix Frankfurter was consistent throughout his career. The question posed by Snyder's book asks whether, to paraphrase Emerson, his consistency was "foolish."⁴

Frankfurter's life experience armed his jurisprudence. And what a life it was, as Snyder recounts in detail. Above all else (including possibly his wife Marion, with whom he shared a lifelong childless marriage), Felix Frankfurter loved the law and his adopted country. He was extroverted and tireless. Author Herbert Croly described him as "one of the most completely alive men whom I have ever met."⁵ His wife Marion once rhetorically asked one of Frankfurter's law clerks, "Do you know what it's like to be married to a man who is never tired?"⁶ He surrounded himself with people. As a professor at Harvard Law School and a Supreme Court justice, he mentored many men (rarely women)⁷ who became leading figures of the 20th century. He left an indelible stamp on American life through the careers of dozens of men he mentored. He hired the first African American Supreme Court law clerk.⁸ At the court, his chambers were described as "Felix's barbershop," an indication of their convivial ambience.⁹ Unlike the other justices, he did not occupy an imposing private office; instead, he sat in a central "bullpen" with his law clerks and staff, collaborating on opinions and bantering throughout the day on a range of topics.¹⁰ He took an interest in his clerks' personal and professional lives. When clerks brought their young children to visit chambers, Frankfurter got down on the floor and played with them.¹¹

Snyder's book is a veritable "who's who" of influential politicians, judges, scholars and writers who lived in Frankfurter's orbit and whose careers he launched. This is the "liberal establishment"

1. 142 S.Ct. 2228 (2022).

2. The debate is not confined to the United States. Across the globe, nations such as Israel, Hungary and Poland are embroiled in controversies about the role of their courts. For an interesting perspective, see Emily Bazelon, "How Much Power Should the Courts Have?," N.Y. TIMES MAG. (April 14, 2023), <https://www.nytimes.com/2023/04/14/magazine/courts-power-government.html>.

3. Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (2022).

4. Frankfurter's consistency was neither inflexible nor doctrinaire. Far from an originalist, he did not view the language of the Constitution as static and stuck in 1790 or 1868. He often quoted Chief Justice John Marshall's famous line from *McCulloch v. Maryland* that "it is a *constitution* we are expounding."

17 U.S. 316, 407 (1819) (emphasis added). He advocated that the document must adapt to the times. However, he urged his colleagues to not get ahead of the will of the majority.

5. Snyder, *supra* note 3, at 61 (citation omitted).

6. *Id.* at 413 (citation omitted).

7. He declined to hire Ruth Bader Ginsburg as a law clerk despite the recommendation of the Harvard Law professor who selected his clerks.

8. Snyder, *supra* note 3, at 512.

9. *Id.* at 335.

10. *Id.* at 518.

11. *Id.*

mentioned in the book's subtitle. On the other hand, he was pedantic, stubborn, pompous and long-winded. He exasperated his colleagues on the court. A (unverified but plausible) rumor reprinted in the press told the tale of a justice passing a note to Frankfurter during oral argument: "Felix, try to restrain yourself."¹² His ineptitude at building coalitions limited his influence,¹³ and one cannot help but suppose that his zeal was his greatest impediment.

The first justice born outside the United States, Frankfurter displayed an immigrant's love of country and faith in democracy. Born in Vienna, Austria, in 1883 to middle-class Jewish parents, he arrived in the United States at the age of 11 speaking no English. He credited his first public school teacher, Miss Annie Hogan, with teaching him English (even threatening his fellow students with corporal punishment if they spoke German to him) and instilling a love of learning.¹⁴ After attending City College in New York, he enrolled at Harvard Law School, where he fell under the lasting influence of Professor James Bradley Thayer, whose famous 1893 *Harvard Law Review* article, "The Origin and Scope of the American Doctrine of Constitutional Law," argued that judges should defer to the actions of Congress and the president,¹⁵ and became Frankfurter's guiding light.

Felix Frankfurter was precocious. While a young man, he huddled with President Theodore Roosevelt, Justices Oliver Wendell Holmes Jr. and Louis Brandeis, and liberal scholars such as Harold Laski.¹⁶ In 1906, less than 12 years after landing at Ellis Island speaking not a word of English, he graduated first in his class at Harvard Law School and was hired by one of Wall Street's leading firms.¹⁷ In the early 1920s, he formed a friendship with Franklin Roosevelt, who was then the assistant secretary of the Navy. Tragically, he lost several good friends at a young age, which caused him to be perpetually in a hurry to do great things.¹⁸

Committed to public service, Frankfurter spent his early career in the Department of Justice (after a brief stop in private practice). Hired by the U.S. attorney in New York, Henry Stimson, the young Attorney Frankfurter made a name for himself as a trust-buster, taking on the infamous Sugar Trust.¹⁹ When Theodore Roosevelt appointed Stimson his secretary of war, Frankfurter went to Washington as the department's top lawyer.²⁰ Against the advice of mentors Stimson, Holmes and the president (but encouraged by Brandeis,

who said he could use his position to inspire young people to enter public service), Frankfurter returned to Harvard as a law professor.²¹ His course in the law of public utilities (a cutting-edge, burgeoning field of study in the 1910s) provided a platform for his progressive ideals.²² He became a leading expert in labor-management relations and an advocate for the right of workers to unionize.²³ In a 1924 article in *The New Republic*, he described income inequality as "the most significant characteristic of our social-economic life."²⁴

The era marked the dawn of the modern administrative state, which was not without serious challenges. Indeed, Frankfurter's views on the role of courts in a democracy were shaped by the Supreme Court of the early 20th century. Frankfurter was an early and committed advocate for economic and social reform, such as a minimum wage, maximum hours, and prohibitions on child labor. At the time, a conservative Supreme Court in cases such as *Lochner v. New York* and *Hammer v. Dagenhart* actively overruled progressive legislation under the guise of "freedom of contract."²⁵ Later, during the New Deal, the Supreme Court declared unconstitutional the National Industrial Recovery Act and the Farm Bankruptcy Act. As a result, Frankfurter developed an early and enduring skepticism about the court's impediments toward progressive policies.²⁶ In this regard, he was the jurisprudential heir of Brandeis, who avoided constitutional questions and preferred a limited judicial role, particularly when it came to interfering with the states in solving socioeconomic problems.²⁷

In addition to confronting a conservative court, progressives operated in an environment of fear. The 1920s was the decade of the Palmer Raids and the Red Scare. J. Edgar Hoover, who became a lifelong Frankfurter nemesis, took over the FBI. Frankfurter locked heads with Harvard President A. Lawrence Lowell, who imposed a quota on Jewish students.²⁸ Contrary to his recent reputation as a steadfast conservative, in the 1920s, Frankfurter was considered a "radical" on the Harvard Law School faculty.

