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Building a More Inclusive Legal Community

By Chinh H. Pham

As we continue to emerge from the pandemic and collectively figure out what "normal" now means, the Boston Bar Association's role in leading and guiding our profession has never been more vital, especially when it comes to ensuring that our members remain connected and informed.

The BBA instituted a hybrid strategy to make certain that our programs can be available to a wider range of our members. Our extensive catalogue of BBA webinars reached more than 10,000 people this year, with thousands more continuing to download and listen on-demand through our Learn Online Library and podcast channel, allowing members to stay connected despite the challenges presented by the pandemic.

We also returned to in-person events in response to a growing interest from our members. These in-person events are providing opportunities for new lawyers seeking to connect with the legal community during the pandemic, for attorneys looking to advance their careers through relationship building, and for Sections and Forum members eager to reconnect with colleagues.

Many recent graduates and junior associates have been navigating the legal profession in almost exclusively remote settings, limiting opportunities to broaden their professional networks and establish relationships with colleagues and the legal community. This return to in-person events allowed the BBA to continue to live up to a key tenet of our mission: to foster a diverse and inclusive professional community. I recognize the importance of engaging law students and younger attorneys, especially those in traditionally underserved communities, who have been deprived of the traditional path to entry into our profession.

This October, we welcomed local law students back to the BBA for a student reception for the first time since the pandemic. Just a week later, we hosted the BBA's inaugural Career Fair at District Hall, supporting not only some of our more underserved student communities, but also some of our potentially overlooked smaller and mid-sized sponsor firms. Forging connections between our future lawyers and experienced practitioners and encouraging networking between student peers will allow the BBA to strengthen itself from within.

It is important that, as President, I ensure the BBA supports all of its current and future members. But it is imperative that those members also support each other, peer-to-peer and mentor-to-mentee, to improve outcomes for all; this return to in-person networking and educational opportunities promotes those connections in a way that has often been limited by technology over these last few years.

Our DEI Summer Fellowship program, funded in part by the Boston Bar Foundation, also serves to promote those connections between more experienced attorneys and those entering the profession. This past summer, the program grew once again, allowing us to provide paid internships to 10 local law students. This provided not just an invaluable professional experience, but a much-needed paycheck for this group of gifted, driven law students. By breaking down some of the financial barriers into the profession, we ensure that the legal community better reflects the people it serves, and that these valuable on-the-job learning experiences are not

reserved only for students in the financial position to take advantage of them.

The BBA's Bar Exam Coaching Program also continued to support students making the initial plunge into the profession, matching bar applicants with volunteer coaches to provide guidance, support, and exam prep. In addition, the BBA hosted free online workshops providing substantive and practical advice to applicants, providing them with crucial information to help improve not just their scores, but also their overall well-being while preparing for the bar exam.

In addition to hopeful would-be attorneys, the BBA continued to support those recently entering the profession; our New Lawyers Forum hosted a robust series of career advancement webinars covering a host of topics, including establishing a professional network in today's legal landscape, maximizing the impact of professional resources such as LinkedIn, increasing visibility as a new lawyer, and how to transition into different practice settings. Our BBA Career Center has also continued to serve as a valuable tool for job seekers to view the latest openings at area law firms, legal departments, and government agencies—complete with free resume review services. This resource has yielded an average of more than 150,000 views per month.

Moreover, we aim not only to live up to our mission to foster a diverse and inclusive professional community, but to be a respected voice and convener both within the profession and the community in which we live and work.

We have responded to legal crises as they've arisen, including a BBA-hosted issue briefing discussing the Martha's Vineyard migrant situation and several educational programs centered on the Supreme Court's *Dobbs* decision and its ongoing ramifications. Over the last year, the BBA has been committed to using our voice to help shape the way the law is administered within the Commonwealth. We supported legislation to improve CORI sealing, advocated for greater inclusion in government via the Language Access and Inclusion Act, and our Amicus Committee filed briefs bolstering our long-standing support for access to justice.

As BBA President, I will continue to not just lead this organization, but to nurture it. We will continue to support our new lawyers and student members as they face the many challenges our current climate produces, while also being a guiding voice to the entire legal community.

I have always believed that the biggest indicator of success is not the path one takes into the profession, nor the location or size of the firm in which they practice, but rather the impact they make when they get there. The same is true for the BBA as a whole; our success is measured by the impact we make, not just on the community we serve but on the lives of those we are proud to call members. I pledge to do all I can while leading this Association to ensure the BBA's impact on its members, the city, and the Commonwealth is positive, inclusive, and—as always—lives up to our core mission of advancing the highest standards of excellence for the legal profession.

Case Focus

Adoption of Patty: When Disaster Strikes Your Virtual Trial

By Alison Bancroft & Andrew Cohen

Last year, the Supreme Judicial Court issued two decisions, *Vasquez Diaz v. Commonwealth*, 487 Mass. 336 (2021), and *Commonwealth v. Curran*, 488 Mass. 792 (2021), in which the Court considered whether pandemic-era virtual hearings in criminal matters violated defendants' Sixth Amendment rights to confrontation, presence, and public trial. The SJC concluded that these hearings did not, primarily because the technology worked well: the Zoom hearings in both cases were much like in-person hearings.

Termination of parental rights cases are civil, not criminal, proceedings. As a result, respondent parents do not enjoy confrontation, presence, or public trial rights in termination cases, even though the State threatens to permanently sever familial relations. "Fair trial" rights for parents are grounded in procedural due process, which is flexible and offers weaker protections than those afforded under the Sixth Amendment. So when the SJC in *Adoption of Patty*, 489 Mass. 630 (2022), looked at the issue of virtual trials in termination cases, there was little doubt that it would hold that such trials were permissible during the COVID pandemic. But what makes the case interesting is that, unlike the hearings in *Vasquez Diaz* and *Curran*, the virtual trial in *Patty* was an audio and video disaster. The technological problems forced the Court to look at whether *that trial* satisfied the requirements of due process and to explain the protections that parents – and presumably all civil litigants in cases involving protected liberty interests – are entitled to in pandemic-era virtual trials. The Court concluded that the trial in *Patty* did not satisfy the requirements of due process and remanded the case for a new trial.

Background

In September 2020, a judge of the Juvenile Court held a Zoom bench trial to determine whether it was in the best interest of the child to terminate the mother's parental rights. The mother, who represented herself, objected and asked for an in-person trial. The mother had no video connectivity and could only participate by audio via cell phone. The court insisted on going forward anyway.

Technological problems started immediately. The mother's connection was faulty during direct examination of the first witness, a Department of Children and Families (DCF) social worker, and it was unclear to the judge what the mother heard. At the end of the testimony, the judge removed the mother from the Zoom trial with instructions that she re-establish contact. After a short recess, the judge decided to resume the trial without the mother, proceeding with the testimony of two additional witnesses who also experienced Zoom-related connection issues. When trial restarted two days later, again via Zoom, the mother was able to connect. She explained to the judge that her cell service had been "really bad" on the first day of trial. The judge did not ask her what she had been able to hear on the first day of trial; instead, he offered her the chance to cross-examine the witnesses whose direct examination she never heard. Shortly thereafter, the judge terminated the mother's parental rights. The mother filed a motion for new trial, explaining that she had heard only parts of the first witness's testimony, that she had not heard any of the other two witnesses' testimony, and that she had tried without success to reach the clerk's office to be reconnected. The judge denied the motion without a hearing.

Opinion

The Court first looked at whether a virtual trial *per se* violates a parent's right to due process in the midst of the COVID-19 pandemic. Employing the procedural due process balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court held that the government's significant interest in protecting public health during a pandemic, coupled with children's interest in timely permanency, outweighed parents' interest in appearing in person for trial.

However, to reduce the risk of erroneous deprivation of substantive rights, the SJC recognized that the trial court must ensure that sufficient safeguards are in place throughout the trial. Finding such safeguards to have been absent at the *Patty* trial, the SJC held that due process during a Zoom trial requires the trial court to:

- inquire, before trial, as to whether the parent has access to the technology necessary to participate via Zoom. If the parent lacks that technology, the court should determine what steps are necessary to help her get it. *Id*. at 645.
- ensure, preferably in advance of the hearing, that the parent understands the procedures to be used when the technology does not work as intended (that is, how to re-connect to the Zoom hearing, how to reach the clerk's office, how to reach counsel, etc.). *Id*. at 648.
- explain, and provide access to, the private "breakout room" Zoom function so that parents can consult with counsel or stand-by counsel at any time during trial. *Id*. at 645-46.
- explain how to offer exhibits and share documents using the "share screen" (or similar) Zoom function during trial. If a *pro se* parent is participating by phone, the court must ensure that all exhibits and other documents are shared ahead of time. *Id*. at 646.