An early indication of Frankfurter's progressivism — as well as his tenacity — was his defense of Sacco and Vanzetti. Frankfurter became involved in the case after the defendants' conviction in the Norfolk County (Massachusetts) Superior Court in Dedham, in the courthouse that still stands today. Active both in public and behind the scenes, he penned an influential article in the *Atlantic*

12. *Id.* at 398 (citing *Minneapolis Star Journal*, 8/4/1942, at 10; *New York Times*, 7/30/1942, at 4).

13. *Id.* at 568.

14. *Id.* at 9.

15. See generally James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *HARV. L. REV.* 129 (1893).

16. Snyder, *supra* note 3, at 32, 44.

17. Snyder, *supra* note 3, at 24.

18. *Id.* at 123.

19. *Id.* at 26-31.

20. *Id.* at 37.

21. *Id.* at 58-61.

22. *Id.* at 66-67.

23. *Id.* at 79.

24. Felix Frankfurter, "Why I Shall Vote for La Follette," *New Republic*, Oct. 22, 1924, at 150, 200-201.

25. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (overturning a federal law against child labor), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *Lochner v. New York*, 198 U.S. 45 (1905) (overturning a New York maximum-hour labor law), *superseded by statute*, Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

26. Snyder, *supra* note 3, at 133.

27. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

28. Snyder, *supra* note 3, at 105, 142-145.

Monthly in 1927, which subsequently was published in book form.²⁹ He advised the defendants' legal team in their post-trial motions. He orchestrated press campaigns and coordinated petitions to the governor. He engaged in a sustained public battle with John Henry Wigmore, the dean of the Northwestern University Law School and one of the most respected members of the legal establishment.³⁰ For three years, he worked obsessively on the case. Although his defense of Sacco and Vanzetti established his reputation in liberal legal circles, it earned him the enmity of the Massachusetts legal establishment and President Lowell of Harvard, the epitome of Puritanical Boston.³¹ Conservative alumni and faculty tried to drive him out of Harvard, and when that failed, President Lowell blocked his recommendations for new professors.³² The Massachusetts State Police tapped Frankfurter's phone, on the orders of the state attorney general.³³

Through the presidential administrations of Woodrow Wilson, Herbert Hoover and Franklin Roosevelt, Frankfurter appeared to be at the center of everything. In 1917, at the age of 34, he was selected for a "secret mission" to try to bring a peaceful end to World War I.³⁴ Within the Wilson administration, he became a leading proponent for the eight-hour workday. He joined the national committee of the newly formed ACLU (mostly as a consequence of his experience at Harvard and during the Red Scare of the 1920s).³⁵ He was a member of the National Legal Committee of the NAACP. He assisted with the founding of *The New Republic*.³⁶ He earned the enmity (and the secret investigation) of J. Edgar Hoover.³⁷ Even before his appointment to the Supreme Court, he was a well-known public figure ... even though his only job was on the Harvard Law School faculty. When Felix and Marion Frankfurter moved permanently to Washington in 1937 (the year of his appointment to the Supreme Court), they joined Georgetown society, counting as close friends the historian Arthur Schlesinger Jr., Phil and Katherine Graham (who owned *The Washington Post*), and future Secretary of State Dean Acheson, with whom Frankfurter shared a daily walk to work.³⁸ In the 1950s, he convinced the publisher of *The New York Times* to assign a reporter with a law degree (Anthony Lewis) to a full-time Supreme Court beat, a first for an American newspaper.³⁹

Viewed from the perspective of almost a century, Frankfurter's political activity is stunning and raises serious ethical questions. While serving on the Supreme Court, he met and conferred with President Roosevelt. He was often seen entering the White House

through a side door during cocktail hour for visits that were not recorded in the visitors' log. During the summer of 1939, he claimed to have written the president "nearly three hundred" notes on Supreme Court memo pads.⁴⁰ He played a leading role in Roosevelt's campaigns for president, both in 1932 (before Roosevelt nominated him to the court) and in 1940 (while he was a sitting justice!). He helped draft the president's inaugural address in 1940.⁴¹ He staffed the Roosevelt Administration with friends and students, much to the ire of Ambassador Joseph P. Kennedy.⁴² During World War II, his relationships with Roosevelt and other members of the administration (including his former boss, Secretary of War Henry Stimson) and his intense patriotism compromised his legal judgment and consumed more of his attention than his work on the court.⁴³

A popular view of Felix Frankfurter is that he failed to change with the times. The supporter of progressive economic laws, the defender of Sacco and Vanzetti, and a founder of the ACLU became — during his 23 years on the court — an opponent of free speech and a skeptic of civil rights. This narrative simplifies Frankfurter's jurisprudence, as Snyder explains. While the consequences of his jurisprudence may have changed, the foundation remained steady. To understand his legal reasoning, one must know Felix Frankfurter the man, not just Frankfurter the justice.

The earliest indication of Frankfurter's unique jurisprudence was the case of *Minersville School District v. Gobitis*.⁴⁴ The case concerned a Pennsylvania law compelling school children to salute the American flag, leading to the expulsion of two students who were Jehovah's Witnesses. Frankfurter voted to uphold the law against First Amendment challenges and wrote the majority opinion, a surprising decision for a founder of the ACLU and a Jew. As Snyder describes his reasoning, Frankfurter was motivated primarily by his view on judicial restraint.⁴⁵ Despite his personal opposition to forcing religious minorities to act against their beliefs (a particularly sensitive subject given contemporary events in Nazi Germany), he believed the courts should defer to legislative bodies.⁴⁶ He also deferred to precedent.⁴⁷ On three prior occasions, the court had upheld state-mandated flag salutes, and he reasoned that precedent should be overturned only in extreme circumstances.⁴⁸

Viewed in context, Frankfurter's *Gobitis* opinion is consistent with the views of his guru, Holmes, likewise a steadfast supporter of the First Amendment, including the religious freedom clauses. Both shared a skepticism about using the Due Process Clause of the

29. Compare Felix Frankfurter, "The Portentous Case of Sacco and Vanzetti: A Comprehensive Analysis of a Trial of Grave Importance," *ATL. MONTHLY*, Mar. 1927, at 409-432 with Felix Frankfurter, *The Case of Sacco and Vanzetti* (Little Brown 1927).

30. Snyder, *supra* note 3, at 170.

31. *Id.* at 162.

32. *Id.* at 184.

33. *Id.* at 175.

34. *Id.* at 86.

35. *Id.* at 6, 123.

36. Snyder, *supra* note 3, at 63.

37. *Id.* at 125.

38. *Id.* at 385.

39. *Id.* at 638-39.

40. *Id.* at 341.

41. *Id.* at 373.

42. Snyder, *supra* note 3, at 414.

43. *Id.* at 418.

44. 310 U.S. 586 (1940).

45. Snyder, *supra* note 3, at 353-355.

46. *Id.*

47. *Id.* at 355.

48. *Id.*

14th Amendment to secure economic or social justice. In *Lochner*, Holmes' dissent disparaged the majority of the court for relying on the Due Process Clause to invalidate a maximum-hour law under the theory that the law violated the Constitution's protection of "liberty of contract." Frankfurter believed that the Due Process Clause gave justices too much power. As Snyder writes, "Unlike other liberals, [Frankfurter] insisted there was no such thing as 'good' and 'bad' reasons to invoke the liberty provision."⁴⁹ Frankfurter worried about the court devolving into a "super-legislature," invading the power of states to set their own agendas, whether the agenda was education or economic.

Lastly, one must read *Gobitis* in light of Frankfurter's life story and his fervid patriotism. In a time of war, he deemed "national unity" an important principle.⁵⁰ His opinion quoted Abraham Lincoln on the balance between individual liberty and a strong state. Emphasizing the symbolic importance of the flag, he wrote, "The ultimate foundation of a free society is the binding tie of cohesive sentiment."⁵¹ He saw no role for judges in telling the nation's public educators how they should teach respect for the flag, even though he personally opposed compulsory flag-salute laws.⁵²

As Roosevelt appointed new justices to the Supreme Court (replacing the reactionaries who had stymied the New Deal), Frankfurter's seat moved from the liberal, to the middle, and finally to the conservative side. From the mid-1940s through his retirement in 1962, Frankfurter often found himself as the leading dissenter. Taking center stage were his ideological and personal battles with the liberal Justices William Douglas and Hugo Black, who play the role of useful foils in Snyder's narrative, although in his balanced approach, Snyder does not shy away from condemning Frankfurter for making his legal disagreements with Douglas personal and petty.

Another 14th Amendment case, from 1946, further demonstrates Frankfurter's consistency. The case involved Willie Francis, who had been sentenced to death by the state of Louisiana. After a botched first execution attempt, his lawyers argued that a second attempt would violate the Fifth Amendment's prohibition against double

jeopardy and the Eighth Amendment's bar on cruel and unusual punishment. The case raised the issue of "incorporation," whether the 14th Amendment applied all of the original eight constitutional amendments to the states. Frankfurter had long held the view that only those provisions "implicit in the concept of ordered liberty" should be applied to the states.⁵³ Although personally opposed to capital punishment (a key ingredient in his defense of Sacco and Vanzetti), Frankfurter concurred in the court's judgment and voted to affirm the death sentence.⁵⁴ Any hope would have to rest with the governor, an elected official.

Frankfurter's views on judicial restraint came to a head in the early 1950s during the second Red Scare of the 20th century. His liberal *bona fides* were bolstered by his support of accused spy Alger Hiss (a former student and a member of the Massachusetts bar, whose law license was suspended in 1952 and reinstated by the Board of Bar Overseers in 1975),⁵⁵ for whom Frankfurter testified at his espionage trial.⁵⁶ In two cases, he excoriated the government for secretly designating organizations as "Communist" and expelling members from government positions.⁵⁷ His concerns rested on the lack of notice and the absence of an opportunity to be heard. During oral argument in one of the cases, the justice "got into a shouting match" with the solicitor general.⁵⁸ Yet, he also displayed a characteristic deference to the legislative branch. In one of the most famous cases of the decade, *Dennis v. United States*,⁵⁹ he voted to affirm the convictions of officials of the Communist Party USA under the Smith Act for organizing or helping to organize any group that advocates or encourages the overthrow or destruction of the government by force or violence.⁶⁰ Rejecting his mentor Holmes' "clear and present danger" test as conveying a "delusion of certitude," he urged a new balancing test in which Congress (not the courts) would weigh free speech against national security.⁶¹ Quoting Brandeis, he wrote that "[t]his Court's power of judicial review is not 'an exercise of the powers of a super-legislature.'"⁶² To Snyder, the *Dennis* concurrence "was Frankfurter's *McCulloch* moment" (harking back to the opinion by Chief Justice John Marshall in 1819), in

49. *Id.* at 354.

50. *Id.* at 355.

51. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940), *overruled by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

52. Frankfurter's recalcitrance about "judicial activism" and its impact on precedent was proved three years later when the Supreme Court in *West Virginia Board of Education v. Barnette* reversed course and invalidated the same law upheld in *Gobitis* on free speech grounds, not religious freedom. 319 U.S. 624 (1943). In a vociferous dissent, Frankfurter disparaged the majority's reasoning, noting that the only change since *Gobitis* was the composition of the court, which had added two liberal justices. *See id.* at 664-66 (Frankfurter, J., dissenting).