If technological problems cannot be fixed, or parents (or their counsel) cannot be reached, the court must suspend the proceedings until the problems are fixed or the court has an explanation for why the parent is not participating. *Id*. at 647. If a parent cannot timely reconnect, the court must explore other options, such as giving the parent time to review missed testimony before conducting cross-examination.

Ultimately, procedural due process means the right to notice and the right to participate in a timely, meaningful manner. *Id*. at 639. Parents may be able to participate meaningfully in a Zoom termination trial, but only if the procedural safeguards set forth in *Patty* are in place.

Implications

Patty leaves many questions unanswered.

First, does the Court's reasoning apply beyond child welfare cases? If the State's interest in public safety supersedes parents' rights to in-person termination trials, it may also supersede the liberty interests at stake in cases involving civil commitment or involuntary use of medication. It certainly suggests that trials involving "lesser" individual interests – such as those at stake in domestic relations, housing, and other civil matters – may be held virtually.

Second, while the SJC focused its inquiry in *Patty* on termination trials "during," "because of," and "in the midst of" the COVID-19 pandemic, *id*. at 638, 642, the Court did not specifically

hold that termination trials can be held virtually *only because of* the pandemic. While the State's powerful interest in pandemic safety tipped the *Mathews v. Eldridge* scale toward virtual trials in *Patty*, the State might argue other strong interests after the pandemic has eased or vanished. Indeed, the Juvenile Court has seemingly ignored the COVID-19 limitations in *Patty*. Even though most courts have returned to relative normalcy, and mask and distancing restrictions have been lifted, the Juvenile Court recently issued Standing Order 1-22(III) (effective September 1, 2022), which permits judges to hold hearings of any type, including termination trials, either virtually or in person in their discretion. It remains to be seen whether the Standing Order satisfies due process.

Third, while *Patty* requires that courts ensure that parties and counsel understand the rules and mechanisms for virtual participation, the SJC does not explain how these instructions must be given. Are they to be shared with lawyers and parties by verbal colloquy? In a published form? Is it sufficient for the judge to ask counsel, "Did you explain all of the video logistics to your client?"

And, finally, the video and audio connections in *Patty* were terrible; everything that could go wrong did. While major connectivity problems must be monitored by clerks and judges, and may require suspension of trials, *Patty* provides little guidance regarding the more common connectivity problems that plague almost every video meeting and hearing. At what point does frozen video, dropped audio, or breakout-room confusion rise to the level of deprivation of the right to meaningful participation?

Internet connectivity, especially in the Commonwealth's older courts, remains flawed. Further, many litigants in underserved communities have low-quality devices, limited data, and poor internet service. These issues *will* lead to problematic virtual hearings. The questions left unanswered in *Patty* must be addressed by the trial and appellate courts.

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Legal Analysis

Dobbs and the Post-*Roe* Landscape

By Amanda Hainsworth

In *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022), the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thus ending nearly a half century of federal constitutional protections for abortion. As a result of *Dobbs*, nearly half the states in the country have already outlawed or severely restricted abortion access, including through recently enacted abortion bans, pre-Civil War abortion bans that remain on the books in some states, or "trigger bans" – that is, bans that were enacted before *Dobbs* but went into effect once *Roe* was overruled. Several other states are likely to enact bans or severe restrictions as legislatures return to session.

The results of this new abortion landscape have already proven far-reaching. Abortion clinics have shuttered operations throughout the Southeast, creating vast "abortion deserts" and forcing patients to travel long distances to access care, if they can travel at all. Patients who can afford to travel must do so with the knowledge that their travel and their inquiries may be subject to digital surveillance or even prosecution, not only of themselves, but of their friends, families, and helpers. Those in rural communities, poor people, domestic violence victims, and countless others for whom travel is not affordable, practical, or safe face a Sophie's choice: they must either attempt to procure abortion pills from an online pharmacy and take them without medical supervision,**[1]** or accept forced birth. A ten-year-old rape victim in Ohio, for example, was forced to travel to Indiana to avoid the horrifying prospect of compelled motherhood as a child. The doctor who performed the abortion in Indiana, where abortion was legal at the time, was subsequently targeted by state officials and harassed by the public. This is to say nothing of the providers in abortion-banning states who, in order to avoid criminal prosecution, must now determine whether a hemorrhaging miscarriage or ectopic pregnancy is life-threatening enough to lawfully provide a medically necessary abortion. Beyond these implications, the *Dobbs* decision has paved the way for what was once merely political rhetoric to become enshrined as state healthcare policy—on topics including abortion, gender-affirming care, contraception, and even the HIV prophylactic, PrEP. This, in turn, threatens our healthcare system as a confusing patchwork of conflicting state bans and protections emerges over time.

This article will address: first, the *Dobbs* decision and what it might mean for the future of constitutional privacy rights; second, the immediate consequences of and responses to the *Dobbs* decision; and third, the continuing legal implications of the *Dobbs* decision as some states continue to ban or severely restrict abortion and others try to safeguard it.

The Dobbs Decision & the Future of Constitutional Privacy Rights

Anti-abortion proponents have worked tirelessly to end federal constitutional protections for abortion ever since *Roe* was first decided in 1973.**[2]** They set the stage through incremental victories, starting in 1976 with the Hyde Amendment which, by banning federal funding for abortion except to save the pregnant person's life or in cases of rape and incest, effectively denies abortion access to poor people.**[3]** After the Supreme Court upheld the Hyde Amendment, anti-abortion proponents shifted their efforts to state legislatures, which began to enact state laws designed to make access to abortion more difficult—for example, by imposing waiting periods, parental consent requirements, and onerous informed consent and ultrasound requirements;

banning specific types of abortion procedures; and targeting abortion providers with regulations designed to force them out of business. While some of these efforts were struck down under *Casey* as imposing an "undue burden" on a person's right to an abortion, many were upheld.**[4]** Abortion access in many parts of the country began to steadily erode. Against this backdrop, anti-abortion state legislatures became emboldened in more recent years to enact flagrantly unconstitutional abortion bans or restrictions. One such ban, Texas Senate Bill 8 ("SB8"), involved an unconstitutional 6-week abortion ban enforceable exclusively by private citizens. The admitted purpose of SB8's private enforcement regime was to foreclose federal judicial review of an otherwise patently unconstitutional abortion ban. **[5]** The Supreme Court allowed SB8 to go into effect in September 2021 and then almost entirely upheld it on the merits in December 2021. The Supreme Court's response to SB8 was not only catastrophic for pregnant people and abortion providers in Texas, but also proved a harbinger of what was to come in *Dobbs*, which involved a similar, facially unconstitutional abortion ban and was on the docket for the October 2021 term.

Sure enough, on June 24, 2022, the Supreme Court issued its decision in *Dobbs* and overruled *Roe* and *Casey*, ending federal constitutional protection for abortion. In doing so, the Court relied on a test that it used in *Glucksberg v. Washington*, 521 U.S. 702 (1997), to deny recognition of a constitutional right to physician-assisted suicide. The *Glucksberg* test recognizes only those rights that are "deeply rooted in our Nation's history and tradition" and that are "an essential component of . . . 'ordered liberty'" as constitutionally protected. *Dobbs*,142 S. Ct. at 2246 (quoting *Glucksberg*, 521 U.S. at 721). Before *Dobbs*, the Supreme Court had never applied the *Glucksberg* test to unenumerated privacy rights (such as the right to abortion) and expressly rejected it in *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015), on the grounds that "it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." Nevertheless, the *Dobbs* court applied the *Glucksberg* test and, after canvassing the legal treatment of abortion prior to the Civil War, 142 S. Ct. at 2249-2254, concluded that abortion is not deeply rooted in our Nation's history and tradition and, therefore, not constitutionally protected, *id.* at 2242, 2283-85.