53. Snyder, *supra* note 3, at 482 (citing *Palko v. Connecticut*, 302 U.S. 319 (1937)).

54. Frankfurter's concurrence stressed his deference to the states so long as state action was "not repugnant to the conscience of mankind." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470-472 (1947) (Frankfurter, J., concurring); Snyder, *supra* note 3, at 485. He maintained this view in *Adamson v. California*, where he opined that the Due Process Clause did not apply to the states the Fifth Amendment's protection against self-incrimination. 332 U.S. 46, 59, 62 (1947) (Frankfurter, J., concurring), *abrogated by* *Malloy v. Hogan*, 378 U.S.

1 (1964). He voted to affirm the death sentence of a defendant whose refusal to testify on his own behalf was used by the state prosecutor in his closing argument as evidence of the defendant's guilt. *See generally id.* (majority opinion). Nowhere in the text of the 14th Amendment, Frankfurter argued, did it suggest the states were giving up their different approaches to criminal procedure. *Id.* at 62-64. He relied on a test of his own devising: states were required only to adhere to "certain minimum standards which are 'of the very essence of a scheme of ordered liberty.'" *Id.* at 65-68 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Of course, this formulation begs the identity and arbiter of those "minimum standards."

55. *See generally* *In re Hiss*, 368 Mass. 447 (1975).

56. Snyder, *supra* note 3, at 532.

57. *See* *Bailey v. Richardson*, 341 U.S. 918 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

58. Snyder, *supra* note 3, at 537.

59. 341 U.S. 494 (1951) (Frankfurter, J., concurring).

60. *Id.* at 516-17 (majority opinion); *see also* 18 U.S.C. §§ 10-11 (1946).

61. *Dennis*, 341 U.S. at 525-26, 543 (Frankfurter, J., concurring) (quoting Freund, *On Understanding the Supreme Court* 27-28 (1949)).

62. *Id.* at 526 (quoting *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting)).

which he reaffirmed Congress' broad powers to "save the country from potential destruction."⁶³

How to reconcile Frankfurter's vociferous denunciations of government conduct in cases such as *McGrath* and *Bailey*⁶⁴ with his concurrence in *Dennis*? To Snyder, the solution is found in Frankfurter's civil libertarian views, particularly the importance of process (notice and an opportunity to be heard). Once those foundational elements were satisfied, he deferred to the will of the people as expressed by their elected representatives, particularly when the decisions were made by the states rather than the federal government. Although he disagreed with the substance of the Smith Act, he distinguished between the law's wisdom and its constitutionality.⁶⁵

In the area of race, Frankfurter's jurisprudence bumped up most directly against his personal beliefs. An unequivocal opponent of discrimination, he was concerned that the court not get too far in front of popular opinion. Unlike the president, who could order the desegregation of the armed forces by executive order, the Supreme Court had only its moral authority. On the other hand, he recognized that times had changed since the court had affirmed the principle of "separate but equal" in *Plessy v. Ferguson*.⁶⁶ Starting with an unpublished concurrence in a case about discrimination in state primary elections,⁶⁷ Frankfurter urged his colleagues to overrule precedent holding that primaries did not involve "state action."⁶⁸ He argued that the Fifth and 14th amendments outlawed racial discrimination, but he did so cautiously and incrementally.⁶⁹ In a memorandum to his fellow justices asking them to tone down the language of an opinion overturning the conviction of a Black teenager whose confession to an alleged rape had been coerced,⁷⁰ he advocated that the court "should deal with these ugly practices of racial discrimination with fearless decency, [but] it does not help toward harmonious race relations to stir our colored [sic] fellow citizens to resentment, however unwittingly, by needless detail."⁷¹ Nor, he wrote, would "inflammatory language persuade northern and southern whites to abandon prejudicial behavior."⁷²

Frankfurter played the key role in achieving the court's unanimity in *Brown v. Board of Education*.⁷³ Recognizing the court's internal divisions about segregation (two southern justices, Stanley Reed and Tom Clark, were of particular concern) as well as the importance of unanimity, he convinced his colleagues to hold the cases over

for reargument, resulting in a year's delay.⁷⁴ The delays bought time for Frankfurter and Chief Justice Earl Warren to lobby their recalcitrant colleagues. Once the cases were submitted, consistent with his past approach to controversial cases, he cautioned his colleagues about the pace of change, urging delay in implementation. Adopting a phrase from a decades-old Holmes opinion, Frankfurter wrote a memo to the other justices that, when the court reverses a deeply rooted state policy (such as segregation), it should do so "with all deliberate speed."⁷⁵ Contrary to a popular view, Frankfurter never intended to dissent in *Brown*.⁷⁶ He advocated for delay in an effort to bring the court to unanimity and to temper Southern opposition (the latter, a naïve and futile aspiration).

Providing a meticulous narrative about the years-long process at the court to end school segregation, Snyder makes a compelling case that Frankfurter, not Chief Justice Warren, deserves the lion's share of credit for steering the court to unanimity and, with it, imposing the full force of the court's moral strength.⁷⁷ Chief Justice Fred M. Vinson died suddenly in September 1953 between the two arguments of *Brown* and was replaced by Warren, who was the governor of California and lacked any judicial experience. Snyder recounts how Frankfurter, using all of his personality, took the new chief justice under his wing, like a law professor tutoring a student. They met privately 11 times to discuss *Brown*, including one session where Frankfurter suggested, "Why not have our discussion at my house on Monday afternoon, say at 4:30, to the stimulating accompaniment of a bourbon highball!"⁷⁸ Frankfurter's influence is seen, not only in the decision's invocation of "all deliberate speed," but Warren's emphasis that the opinion should be "short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory."⁷⁹

Frankfurter's reliance on the 14th Amendment to end segregation may seem inconsistent with his general views on judicial restraint, particularly as affecting the states. One of Snyder's main objectives is to resuscitate Frankfurter's reputation as a forward-thinking civil libertarian, who does not deserve the enmity of the present age. Snyder does this by placing the justice's judicial restraint in the context of his life and times, particularly by drawing a line that starts with Holmes, runs through Brandeis, and ends with Frankfurter. Sitting on a reactionary court, Holmes sought to limit the deleterious

63. Snyder, *supra* note 3, at 540.

64. In both cases, Frankfurter excoriated the government for secretly designating organizations as "Communist" and expelling members from government positions. See *Bailey v. Richardson*, 341 U.S. 918 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

65. Snyder, *supra* note 3, at 542 (citation omitted).

66. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

67. *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

68. *Grove v. Townsend*, 295 U.S. 45, 52-53 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

69. His progressivism on race relations outpaced his views on gender equality, as demonstrated by his upholding a Michigan law forbidding women from working as bartenders unless they were related to the tavern owner. See *generally* *Goesaert v. Cleary*, 335 U.S. 464 (1948), *abrogated by* *Craig v. Bowen*, 429 U.S.

190 (1976). Frankfurter reasoned that states could discriminate between the sexes in such matters as alcohol regulation. *Id.* at 465-66.

70. *Lee v. Mississippi*, 332 U.S. 742 (1948).

71. Snyder, *supra* note 3, at 514.

72. *Id.*

73. 347 U.S. 483 (1954).

74. Snyder, *supra* note 3, at 580.

75. *Id.* at 607 (citation omitted).

76. *Id.* at 595.

77. *Id.* at 594.

78. *Id.* at 589 (citation omitted).

79. *Id.* (citation omitted). Presciently in light of events surrounding the *Dobbs* opinion, Warren insisted that his colleagues return printed drafts to him when finished. He was concerned about leaks.

impact of its views on economic justice. During the New Deal, Brandeis succeeded in phrasing progressive opinions in terms of judicial restraint . . . courts should defer to elected officials. Lastly, as he participated in an expanded civil rights docket, Frankfurter feared the unintended consequences of an activist legal theory. Rights recognized by one court could be removed by another. Thus, his primary objective in *Brown* was to guide the Supreme Court to a decision that was centered on fundamental rights.

In advocating for desegregation, Frankfurter offered a theory that relied, not on due process, but on equal protection, which he observed:

[W]as “not a fixed formula defined with finality at a particular time. . . . Law must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men’s feelings for what is right and just is equally relevant in determining whether differentiation of treatment by law is a denial of ‘the equal protection of the laws.’”⁸⁰

In other words, Frankfurter put no stock in the original meaning of the 14th Amendment.⁸¹ This view formed the core of the *Brown* decision. The defendants argued that the amendment’s drafters would not have been opposed to segregation of schools on the basis of race. They pointed to *Plessy v. Ferguson* (decided in 1896, almost 30 years after the 14th Amendment) as evidence that “separate but equal” schools were constitutional. At the urging of Frankfurter (who likely knew what the outcome would be), his law clerk, Alexander Bickel, had spent an entire year researching the history of the amendment. As Justice Warren wrote about the sources, “At best, they are inconclusive.”⁸² With that impediment out of the way, the court decided the case on the basis of its own findings, particularly modern research on the effects of segregation on Black children. With particular relevance to modern debates about the document’s interpretation, Frankfurter advocated that the Constitution was not static: judges had to recognize historical context as well as the reality that the drafters (whether in 1789 or 1868) possessed the wisdom to build some play in the joints.

Thus, Frankfurter recognized that:

“The outcome of the Civil War, as reflected in the Civil War Amendments, is that there is a single American

society. Our colored [sic] citizens . . . are not to be denied opportunities to enjoy the distinctive qualities of their cultural past. But neither are they to be denied opportunities to grow up with other Americans as part of our national life.” . . . Equal protection . . . [is] “not a fixed formula defined with finality at a particular time. . . . Law must respond to transformations of views as well as to that of outward circumstances.”⁸³

His philosophy is best summarized by a lecture he gave at Harvard Law School on the 200th anniversary of the birth of Chief Justice John Marshall. In the speech, he extolled Marshall’s “hard-headed appreciation of the complexities of government” and “deep instinct for the practical.”⁸⁴ He admitted to “an old-fashioned liberal’s view” of “the humane and gradualist tradition in dealing with refractory social and political problems.”⁸⁵

Profiling Frankfurter in the *New York Times Magazine* in 1957, Anthony Lewis described the justice’s views on the role of the Supreme Court in a democracy. Overreliance on the court gave nine justices an undemocratic veto of legislation, which the court had invoked frequently in the 1920s and 1930s to squelch the New Deal. Reliance on the court imperiled its legitimacy in the eyes of the American public. Above all else, Lewis portrayed Frankfurter as an institutionalist, committed to preserving the court’s standing.⁸⁶ He disagreed with the court’s liberal wing in the 1950s (Chief Justice Warren and newly appointed Justice William Brennan along with Frankfurter’s old antagonists, Black and Douglas) as vehemently as he disagreed with the reactionaries of the 1930s. As Frankfurter wrote to Judge Learned Hand, “[T]he possible gain [of a liberal Supreme Court] isn’t worth the cost of having five men without any reasonable probability that they are qualified for the task, determine the course of social policy for the states and the nation.”⁸⁷

In his later years on the court, Frankfurter rarely voted with the majority in significant civil rights cases. Maintaining his limited view of incorporation, he continued to refuse to apply to the states the Double Jeopardy Clause. In *Mapp v. Ohio* (the case that established the exclusionary rule and applied the Fourth Amendment to the states),⁸⁸ he joined the dissent.⁸⁹ He took a limited view of the types of “searches and seizures” the federal courts should declare unconstitutional under the 14th Amendment. Advocating for the

80. Snyder, *supra* note 3, at 571 (citing FF Memorandum 9/26/1952 at 1-2; EWP, Box 571 Folder 3).

81. *Id.*

82. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

83. Snyder, *supra* note 3, at 571 (citing FF Memorandum 9/26/1952 at 1-2; EWP, Box 571 Folder 3).

84. *Id.* at 611 (quoting Felix Frankfurter, “John Marshall and the Judicial Function,” 69 HARV. L. REV. 217, 222-23 (1955)).

85. *Id.* at 612 (quoting Felix Frankfurter, “John Marshall and the Judicial Function,” 69 HARV. L. REV. 217, 237-38 (1955)); *see also* discussion and source cited *supra* note 2.