In reaching this conclusion, the Supreme Court took great pains to suggest that the state's interest in "fetal life" differentiates abortion from other precedents involving privacy rights, such as those recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception for married couples), *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual intimacy between members of the same sex), and *Obergefell*, 576 U.S. at 675 (same-sex marriage). The majority opinion would have us believe that this difference makes *Roe* and *Casey* some type of legal aberration akin to *Plessy v. Ferguson*, 163 U.S. 537 (1896)—something "egregiously wrong" on the day that it was decided and easily excisable from our constitutional fabric. *Dobbs*, 142 S. Ct. at 2265. However, *Roe* was built on the substantive due process decisions that came before it: *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage), *Griswold*, and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried couples), and provided the doctrinal foundation for decisions that came after, such as *Lawrence* and *Obergefell*. In other words, *Roe* was neither an aberration nor an outlier in its constitutional basis. Notably, none of the privacy rights that came before or after *Roe* can trace their roots to the colonial period.

There is good reason to fear for the future of constitutional privacy rights given this Supreme Court's willingness to contort *stare decisis* principles to reach a desired outcome. Indeed, few precedents recognizing a constitutional right have been affirmed, reaffirmed, and consistently

applied more than *Roe* and *Casey*. *See, e.g.*, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983) ("[A]rguments [against *Roe*] continue to be made," but that the doctrine of *stare decisis* "demands respect in a society governed by the rule of law"); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (the "vitality" of "constitutional principles cannot be allowed to yield simply because of disagreement with them"); *Casey*, 505 U.S. at 853-55 (taking full account of the diversity of views on abortion and the importance of various competing state interests before once again reaffirming *Roe*); *see also June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Hodgson v. Minnesota*, 497 U.S. 417, 434-35 (1990); *Bellotti v. Baird*, 443 U.S. 622, 639 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61 (1976). As the *Dobbs* dissent points out, absent a changed legal or factual circumstance or some other cognizable rationale for eliminating a half-century of protection of a constitutional right, we are left with "one reason and one reason only" for the Court's decision: "the composition of [the] Court has changed [and] the proclivities of individuals rule." *Dobbs*, 142 S. Ct. at 2320 (Breyer, J., dissenting). **[6]**

The Reality of a Post-*Roe* World

As abortion bans go into effect across the country and constitutional privacy rights hang in the balance, serious legal questions have started to emerge that will likely take years—and, inevitably, further Supreme Court intervention—to resolve. Questions have already surfaced regarding the extent to which federal law may preempt conflicting state abortion bans. For example, the federal government has argued in two separate cases that near-total abortion bans in Idaho and Texas conflict with the Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals to provide stabilizing emergency treatment, including abortion care, when necessary. Federal district courts in Texas and Idaho have already reached conflicting decisions on that question, **[7]** which could lead to a circuit split. Likewise, it is unclear whether and the extent to which the federal government's regulation of medication abortion, which is subject to restrictions under the FDA's Risk Evaluation and Mitigation Strategy (REMS) drug safety program, preempts state bans that specifically target medication abortion. The extent to which medication abortion remains available is essential to ensuring abortion access in a post-*Dobbs* world, given medication abortion now accounts for more than half of all abortions performed in the United States.

There are also many unknowns about the potential extraterritorial reach of abortion bans into states where abortion remains protected and legal. This has led some states, including Massachusetts, to enact so-called "shield" laws in an effort to make it harder for out-of-state investigators, prosecutors, and bounty-hunters to subject our residents to out-of-state consequences for providing or assisting a person in accessing abortion care or gender affirming care (which has similarly been the subject of criminal bans in some states). While specific provisions of these "shield" laws vary, they generally limit or prohibit the involvement of in-state institutions or agencies in facilitating out-of-state consequences for abortion care. For example, the Massachusetts law, among other things, prohibits discretionary rendition, prevents adverse licensing consequences, prohibits malpractice insurance premium increases, and bans interstate law enforcement collaboration in connection with or resulting from out-of-state investigations, litigations, or prosecutions for reproductive and gender affirming care. In recognition of the unique risks that providers may face due to the breadth of state bans, the

Massachusetts law is the only law in the country that expressly covers providers of abortion and gender affirming care "regardless of the patient's location" as long as the care complied with Massachusetts law.

While these laws are certainly important in ensuring the continued availability of abortion services in states where abortion remains legal, it is not possible for one state to entirely immunize a provider from out-of-state consequences if that provider is subject to the jurisdiction of another state. Thus, despite these protections, the fear among providers of potential out-of-state consequences (no matter how hypothetical) has caused some to preemptively restrict access in states where abortion remains legal, particularly around medication abortion. **[8]** These types of self-imposed restrictions make it more difficult, if not impossible, for out-of-state patients to access abortion even in those states that allow it, and will pose serious health and socio-economic consequences for pregnant people, and in particular poor people, across the country.**[9]**

Some of these fears are compounded by the increasing availability and use of digital surveillance in connection with law enforcement investigations. In states with abortion bans, we have already seen invasive investigations into people seeking abortion care or information about abortion. This may include monitoring of not only call histories, text message, and emails, but also location data, online payment records, Google search histories, and fertility tracking apps. Location data showing abortion clinic visits has long been available. The Massachusetts Attorney General, for example, reached a resolution in 2017 with an advertising agency that used geofencing technology to target advertisements to cellphone users within a certain geographic proximity to an abortion clinic in the state. The ubiquitous nature of personal data on the internet now poses a much more serious risk to individuals trying to obtain abortion care, to their healthcare providers, and to their friends, family members, and helpers.

These implications are just the tip of the iceberg. It remains to be seen how far Republican-controlled state legislatures will go in banning abortion. The recent experience in Kansas, where voters rejected state constitutional restrictions on abortion at the ballot box, may caution elected officials against going too far, as access to abortion remains popular across the political spectrum. At the same time, some federal Republican lawmakers have made clear that their endgame is to enact a federal ban and perhaps ultimately secure constitutional recognition of fetal personhood. *Dobbs* leaves the door open for the recognition of fetal rights at least as coextensive as those of a gestating parent. And, to the extent anti-abortion proponents are successful in any of such efforts, not only would states like Massachusetts no longer be able to protect reproductive rights, but some could further restrict reproductive autonomy by banning certain forms of contraception, artificial reproductive technologies, or embryonic stem cell research, and could begin to use criminal homicide statutes in pregnancy termination, including miscarriage, cases.

Conclusion

Many in the legal profession, including judges, lawyers, legal academics, and most recently the justices of the Supreme Court, have suggested that abortion law would become simpler without federal constitutional protection.**[10]** But that is simply not the case. While it is not possible to know at this writing exactly what lies ahead, it seems clear that abortion regulation will remain with the states until Congress acts—either to codify *Roe* or to enact a federal ban. Unless Congress codifies *Roe*, providers, patients, and many others throughout the country will continue

to face potential criminal, civil, and life-threatening consequences for the provision of essential healthcare. Given the implications of *Dobbs* for other constitutionally protected privacy rights that protect marriage, sexual intimacy, and family formation, it is reasonable to fear a retrenchment of those rights as well.

*This article represents the opinions and legal conclusions of its author(s) and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

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[1] Although medication abortion is safe and widely prescribed by doctors, many patients would prefer medical supervision in managing their abortions and many patients may experience barriers to accessing pills online. See Abigail R.A. Aiken, et al., "Safety and effectiveness of self-managed medication abortion providing using online telemedicine in the United States: a population based study," *The Lancet Regional Health- Americas* (Feb. 17, 2022), available at: https://tinyurl.com/y6d2whxm (noting that 1% of patients who self-managed their own abortion with pills obtained online experienced adverse health outcomes).

[2] See generally Mary Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment*, Yale Univ. Press (2022).

[3] For a comprehensive discussion of the Hyde Amendment and its impact on pregnant people, see Alina Salganicoff, et al., *The Hyde Amendment and Coverage for Abortion Services*, Kaiser Family Foundation (March 5, 2021), https://tinyurl.com/4pv742ym.

[4] See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Gonzalez v. Carhart*, 550 U.S. 124, 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 750 (1986); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 421-25 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622, 625-26 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 56-57 (1976).

[5] Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)). See also Emma Green, "What Texas Abortion Foes Want Next," *The Atlantic* (Sept. 2, 2021), https://tinyurl.com/45eubtyt (asserting that S.B. 8 was crafted out of "frustrat[ion]" with courts that "block[] pro-life laws because they think they violate the Constitution or pose undue burdens").

[6] Compare *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (Stare decisis "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals."); *see also Blackstone's Commentaries on the Laws of England*, 1 Blackstone 69 (respect for precedent "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion.")

[7] *United States v. Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *8-*10 (D. Id. Aug. 24, 2022) (finding that EMTALA preempts Idaho's abortion ban); *Texas v. Becerra*, No. 5:22-cv-185-H, 2022 WL 3639525, at *21-23 (N.D. Tex. Aug. 23, 2022) (reaching opposite conclusion).

[8] See, e.g., Kelsey Butler, *Montana Planned Parenthood Won't Give Abortion Pill to Some Out-of-State Women*, Bloomberg News (July 1, 2022); Caroline Kitchener, *New restrictions from*

major abortion funder could further limit access: The National Abortion Federal has imposed rules that many providers say are burdensome and legal unnecessary, Wash. Post (Aug. 25, 2022).

[9] Caitlin Gerdts, et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, Women's Health Issues 26-1, 57-58 (2016), https://tinyurl.com/56e3pb9d; Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, Am. J. Pub. Health 108, no. 3, at pp. 407-413 (2018), https://tinyurl.com/yeawzmpf.

[10] David S. Cohen, et al., *The New Abortion Battleground*, 123 Columbia Law Rev. at 2 (Aug. 4, 2022 Draft), available at: https://tinyurl.com/2b9ys9yd.

Practice Tips

Love Them or Hate Them, Remote Depositions are Here to Stay

By Chris Henry

Before the COVID-19 pandemic, many attorneys had a strong preference for in-person depositions. Today, as the legal profession (and the world) moves forward, a return to pre-pandemic levels of in-person depositions is unlikely. This is because remote depositions have largely proven to be effective, efficient, and less expensive for clients. In fact, courts across the Commonwealth, which turned to remote proceedings during the pandemic, recognize that ample resources exist to allow counsel to continue remote depositions, and that any issues, such as technical ones, numerous exhibits, and "Zoom fatigue," can be readily overcome. This article discusses the best practices and key considerations for making the most of remote depositions.

Clearly Set Out (And Negotiate If Necessary) Deposition Parameters

When noticing a remote deposition, it is important to cover the basics. Your notice should state that the deposition will be remote, provide the time zone for your start time (as attendees may join from different time zones), and identify any materials to which the deponent should have access that cannot be distributed electronically, such as confidential discovery or other information subject to distribution restrictions.

In addition, in advance of the deposition, consider whether you need to raise and negotiate other specifics with opposing counsel (if not already covered by a separate stipulation or court order, for example, the SJC's Updated Order Regarding Remote Depositions). One key consideration is the location of the deponent and the defending attorney. For instance, you may want to confirm that the deposition will be fully remote, with all attendees participating remotely from separate locations. Otherwise, when the deposition begins, you may be surprised to learn that the deponent and defending attorney are appearing "remotely" while seated next to each other in the same room. Another key consideration concerns the treatment of any exhibits circulated before the deposition. For those, confirm that any packages containing exhibits will be unsealed only on the record and at the questioning attorney's direction.

If you are on the receiving end of a deposition notice and want to present your witness remotely, tell opposing counsel your legitimate reason for proceeding remotely as soon as practicable. Then raise and address any specifics that need to be ironed out in advance such as those discussed above. If a protective order is necessary, after a legitimate reason for a remote deposition is shown, the other side must demonstrate prejudice, which is more challenging in the post-pandemic world.

Preparation Is Key (Of Course), And You Should Practice How You Play

As with all depositions, preparation for remote depositions is key. When preparing a witness, hold remote preparation sessions to develop or increase the witness's comfort with the remote environment. Describe how the remote deposition will take place. For example, note that a remote deposition might be attended by a technician tasked with marking and distributing exhibits (through an exhibit distribution platform or chat feature), as well as more observers than one might ordinarily expect. Those observers can include experts and junior attorneys second chairing or otherwise attending for case purposes.

The witness should also know that, despite best efforts, technical issues arise. Teach your witness that if they arise (for example, a spotty connection leaving the witness undefended), the witness can insist on a break and wait for them to be fixed. The witness should expect the questioning attorney to ask about the witness's location, people in the room, and materials brought to the deposition, and to request confirmation that the witness understands that texts, chats, emails, and the like should not occur while on the record.

You should demonstrate how exhibit distribution will take place and teach the witness that, if a questioning attorney tries to use only screen sharing, they should request the full document. Note that you will make that request if the witness forgets. You should download local copies of exhibits during the deposition, so you and your witness maintain control over and the ability to navigate them. You should also explain that a potential drawback of remote depositions is that witnesses sometimes pay less attention to defending attorneys. However, it is important that the witness be careful and pay attention to your objections even if, on deposition day, you appear as just another small head in a gallery. Finally, the witness should dress appropriately and appear in a suitable location (for example, the witness's or your office) with an acceptable background (real, virtual, or blurred), and know how to turn off the video feed, mute the microphone, and separately contact you during breaks, as needed.

If you are taking the deposition, make sure you plan and practice the logistics. Understand how your video platform works. Ask your vendor for a tutorial, if needed. Ensure attendees have the links they need (for attending and exhibit distribution). Upload or stage potential exhibits no later than the night before the deposition, and confirm they are ready. Use innocuous filenames for exhibits, such as production numbers (not "Smoking Gun.docx"), because they are frequently visible when an exhibit is distributed. Also, even though marking and circulating your own exhibits is generally straightforward, most vendors offer technician assistance. Use that assistance if it will help your questioning flow smoothly (and your client does not mind the added, usually very reasonable, cost). The goal is to eliminate foreseeable points of friction and surprise.

Take And Defend Remote Depositions As You Would In An In-Person Setting

At a remote deposition, a questioning attorney should cover the preliminary issues noted above, such as witness location, people in the room, and admonitions about separate communications, but the deposition should quickly resume the cadence of a typical, in-person deposition. Deposition defense likewise should proceed as it typically would in an in-person setting because you and your witness will have covered the nuances of the remote deposition in thorough preparation.

Conclusion

Remote depositions are here to stay and are an important, effective, and often less expensive tool for attorneys to harness and use to serve their clients' interests.

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Legal Analysis

Party-Funded Amicus Briefs in Massachusetts: A New Frontier or a Dead End?

By Neal Quenzer

Earlier this year, in *H1 Lincoln, Inc. v. South Washington Street, LLC*, 489 Mass. 1 (2022), the Supreme Judicial Court was faced with an interesting question concerning amicus practice: how should the court treat an amicus brief that has been paid for by one of the parties to the appeal? This is a novel question in Massachusetts. The court sent the question to its standing advisory committee on the Rules of Appellate Procedure for consideration. This article examines the backdrop against which this question arises and what the possible answers might mean for Massachusetts amicus practice.

The Court's General Approach Toward Amici

The Supreme Judicial Court has a very liberal amicus practice. The court proactively solicits amicus briefs in most cases it transfers from the Appeals Court for direct and further appellate review, as well as cases that are reserved and reported by the single justices or certified by the Federal courts. These make up the bulk of the court's caseload. When the court solicits amicus briefs, an individual or organization wishing to file a brief need not request leave to do so or state reasons why an amicus brief is desirable, as would otherwise be required.**[1]** Even in cases where the court does not solicit briefs, and amici are required to obtain leave to file and make the requisite showing that an amicus brief is desirable, leave is almost never denied.

The court continues to accommodate amici liberally after it solicits their briefs. Unlike in the Federal courts, amici can file their briefs after – sometimes well after – the parties' briefing is complete, regardless of which side's position an amicus supports.**[2]** Amici are also occasionally permitted to participate in oral argument on a showing of good cause.**[3]** Moreover, as a matter of practice, the court will often accept letters and memoranda from amici in lieu of formal briefs, although this practice is not reflected in the appellate rules.

Restrictions on Amicus Practice

To be sure, the court does not just acquiesce in *everything* that amici want to do. For example, there have been instances where an amicus has sought to file a reply to a brief of another amicus; sought leave to argue in order to respond to something another amicus said in its brief; filed unsolicited post-argument material in response to the court's questions to a party; asked the court to solicit additional amici; and even moved for reconsideration of the court's opinion where no party had done so. The court denied most of these requests, declined to act on others, and reluctantly allowed a few of them.