86. *Id.* at 639 (citing *New York Times Magazine*, Nov. 10, 1957, at 25).

87. *Id.* at 138 (citation omitted).

88. 367 U.S. 643, 657 (1961).

89. Snyder, *supra* note 3, at 676. *But see Mapp*, 367 U.S. at 672 (Harlan, J., dissenting) (indicating that Justice John M. Harlan II wrote the dissenting opinion and was joined by Justices Frankfurter and Charles Whittaker).

court's limited role in government, he urged his colleagues to hear only significant cases. As Snyder writes:

He did not believe the Court should try to solve all the country's problems . . . Frankfurter feared a Supreme Court on judicial steroids, embroiled in electoral or other political disputes on the basis of a flimsy equal protection rationale, and forgetting about the historic purposes of the Reconstruction Amendments of protecting the rights of African Americans and other minorities.⁹⁰

Frankfurter's resistance came to a head in the 1962 case of *Baker v. Carr*,⁹¹ his final case on the court. In *Baker*, the court overturned a Tennessee voting map on the basis of the 14th Amendment's Equal Protection Clause, finding that it disenfranchised Black voters (the state had not revised its map since 1901). In dissent, Frankfurter argued that the court should never have heard the case, under the political question doctrine.⁹² He expressed concern that the court would be flooded with reapportionment litigation, and that the majority opinion provided no guidance for how courts should weigh such claims other than a vague "arbitrary and capricious" standard.⁹³ Chiefly, he objected to the majority's statement that the court was the "ultimate interpreter of the Constitution"⁹⁴ as a bold assertion of judicial supremacy over the other two branches. It reminded him of the due process cases in which the court had invalidated a maximum-hour law in *Lochner* as well as minimum wage laws. To Frankfurter, the *Carr* opinion represented what he deemed the worst excesses of the Warren court.⁹⁵

Despite Frankfurter's concerns, the court proved able to develop standards for reviewing legislative apportionment cases when it established the "one person one vote" rule in *Reynolds v. Sims*.⁹⁶ In doing so, the court revealed both the fallacy and the limits of Felix Frankfurter's judicial restraint. Most importantly, his approach to judging assumes an impossibly perfect world, where democratic institutions function free of undue influence and reflect the will of the majority . . . a benign majority that still protects the rights of minorities. The right to an abortion, mentioned at the beginning of this review, is a case in point. In a purely republican government, the comfortable majority of voters who support the right would have their preferences expressed by federal and state legislatures and executives. Of course, due to gerrymandering, the apportionment of the Senate by state rather than population, the filibuster rule, and the Electoral College, the federal government is not perfectly

"republican." Frankfurter's usual rejoinder — that voters who did not approve of their representatives could simply vote them out of office — imagines a world that does not exist.

Frankfurter's views also place a naïve faith in the democratic process. Writing for the majority in *Gobitis* (the case involving the rights of Jehovah's Witnesses to not salute the flag), he advised the students' parents could "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than [] transfer such a contest to the judicial arena."⁹⁷ Really? Does any knowledgeable observer of American history and politics believe that in the 1940s a school board or legislature in West Virginia would have sided with a tiny religion over the loud voices of a nation on war footing?

Unlike law professors, justices of the Supreme Court do not have the luxury of living in ivory towers. They decide real-world cases with real-world consequences. Viewed from that world (the one in which we all live), Frankfurter's views seem naïve and privileged. We look to the courts as the ultimate protectors of civil liberties, particularly the rights of minorities. Snyder's defense of his subject's jurisprudence elides the importance of that reliance.

Democratic Justice provides an eye-opening view into the inner workings of the Supreme Court, blowing the lid off any pretense of judicial decorum and objectivity. Snyder gives the reader an insider's view of the negotiations, conversations and alliances that led to some of the most consequential constitutional decisions of the mid-20th century. We also get an unvarnished account of the personality conflicts among the court's gigantic egos. When Chief Justice Harlan Fiske Stone died, an internal battle broke out over his successor. Two justices, Hugo Black and William Douglas, threatened to resign if a third, Robert Jackson, was appointed chief.⁹⁸ In a case involving a coal miners' strike, Black threatened a "declaration of war" if Jackson published a draft opinion, to which Jackson responded that he "would not stand for any more of this bullying."⁹⁹ While sitting next to each other on the bench, Justice Frank Murphy quietly accused Frankfurter of being the source for an article by Arthur Schlesinger about the justices' personal conflicts. Denying the accusation, Frankfurter wrote a memo to the entire court.¹⁰⁰

Told from Frankfurter's perspective, the justices are knocked off their pedestals. Chief Justice Stone failed to control the justices' conference discussions and lacked the work ethic to write many of the court's controversial opinions. His successor, Chief Justice Fred M. Vinson, comes in for particular excoriation both by

90. Snyder, *supra* note 3, at 661, 685.

91. 369 U.S. 186 (1962).

92. Snyder, *supra* note 3, at 685-87.

93. *Id.*

94. *Baker*, 369 U.S. at 211.

95. Snyder, *supra* note 3, at 685.

96. 377 U.S. 533, 558 (1964).

97. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940), *overruled by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

98. Snyder, *supra*, note 3, at 473-74.

99. *Id.* at 477 (citation omitted).

100. *Id.* at 479-80.