The court has also remarked in at least three of its opinions on amicus practices it found problematic. First, in *Aspinall v. Philip Morris Co., Inc.*, 442 Mass. 381 (2004), an amicus, the National Association of Manufacturers, disclosed that its brief was paid for by three major tobacco companies that had the same interests as the defendant, Philip Morris, in the legal issues that were before the court. That was not the court's concern. That is part and parcel of modern amicus practice. What bothered the court was that the amicus did not reveal that the law firm that prepared its brief also represented Philip Morris in similar litigation then pending in another

jurisdiction. In other words, the brief was written by attorneys who represented the defendant, although they were not the defendant's counsel of record in the case before the court. The court noted that "[a] full and honest disclosure of the interest of the amici is crucial to the fairness and integrity of the appellate process," and that "[b]riefs of amicus curiae are intended to represent the views of *non*parties." *Id*. at 385 n.8 (emphasis in original). The court nevertheless accepted the brief. The version of Rule 17 then in effect did not expressly require disclosure of an amicus counsel's representation of the supported party in other cases raising similar issues, and the court was careful to say that the amicus counsel therefore "had no basis to know" that the court would require it, and "[f]or that reason, counsel cannot be faulted for not making the disclosure." *Id*. Going forward, however, the court said that "counsel for proposed amici should make disclosure in [such] circumstances." *Id*.

The second case was *Local 1652, International Association of Firefighters v. Town of Framingham*, 442 Mass. 463 (2004), decided just three days after *Aspinall*. There, without fanfare or elaboration, the court, on its own initiative, struck an amicus brief proffered by the Professional Firefighters of Massachusetts because it was written by the same law firm (and one of the same attorneys) who represented the appellee union. The court repeated what it said in *Aspinall*, that "[b]riefs of amici curiae are intended to represent the views of nonparties." *Id*. at 463 n.1.

The third case was *Champa v. Weston Public Schools*, 473 Mass. 86 (2015), concerning public access to certain settlement agreements between a town and parents of special education students in the town's public schools. One of the amicus briefs in the case was from an individual who was a partner in the law firm that represented the town on appeal. Although this attorney did not appear for the town on appeal, she had represented the town in earlier stages of the dispute. She filed the amicus brief on her own behalf. The court said in these circumstances that "her filing a separate brief, purportedly as an amicus, to make further arguments supporting the client's position, was ill-advised." *Id*. at 87 n.2.

One of the court's clear concerns – reflected in all three opinions – is that an amicus ought to be sufficiently independent from the party whose position it supports. The more influence and control a party or its counsel exerts over an amicus, the more likely the amicus brief is nothing more than another brief of the party in disguise.

Requirements of Mass. R. A. P. 17

As part of its 2019 overhaul of the Massachusetts Rules of Appellate Procedure, the Supreme Judicial Court added several new requirements for amicus briefs, including, in new Rule 17(c)(5), that all amici (other than the Commonwealth and its agencies and officers), state in their briefs whether:

> (A) a party or a party's counsel authored the brief in whole or in part;
>
> (B) a party or a party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief, and, if so, identifying each such person or entity; and

(C) the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and, if so, identifying the proceeding or transaction, its relevance to the pending appeal, and the parties involved.**[4]**

The new requirements in (A) and (B) are essentially the same as the disclosure requirements in the cognate Supreme Court rule and Federal rule, whereas (C) goes beyond what is required under those rules. The 2019 Reporter's Notes make clear that the rule as amended does not "require the amicus to disclose mere coordination of arguments or sharing of drafts with a party."**[5]** Rather, the new language is designed to alert the court to those situations where an amicus brief is actually written or paid for by one of the parties or its counsel – or, as in *Aspinall* and *Champa*, where the amicus brief is written by an attorney or firm that represents one of the parties in similar proceedings elsewhere, or represented a party at an earlier stage of the matter.

The Question Raised by *H1 Lincoln*

Having adopted these new disclosure requirements, the court was soon faced with the next logical question: what happens when one of the parties strategically chooses to pay part or all of the cost of an amicus brief, and the amicus candidly discloses, as Rule 17 requires, that its brief was paid for by the party?

In *H1 Lincoln*, one of the amici, National Retail Tenants Association, indicated in its Rule 17(c)(5) declaration that the appellee had "made a monetary contribution intended to fund the preparation or submission of" the organization's brief. Another amicus, Retailers Association of Massachusetts, indicated that a limited liability company "affiliated with" the appellee "made a monetary contribution to fund the preparation and submission of" the amicus's brief. The appellant moved to strike both briefs for those reasons. The amici responded by arguing, among other things, that Rule 17 does not prohibit parties from paying for amicus briefs, it simply requires an amicus to disclose that a party has done so. They also pointed out that the appellee and its counsel did not actually write any part of the amici's briefs, that the briefs represented the independent views of the amici, and that the briefs would provide considerable value to the court in deciding the issues. Interestingly, just as the appellant did not cite any case law in Massachusetts or elsewhere for its proposition that a party's financial contribution toward an amicus brief necessarily disqualifies the brief, the amici cited no case law holding that an amicus brief paid for by a party is permissible.**[6]**

The court did not act on the appellant's motion to strike. Acknowledging that it has not yet ruled on what consequences, if any, follow from a party's funding of an amicus brief, the court stated that it did not need to answer the question because it did not rely on the challenged briefs. Instead, the court sent the question to its standing advisory committee on the Rules of Appellate Procedure for study. The answer to this important question thus awaits an amendment to Rule 17 or some other guidance from the court.

Pros and Cons of Party-Funded Amicus Briefs

Amicus briefs can be enormously helpful for the court, particularly when it decides novel and complex issues of law. That no doubt is one of the main reasons why the court fosters and

embraces a robust amicus practice in the first place.

From this perspective, there is nothing inherently wrong with a party contributing to the cost of an amicus brief. The contribution might persuade an individual or organization with valuable information to participate in the appeal when it would not otherwise do so. The party, the prospective amicus, the court, and our jurisprudence all benefit. Further, as stated, there is nothing in Rule 17 expressly prohibiting this. Indeed, one might argue that the disclosure requirements – coupled with the mandatory corporate disclosure statement, *see* Rule 17(c)(1), and the required statement of the amicus's interest in the case, *see* Rule 17(c)(4) – help to bring into the open what had been occurring *sub silentio* before the disclosure requirements were added, and thereby give the court a clearer picture of the extent of the relationship between an amicus and the parties.

Will the court suddenly be flooded with amicus briefs that are bought and paid for by the parties? Probably not. And if that does happen, and if those briefs are merely transparent attempts to reiterate or supplement the arguments of the parties that they could not fit within the page constraints of their own briefs, there is a simple solution: disregard those briefs. Judges are under no obligation to pore over amicus briefs and respond to every amicus argument; they can quickly size up those that are helpful and those that are not, and choose to disregard the latter.**[7]** Moreover, with respect to briefs they do consider, they are free to give the information and arguments in the brief whatever weight they think is warranted in light of the known fact that the brief has been subsidized by a party.**[8]**

The position against party-funded amicus briefs is at least as compelling. First, although Rule 17 does not expressly prohibit funding and requires only the disclosure of it, the spirit of the rule seems to discourage the practice. The 2019 amendment to Rule 17 was modeled in part after Federal Rule 29 (c)(4), which itself was modeled after Supreme Court Rule 37.6. Those rules were meant to increase the likelihood that amici and their briefs remain sufficiently independent of the parties, and to maintain some semblance of a line between the two.**[9]** Funding, in contrast, tends to have the opposite effect; it suggests (or at least has the appearance of suggesting) some degree of influence and control by one over the other, thus increasing the possibility of less independence.**[10]**

Second, the structure of Rule 17 appears to disfavor funding. Subsection (c)(5)(A) requires disclosure when a party or its counsel authors the amicus brief in whole or in part, and subsection (c)(5)(B) requires disclosure when a party funds the amicus brief in whole or in part. The inclusion of authorship and funding in back-to-back provisions suggests the court meant to treat them similarly. Yet we know from *Local 1625* and *Champa* that the court finds the situation under (c)(5)(A) unacceptable. It was not enough in those cases that the authorship by the party's counsel was known to the court. So, unless (c)(5)(A) was intended to change existing case law – and there is no indication in the Reporter's Notes of that – it seems logical to conclude that party funding, even if known to the court, is likewise unacceptable. At a minimum, if these two practices are to be treated differently, then the rule ought to be changed to reflect that.

Third, can judges really ascribe differing weights to amicus briefs depending on whether or not they have been funded by a party? Suppose there are two briefs, the party's own brief and a brief that it funded or wrote for an amicus who otherwise might not have participated. The court reads the main brief and is not persuaded by the arguments therein but is persuaded by an argument in

the amicus brief. Maybe the amicus has provided case law from other jurisdictions, legislative history analysis, insightful details about an industry's norms and practices, or perhaps just better advocacy. Is the court prepared to say, "that's a winning argument, but we are going to discount it because it is contained in a brief funded by a party"?**[11]** We would like to think that the court would not ignore or discount valuable, maybe critical, information – whether it is factual or legal – but there lies the concern. The court may be well-intentioned if it believes it can control the situation by giving certain amicus briefs a different weight in light of the disclosures, but that may prove too difficult, if not impossible, to do.

Finally, there is a concern that accepting party-funded amicus briefs would create an unfair disparity between litigants who have ample resources to pay for amicus support – whether offered to an amicus to entice participation or demanded by the amicus as its fee to participate – and those with fewer resources.**[12]** Will a well-heeled party effectively be able to buy more pages of appellate argument than the procedural rules allow, while those without the financial resources are resigned to comply with the limitations of the rules?

If the court accepts party-funded amicus briefs, it may wish to consider imposing limits on the practice or, at least, additional disclosure requirements so that it will be fully informed of the extent of the party's involvement. Rule 17(c)(5)(B) currently does not require an amicus to say much. Simply saying that a party has "contributed money . . . to fund the preparation or submission of the brief" is quite nonspecific and unhelpful. It does not seem to be the kind of "full and honest disclosure" envisioned by the court in *Aspinall*. It does not differentiate, for example, between a situation where a party pays a few hundred dollars to cover the amicus's printing costs and a situation where the party pays tens of thousands of dollars for the amicus's attorney fees. Nor does it differentiate between a party who contributes a fraction of the amicus's cost and a party who foots the entire bill.**[13]** Requiring an amicus to disclose exactly what the party paid for, or possibly how much (percentage-wise or dollar amount) was contributed, may help the court gain a better understanding of the support given by the party to the amicus and hence the degree of true independence of the amicus.

Conclusion

When the court amended Rule 17 in 2019, it likely envisioned that the new disclosure requirements would operate in the negative – *i.e.*, by requiring an amicus to make the disclosures, parties and their counsel would be discouraged from writing or funding an amicus brief, and, further, the court would be assured that, when an amicus indicates that none of the three conditions in Rule 17(c)(5)(A)-(C) apply, which would almost always be the case, the proffered brief would be the product of a sufficiently independent amicus and not merely a party's brief in disguise. The court may not have anticipated what would happen when an amicus indicates that one of the conditions does apply. The court now has an opportunity to address that situation.

There appears to be no State or Federal court anywhere that expressly approves of party-funded amicus briefs. That said, the Supreme Judicial Court is more progressive than most when it comes to soliciting and accommodating amici. Will the court's generous attitude toward amicus practice lead it to be the first to openly accept party-funded briefs?

If the court closes the door on party-funded amicus briefs, appellate litigators will know that the

practice is off-limits and can proceed accordingly. If, on the other hand, the court accepts these briefs, with or without further restrictions, appellate litigators will have an opportunity, perhaps a need, to shape their relationships with amici differently. Either way, we welcome the court's much-needed guidance in this important area.

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[1] See Mass. R. A. P. 17(a). In contrast, Supreme Court Rule 37 and Fed. R. A. P. 29 have no similar language about court-solicited amicus briefs. They state that an amicus brief may be filed only if all parties to the appeal consent to the filing or, barring unanimous consent, by leave of court.
[2] Compare Rule 17(b) (amici may file up to twenty-one days before date of oral argument, or later for good cause shown), with Supreme Court Rule 37.3 (at merits stage, amici typically must file within seven days of filing of brief of party whose position they support) and Fed. R. A. P. 29(a)(6) (same).
[3] See Rule 17(e). Before 2019, the rule permitted amici to participate in oral argument "only for extraordinary reasons." The amendment softened that limitation; it was meant "to reflect that an amicus curiae's participation at oral argument may be desirable for a variety of reasons, even if those reasons might not be fairly described as 'extraordinary.'" *See* 2019 Reporter's Notes, par. 8.
[4] Rule 17(c)(5) was amended again in 2022 to improve its consistency and clarity. The language quoted here incorporates the 2022 amendments.
[5] See Stephen M. Shapiro, et al. *Supreme Court Practice*, c. 13.14 at 13-47 (11th ed. 2019); Committee Notes to 2010 amendment to Federal Rule 29. *See generally,* Allison O. Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016).
[6] The appellant in *H1 Lincoln*, the party that moved to strike the amici briefs, was represented by Robert Cordy, a distinguished former Justice of the Supreme Judicial Court. He was on the quorums that decided *Aspinall*, *Local 1652*, and *Champa*. The appellee, the party that funded the amicus briefs, was represented by, among others, John Greaney, also a distinguished former Justice of the court. He authored the opinion in *Aspinall* and was on the quorum in *Local 1652*. This is a sure indication that the law on party-funded amicus briefs is an area where reasonable minds can differ.
[7] This apparently is what occurs in the Supreme Court, where amicus briefs are far more plentiful than in the Supreme Judicial Court. See Stephen M. Shapiro et al., *supra* at 13-51.
[8] Cf. Steven M. Shapiro, et al., *supra* at 13-47 (suggesting that "those counsel intent on continuing such practices should expect the Court to accord their amicus briefs a lesser degree of credibility").
[9] See Committee Notes on the 2010 amendment to the Federal rule. See also Steven M. Shapiro, et al., *supra* at 13-47 (suggesting that Supreme Court Rule 37.6 "reflects the Court's perception that some parties to a case had been silently authoring or financing amicus curiae briefs in support of their positions. [The rule] constitutes the Court's effort to curb such practices by requiring full disclosure of the pertinent facts in the amicus briefs").
[10] See Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency,* 131 Yale L.J. Forum 141 (2021) (advocating for greater disclosure than Supreme

Court rule and Federal rule currently require to better guard against potentially corrosive effect of "dark money" amicus submissions on judicial decision-making).

[11] *See, e.g.*, *Rowley v. Massachusetts Elec. Co.*, 438 Mass. 798, 805 n.12 (2003); *Yeretsky v. City of Attleboro*, 424 Mass. 315, 323 n.17 (1997); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 760 n.15 (1993). Query whether the court would have found the important information and advocacy supplied by the amici in these cases any less significant or reliable if their briefs had been funded by parties.

[12] This concern can arise in two ways. First, by voluntarily offering to fund a prospective amicus's brief, a party with ample resources might be able to persuade an amicus to become involved who otherwise would not be involved. Second, if party-funded amicus briefs are allowed, some prospective amici inevitably will expect to be paid and might decline to participate without a payment. In both scenarios, the party who can pay for the amicus's participation fares better than the party who cannot.

[13] Nor does the current rule distinguish between a situation where a party solicits a prospective amicus's participation and voluntarily offers financial assistance, and a situation where the amicus solicits funding from the party (or even approaches a party with a proposal to file a brief for a fee).

Case Focus

Commonwealth v. Perry: Searching Innocence to Find a Suspect

By Gabrielle Mainiero

Over the past decade, the Supreme Judicial Court ("SJC") has grappled with the evolving contours of constitutional privacy rights in our digital age. As modern technology continues to advance, Fourth Amendment jurisprudence has struggled to keep up. Maintaining constitutional protections against unreasonable government searches and seizures has proved challenging where personal devices like cell phones—which contain a quality and quantity of digital surveillance and personal data beyond what the framers could have ever imagined—are on our person, recording our locations, at virtually all times.

In the Spring of 2022, the SJC decided a novel issue involving cell phone location information in *Commonwealth v. Perry*, 489 Mass. 436 (2022). In an effort to identify an individual suspect, the government sought the data of tens of thousands of cell phone users. While reaffirming that individuals have a reasonable expectation of privacy in their location data, the Court also held that broad searches sweeping thousands of innocent individuals onto the government's radar are not necessarily so general as to be unconstitutional.