Frankfurter and Snyder as a feckless intellectual lightweight who was overwhelmed by the *Brown* deliberations before his death and replacement by Earl Warren.¹⁰¹ Snyder sheds light on some startling extra-judicial conduct. The day before he argued a minimum-wage law before the Supreme Court in 1923, Frankfurter met privately with Justice Holmes to discuss strategy for the oral argument.¹⁰² After the Supreme Court (with his concurrence) voted to uphold the death sentence of Willie Francis in 1947, Justice Frankfurter used back-channels in an attempt to persuade the governor of Louisiana to commute the sentence.¹⁰³ In 1952, he discussed the upcoming school desegregation cases with a former law clerk, who drafted the Justice Department's brief.¹⁰⁴ Not to be outdone, Chief Justice Vinson at least twice met secretly with executive branch officials in an effort to resolve high-profile cases: President Harry Truman's seizure of steel mills during a labor strike and the espionage case of Julius and Ethel Rosenberg.¹⁰⁵

Democratic Justice paints a nostalgic portrait of American law in the late 19th and early 20th centuries. The predecessors to modern international law firms were, in those days, boutique enterprises, and the names on today's letterhead were practicing attorneys: Hale, Dorr, Gray, Thacher, Wilkie, Hill & Barlow et al. Justice Brandeis began his legal career at the Boston firm now known as Nutter, McClennen and Fish. The organized bar was only a few thousand lawyers. Frankfurter's salary at his first job after law school was \$1,000 per year.¹⁰⁶ The modern law school was born during this time. The first academic law reviews appeared.¹⁰⁷ Lawyers such as Frankfurter, his mentors and his proteges created the modern administrative state. One can imagine the excitement of being present at the foundation of the legal profession as we know it.

An interesting theme (worth an entire book in itself) is Frankfurter's Judaism and the antisemitism he faced. White-shoe law firms did not hire Jews. Although Frankfurter broke through the bigotry when he was hired by a Wall Street firm for his first job out of law school, one of the firm's partners suggested he change his last name.¹⁰⁸ Harvard President Lowell, an infamous Jew-hater, not only imposed quotas on Jewish undergraduates, he held a deep-seated enmity against Professor Frankfurter, who for most of his tenure was the only Jew on the law school faculty. On meeting Frankfurter

in the 1920s, Eleanor Roosevelt described him to her mother-in-law as, "An interesting little man but very Jew."¹⁰⁹ Although not observant (he walked out of a Yom Kippur service as a teenager and rarely returned to synagogue for the rest of his life), he was a zealous Zionist and played an influential role in the formation of Israel, working alongside Brandeis. He did so even as a sitting justice. In the years before World War II, he was a vocal proponent of U.S. involvement in the war, writing FDR in 1934, "there is no doubt that the Jew in Germany is doomed."¹¹⁰ Even while sitting on the court, he publicly (and repeatedly) opposed U.S. neutrality between 1939 and 1941.

In the end, Frankfurter's life, as ably told by Snyder, invites us to question the labels we use as shorthand to describe judges and political figures. Was Felix Frankfurter a liberal? A conservative? Did he start life as the former and become the latter as he aged and took on the responsibility of judging? Snyder probably would answer that Frankfurter did not change from the time he entered law school until he retired from the Supreme Court. Nor would he concede that the times changed around Frankfurter, and he simply failed to keep up. Instead, Snyder would probably say that labels are dangerously misleading. In modern usage, Frankfurter was liberal economically, socially and politically, but conservative in spirit. To his credit, Snyder's biography does not try to take sides in this philosophical debate. An obvious admirer of his subject, the author objectively and neutrally exposes attributes and flaws of Frankfurter the man and the justice.

Unlike some judges for whom the end justified any means, Felix Frankfurter was an institutionalist, whose primary impulse was protecting the Supreme Court. Eulogizing his mentor, Professor Paul Freund described Frankfurter's judicial philosophy as, "forbearance in the use of power."¹¹¹ At times, that required him to do things that were contrary to his personal beliefs. In *Democratic Justice*, Brad Snyder has written an absorbing narrative of how Felix Frankfurter, a man of passionate beliefs, calibrated his values to what he viewed as the greater good.

— Joseph S. Berman

Any views expressed herein are those of the author himself and are not the views of any organization with which he works or is affiliated.

101. In an exclamation that reveals much about his character, when told of the chief justice's death, Frankfurter said to a former law clerk, "[T]his is the first solid piece of evidence I've ever seen that there really is a God." Snyder, *supra* note 3, at 569 (quoting Norman Silber, *With All Deliberate Speed: The Life of Philip Elman* 219 (2004)).

102. *Id.* at 136.

103. *Id.* at 485-86.

104. *Id.* at 574.

105. *Id.* at 557, 565.

106. Snyder, *supra* note 3, at 24.

107. *Id.* at 19.

108. *Id.* at 24.

109. *Id.* at 100 (citation omitted).

110. *Id.* at 236 (citation omitted).

111. *Id.* at 707 (citation omitted).

BOOK REVIEW

Mystic Wind

By James Barretto, Oceanview Publishing (2022), 386 Pages

Massachusetts District Court Judge James Barretto is known to his colleagues and the bar as a prolific legal writer, having issued scores of legal opinions. In *Mystic Wind*,¹ however, Barretto puts down his judicial pen and picks up his pen as a novelist in a legal thriller that keeps its reader turning the pages until the very end.

Mystic Wind takes place in the early 1980s in the fictional town of Mystic, which sits in Boston's shadow across the Mystic River.² Protagonist Jack Marino had come a long way from his tough upbringing in Mystic; when the reader first meets him, Jack is a rising star in the Suffolk County District Attorney's Office as head of the office's urban gang unit.³ Jack's ascendance, however, is abruptly cut short when, after a trial, Jack is savagely beaten.⁴ Jack asks his boss, the district attorney, for a transfer to another unit.⁵ Fearful that Jack has lost his edge and could become a liability in his race for governor, the district attorney instead fires him.⁶ Jack resigns himself to working for his father-in-law's large law firm doing corporate work.⁷

And that is where Jack stays for two years when, out of the blue, a judge, who was once Jack's mentor, asks him to take an appointment to represent a young man charged with murder.⁸ Jack takes the case and gets back into the arena he soon realizes he so sorely missed.⁹ Jack's initial belief that he could juggle his corporate practice, the murder defense and his personal life proved far too ambitious, and the case immediately throws Jack's life into turmoil.¹⁰ Jack comes to believe that his client is being set up, and as he gets deeper into his investigation into the case, he finds that he is waging a multi-front battle.¹¹ As he races against time to find evidence critical to his client's chances in court, Jack must confront a judge

seemingly predisposed to hinder his case and his former boss, the district attorney, who has become blind with ambition for higher office.¹² Jack must also confront his wife and his father-in-law, neither of whom can understand Jack's sense of obligation to the case.¹³ Jack risks professional and personal ruin and, eventually, his life as he works to uncover the truth and secure his client's innocence.¹⁴

Jack's taking of the murder case also forces him to confront who he is and his outlook on the legal system. When the reader first meets Jack, he has made good on his determination to leave his childhood roots behind. Although the reader sees glimpses of his humanity at the outset, Jack, as an assistant district attorney, had been singularly focused on his career. He had made it out of Mystic; he was working as a powerful prosecutor; and he had forsaken a promising relationship and married instead into a wealthy, powerful family in the legal community.¹⁵

As he takes on his representation of a man charged with murder, however, Jack comes to several realizations. He comes to realize that his upbringing is something that he should embrace. He comes to realize the importance of relationships that he had cast aside. And he comes to realize the harm that the win-at-all-cost culture instilled by his former boss, the district attorney, can have on the criminal justice system and the persons enmeshed in it. As the story progresses, Jack's character traces an arc from hubris to recognition and redemption.

Barretto infuses the story with characters who range from gritty to tragic. Not only do these characters add color to the story, they represent differing worlds existing in society, from wealthy

1. James Barretto, *Mystic Wind* (2022).

2. *See id.* at 9-10.

3. *See id.* at 15-16.

4. *See id.* at 30-33.

5. *See id.* at 35-41.

6. *See id.*

7. *See Barretto, supra* note 1, at 54.

8. *See id.* at 56-61.

9. *See id.* at 62-66.

10. *See id.* at 73-76.

11. *See id.* at 107-117.

12. *See id.* at 371-80.

13. *See Barretto, supra* note 1, at 371-80.

14. *See id.* at 111-118.

15. *See id.* at 15-22.

and powerful, to working-class, to criminal underbelly. Jack must navigate each of these worlds as he struggles to uncover the truth regarding the murder. The story includes flashpoints in the criminal justice system — immunity from prosecution, prosecutorial misconduct and the application of the death penalty — and the impacts these flashpoints can have on the justice system and the persons involved in it.¹⁶ In one particularly insightful moment, Jack reminds the reader that our criminal justice system — for all its lofty ambition and intention — can succumb to human frailty, telling himself, “[l]ike all criminal lawyers, he’d lost cases he should’ve won and won cases he should’ve lost, a frightening reality in the criminal justice system.”¹⁷ Barretto’s weaving of these issues into the story grabs the reader’s attention and increases the drama and suspense. These issues also highlight for Jack that complacency can be the enemy of fairness and the administration of justice.

Connoisseurs of legal thrillers and non-connoisseurs alike will appreciate the courtroom action and drama. The story abounds with tense courtroom hearings. Readers are treated to enjoyable courtroom banter, rapid-fire cross-examination and trial strategy. In these scenes, Barretto touches on legal principles such as third-party motive and the introduction into evidence of prior bad acts that add credibility and authenticity to the story.¹⁸ Those in the legal field will find the principles familiar while those not will find them

informative. From a narrative perspective, however, Barretto incorporates these principles without breaking the story’s stride.

As *Mystic Wind* is set in Massachusetts, it offers additional familiarity to those with Massachusetts ties.¹⁹ Readers may be familiar with some of the scenes set in Boston, and Barretto incorporates historical nuggets about the Massachusetts legal system. For example, the first grand jury in America was sat in Boston in 1689.²⁰ The book also features an added bonus for those who have practiced in the Suffolk Superior Court. Barretto’s description of the Suffolk Superior Courthouse, where much of the action happens, is rendered in rich detail.²¹ Those readers familiar with the courthouse will be able to picture the story unfolding as if they were in the gallery watching a real-life proceeding.

Readers will be surprised to learn that this is Barretto’s debut novel, as the story reads as if written by someone long honed to the craft. His prose is punchy, lively and descriptive. The dialogue is quick, gritty and insightful. The characters evoke connections with the reader. And the story, which is compelling, entertaining and full of suspense, is captivatingly told.

Mystic Wind will appeal to fans, occasional subscribers and first-timers to the legal thriller genre. But be forewarned, if you pick it up, be prepared to put any scheduled tasks on hold, as the book rates very high on the “cannot put it down” index.

— Hon. Zachary Hillman

16. See *id.* at 40-41; 84-85. Barretto uses the fictionalized account in *Mystic Wind* of a 1982 legislative amendment to provide for the death penalty as a surrogate for actual changes to the applicability of the death penalty in Massachusetts in the early 1980s. See *id.* at 40-41. In 1980, the Supreme Judicial Court held in *District Attorney for the Suffolk District v. Watson*, 381 Mass. 648, 671 (1980), that a recently enacted capital punishment statute, c. 488 of the Acts of 1979, was cruel or unusual punishment and struck it down. Thereafter, Massachusetts voters voted by referendum to amend Article 26 of the Massachusetts Constitution to declare that “No provision of the [Massachusetts] Constitution . . . shall be construed as prohibiting the imposition of the punishment of death.” MA CONST. art. XXVI; Amend. Art. 116. In 1984, however, the Supreme Court, in *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 171-72 (1984), once again struck down the death penalty in Massachusetts, ruling it unconstitutional on the grounds that it was not applied fairly, as it was only applicable to defendants who were convicted after trial. Since *Colon-Cruz*, the

statute setting out the punishment for first-degree murder, MASS. GEN. LAWS c. 265, § 2, has been amended to no longer provide for punishment by death. MASS. GEN. LAWS c. 265, § 2 (2014); St. 2014, c. 189.

17. Barretto, *supra* note 1, at 61.

18. See *Mass. Guide to Evid.* § 1105; see, e.g., *Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986).

19. Barretto, *supra* note 1, at 23.

20. *Id.* at 58.

21. See *id.* at 56, 401. Discerning readers will also note that Barretto references the allegorical statues lining the Great Hall of the John Adams Courthouse. *Id.* at 155. For a captivating history of those statues, see Kenneth Bresler, “Virtues in the Great Hall: Understanding the Allegorical Statues in the John Adams Courthouse,” 102 MASS. L. REV. 71 (2021).