Background

In 2018, law enforcement officials investigated a string of armed robberies, one of which resulted in a homicide. Law enforcement believed that the same individual was ultimately responsible. Investigators aimed to narrow in on a suspect by seeking two search warrants for a series of "tower dumps"—voluminous records maintained by cellular network providers which contain the historical cell site location information ("CSLI") for all cell phone users in the vicinity of the crimes during the relevant time periods. While the CSLI records requested only totaled three cumulative hours of data, they contained glimpses into the locations of over 50,000 unique cell phone users for a time period spanning seven separate days over the course of five weeks.

Typically, the government seeks a warrant for the targeted, individualized CSLI data of a known, single suspect. In *Perry*, by contrast, the government sought to obtain the CSLI data of every individual who connected to cell towers near the scenes of the crimes. After cross-referencing the data from each tower dump, police discovered that Jerron Perry's phone number appeared in at least two of the tower dumps. He was eventually indicted in 2019 on a number of charges including one count of first-degree murder and multiple counts of masked armed robbery.

In advance of trial, Perry moved to suppress the evidence derived from the tower dumps as the fruits of an unconstitutional search. He argued that search warrants seeking CSLI data from tower dumps, as opposed to the targeted CSLI data of an individual suspect, are general warrants, and therefore per se unconstitutional. He also argued that the underlying search warrants were not supported by probable cause.

What is CSLI?

When a cell phone is turned on, it registers its location with nearby "cell cites" or "cell towers" every seven seconds. *Commonwealth v. Estabrook*, 472 Mass 852, 858 n.12 (2015). When a cell

phone user sends or receives a phone call or text message, their phone must connect with a nearby cell tower to do so. *Perry* at 438. This connection generates a time-stamped record known as Cell Site Location Information ("CSLI"), which contains the precise location of the cell tower as well as the specific sectors that provided service to the cell phone user. *Id.* at 438-39. With varying degrees of accuracy and specificity, this information can be used to triangulate a user's general location, allowing a cell phone to function much like a GPS tracker. *Id*.

CSLI Jurisprudence

Prior to 2014 in Massachusetts, the government typically obtained CSLI data without a warrant pursuant to 18 U.S.C., § 2703(d) of the Federal Stored Communications Act. To obtain a § 2703(d) warrant, the government must essentially meet a reasonable suspicion standard, providing "specific and articulable facts showing that there are reasonable grounds to believe that the contents . . . are relevant and material to an ongoing criminal investigation." [18 U.S.C., § 2703(d)]. However, as CSLI data became an increasingly powerful tool for law enforcement agencies, privacy experts became concerned about the right to privacy in the whole of one's movements and demanded that the government meet a more stringent standard before accessing this kind of data. As a result, the courts have heard a number of cases concerning the growing threat that cell phone location data poses to individual privacy rights in a society where we rely on cell phones to participate in everyday life. A series of landmark decisions established that cell phone users have a reasonable expectation of privacy in their CSLI data, and therefore, a warrant supported by probable cause must be issued before law enforcement may gain access to six or more hours of such data. *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Commonwealth v. Perry*, 489 Mass. 436 (2022); *Commonwealth v. Estabrook*, 472 Mass 852 (2015); *Commonwealth v. Augustine*, 467 Mass. 230 (2014).

***Perry* Decision**

In *Perry*, the SJC held that the tower dumps intruded upon the defendant's reasonable expectation of privacy, and therefore constituted a search under Article 14 of the Massachusetts Declaration of Rights. Tower dumps, unlike targeted CSLI data, provide the historical location data for all cell phone users connected to specific cell towers—in this case, over 50,000 individuals. Among those tens of thousands of individuals was the defendant—an individual otherwise unknown to investigators.

When the government engages in data collection as a form of long-term surveillance, as it did in *Perry*, its actions must be analyzed in the aggregate. This Fourth Amendment framework, known as the "mosaic theory," acknowledges that discrete acts of surveillance may, in totality, impermissibly intrude upon our constitutionally protected privacy rights.

CSLI data allows for an individual's location to be tracked in constitutionally protected areas such as the home or a place of worship. It allows for the identification of both individual cell phone users and the users with whom they communicate, thereby revealing private associations to the government. The data can then be used in the aggregate to piece together broader patterns of private behaviors and practices. Further, CSLI data provides law enforcement with information that would otherwise be unknowable, as it would be impossible for police to obtain the quantity and quality of information provided by tower dumps using traditional law enforcement techniques. *Perry* at 452.

Moreover, prior to *Perry*, the Commonwealth did not need a probable cause warrant for CSLI data spanning less than six hours. *Commonwealth v. Estabrook*, *supra*. However, the tower dumps in *Perry*, despite producing only three cumulative hours of CSLI data, were not protected by this "safe harbor rule." *Estabrook*, the Court clarified, imagined a rule exempting six *continuous* hours of data collection, and was thus inapplicable where the government obtained data in small increments over a longer period of time.

The SJC disagreed, however, that the search warrants for tower dumps were akin to general warrants, and as such, were *per se* unconstitutional. A search warrant must describe with particularity the places to be searched and items to be seized. Perry argued that while targeted CSLI data for an individual may be constitutionally permissible, warrants for tower dumps—which expose the data of individuals not otherwise suspected of any crime or wrongdoing—necessarily lack the particularity required to pass constitutional muster. In this instance, the warrants allowed the government to comb through the data of over 50,000 innocent individuals for which they did not have probable cause to search—a practice antithetical to basic Fourth Amendment principles.

The SJC was unpersuaded, finding that because the warrants in question authorized the further analysis of only a narrow subset of the CSLI data—those phone numbers appearing in two or more tower dumps—they were sufficiently particular and thus properly limited in scope.

To protect against further privacy intrusions, the SJC announced a prospective rule. In the future, the government must obtain a search warrant from a judge before acquiring a series of tower dumps and, also, that judge must be assured that there exist protocols for the prompt and permanent disposal of any and all data of uninvolved persons at the conclusion of the case. *Perry* at 463-64.

Future Implications

Questions remain as to how this decision will impact law enforcement's continued access to, and use of, ever expanding surveillance technologies.

Consider for instance the government's growing reliance on reverse keyword search warrants—orders permitting companies like Google to comb through their databases containing the search histories of billions of unique individuals in order to identify devices used to search key words or phrases deemed relevant to a criminal investigation. Broad law enforcement requests for information on individuals who searched the address of a crime scene or the name of a victim have been allowed in Colorado, Minnesota, Texas, and Wisconsin. Thomas Brewster, *Government Secretly Orders google to Identify Anyone Who Searched A Sexual Assault victim's Name, Address Or Telephone Number*, Forbes, (October 4, 2021), https://www.forbes.com/sites/thomasbrewster/2021/10/04/google-keyword-warrants-give-us-government-data-on-search-users/ . These warrants, like those in *Perry*, seek to obtain the data of enormous groups of people in order to find a suspect, rather than pursuing the targeted data of an already identified individual.

Importantly, the privacy implications at issue extend to conduct beyond that which is criminalized. Consider the ways in which broad keyword warrants may be used to implicate

anyone seeking information about an abortion—rather than just those individuals accessing or providing services in states where abortion is criminalized. Consider further a routine investigation into a hate crime or the illegal purchase of a firearm. Rather than identifying a suspect, and obtaining a warrant for that individual's internet search history, law enforcement officers may be permitted to obtain information on *any* individual who searched terms like "mosque near me" or "where can I buy a gun?" These digital dragnet searches threaten to sweep increasingly large numbers of innocent individuals into the purview of criminal investigations based upon non-criminal—if not entirely innocuous—internet searches.

Conclusion

While the *Perry* decision advanced privacy rights by strengthening certain protections around our digital data, it leaves open the question of just how far the government can go in searching the private data of innocent individuals in the hopes of developing a suspect. Without a doubt, the Court will continue to face challenges to the government's ever-expanding use of surveillance technologies and the growing threat of general warrants resurfacing in our modern digital age.

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Legal Analysis

Supreme Court Muddies the Waters Around the Government Speech Doctrine in Boston Flag Case

By Austin Anderson

In its May 2, 2022 opinion in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), the Supreme Court held that the City of Boston violated the First Amendment by refusing to allow a religious organization to raise a religious flag in City Hall Plaza. Boston runs a program under which it allows organizations to apply for a permit to raise a flag of their choosing on a city-owned flagpole in front of City Hall. Camp Constitution, a religious organization, applied for a permit to raise its "Christian Flag," which featured a cross. Boston denied the application, citing a concern that allowing this flag-raising would constitute government endorsement of religion and violate the Establishment Clause. Camp Constitution sued, claiming that Boston's refusal to grant the permit violated Free Speech principles, among other grounds. The district court and the First Circuit ruled for Boston, but a unanimous Supreme Court reversed, finding that Boston violated Camp Constitution's Free Speech rights.

The constitutionality of Boston's decision to deny a permit to Camp Constitution turned on whether its flag-raising program constituted government speech or instead created a public forum for private expression. When the government speaks for itself, Free Speech protections do not apply—the government is allowed to communicate one message and not another. This has become known as the "government speech doctrine." But the government violates the Free Speech clause if it selectively prohibits *private* speech based on the message it conveys.

The application of the government speech doctrine becomes challenging when the government invites the public to participate in a program involving expressive conduct. The Supreme Court acknowledged in *Shurtleff* that it is difficult to distinguish between activities that involve public engagement but communicate the government's own message, and a situation where the government provides a "forum for the expression of private speakers' views." To draw that line, the Supreme Court generally considers three factors: the history of the expression at issue; the public's likely perception of the identity of the speaker; and the extent to which the government has actively shaped or controlled the message. *Shurtleff* recognized that the analysis is "driven by a case's context."

In *Shurtleff*, the Supreme Court found that the history of flag flying in Boston, particularly at the seat of government, weighed in favor of finding that the program was government speech. Public perception also favored a finding of government speech, as a passersby would likely assume the flags on City Hall Plaza conveyed the government's message. Only the third factor, the extent to which Boston shaped or controlled the message, weighed in favor of finding that Boston had created a forum for private speakers, but this factor was found to be determinative. The Supreme Court focused on the facts that Boston stated that it wished to "accommodate all applicants" and that the application process for a flag-raising permit did not involve a review of the proposed flag's design. Boston's practice was instead "to approve flag raisings, without exception." This lack of control precluded a finding that the flag raisings conveyed government speech. Because the program created a public forum, Boston could not discriminate among applicants based on viewpoint. Thus, assuming it continues the program, Boston must allow the flying of flags that it deems to be offensive or inappropriate. As Justice Kagan suggested during oral argument, Boston could not prevent the raising of a flag promoting Nazism or the Ku Klux

Klan.

Although the Supreme Court reversed the First Circuit's decision—which reached the opposite conclusion after applying the same test to the same facts—it did not explain where the lower court's analysis went wrong. The fact that the two courts reached opposite conclusions illustrates the challenge of applying the government speech factors to a given fact pattern, and the lack of explanation of how the First Circuit misapplied the test makes the outcome of future cases more difficult to predict.

It is also difficult to reconcile *Shurtleff* with the Court's previous government speech cases. For instance, in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the Supreme Court upheld Texas's refusal to issue a proposed specialty license plate with a confederate battle flag, relying on the government speech doctrine. The *Shurtleff* Court distinguished *Walker* on the issue of government control because Texas had rejected "at least a dozen" license plate designs—even though it approved commercial designs that did not reflect the government's message and even approved conflicting messages (including both pro-choice and pro-life designs).

The *Shurtleff* Court's emphasis on government control is also difficult to square with *Matal v. Tam*, 137 S. Ct. 1744 (2017). There, the Supreme Court struck down a law allowing the Patent and Trademark Office (PTO) to reject disparaging trademarks, holding that the PTO's review and registration did not convert the marks into government speech. The level of government control in *Tam* was similar to that in *Walker*: the PTO had rejected proposed trademarks following review. But the Supreme Court found the first two factors—history of the expression and public perception—precluded a finding of government speech. In *Shurtleff*, the reverse was true: although the first two factors pointed toward government speech, Boston's lack of control over the message was enough to find that the speech was not government speech.

Shurtleff threatens to further complicate the already difficult task of drawing the line between government speech and a forum for private expression. *Shurtleff* suggests that government control over the message is critical, but *Tam* suggests it is not determinative. Under *Walker*, it is unnecessary to show that the messages conveyed by the program are consistent or endorsed by the government, and the government may encourage speech by a number of private participants, as long as the government exercises some editorial control. But it is reasonable to question *Walker*'s continued vitality in light of *Shurtleff*. Indeed, Justice Alito suggests in his *Shurtleff* concurrence that *Walker* may be an outlier and of little precedential value. One factor that might distinguish *Shurtleff* from *Walker* is that, in *Walker*, the government took ownership of the license plate designs, whereas in *Shurtleff* and *Tam*, the government did not own the flag design or trademark. Government ownership of the expression was previously only discussed by the Supreme Court in the context of the public perception prong of the analysis. But *Shurtleff* mentions ownership in its discussion of government control, signaling that, going forward, government ownership of the message might be relevant to the control factor.

The difficulty in seeing how *Shurtleff* is consistent with the government speech doctrine suggests that this area of the law is evolving. Indeed, three justices, in a concurrence, explicitly endorsed adopting a new approach to the doctrine. In light of the lack of clarity, states and municipalities should anticipate future modifications to the doctrine, which are almost certainly on the horizon.

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Case Focus

Cavanagh v. Cavanagh: A Whole New World for Calculating Alimony and Child Support in Massachusetts

By Jessica Dubin

In *Cavanagh v. Cavanagh*, 490 Mass. 398 (2022) ("*Cavanagh*"), the Supreme Judicial Court ("SJC") issued one of its lengthiest family law decisions to date, and introduced a new method judges must apply when calculating alimony and child support. In so ruling, the Court provided guidance about what types of income must be included and excluded in child support calculations. Considered a radical decision by many within the family law bar, the SJC held, *inter alia*, that it was an abuse of discretion for a trial judge to calculate child support first so as to deny alimony based on the trial judge's understanding that, under G.L. c. 208, § 53(c)(2), the same income relied on to calculate child support cannot be used also to calculate alimony.**[1]**

New Method for Calculating Alimony and Child Support

Prior to *Cavanagh*, many family law judges and practitioners believed that child support should be calculated before alimony, and alimony was to be awarded only if there was *excess* income not used in the child support calculation. The *Cavanagh* Court rejected that approach, and held that "[w]here, as here, a judge chooses to calculate the child support and then denies alimony on the basis that § 53(c)(2) prevents the use of the payor's income to calculate alimony, the judge has abused her discretion because she has failed to do the fact-specific analysis of the family's circumstances required by § 53(a)." *Id*. at 409. The SJC then introduced a new three-step method that must be followed in cases in which both alimony and child support are involved. The method is as follows:

> (1) Calculate alimony first, in light of the statutory factors enumerated in § 53(a) and the principle that, with the exception of reimbursement alimony, the amount of alimony should be determined with reference to the recipient spouse's need for support to allow the spouse to maintain the lifestyle enjoyed prior to the termination of the parties' marriage. Then calculate child support using the parties' postalimony incomes.
>
> (2) Calculate child support first. Then calculate alimony, considering, to the extent possible, the statutory factors enumerated in § 53(a). We acknowledge that in the overwhelming majority of cases, the calculation of child support first will preclude any alimony being calculated in this step.
>
> (3) Compare the base award and tax consequences of the order that would result from the calculations in step (1) with those of the order that would result from the calculations in step (2), above. The judge should then fashion an order which would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in G. L. c. 208, § 53(a), and the public policy that children be supported as completely as possible by their parents' resources, G. L. c. 208, § 28, and then fashion the order such that it reflects, or alternatively is responsive to, those considerations. Where the judge chooses to issue an order pursuant to the calculations in step (2) or otherwise that does not include any award of alimony, the judge must articulate why such an order is warranted in light of the statutory factors set forth in § 53(a).**[2]**

Id. at 410-11 (internal citations omitted).

The SJC did not provide any guidance regarding how judges are to determine which order will be "the most equitable" under this new method. Moreover, Step 3 of the new method suggests that litigants will need to retain tax experts to calculate and then present to the court the tax consequences of the different potential alimony and child support orders, and the parties' expected net after-tax incomes under both scenarios. Further, as a matter of public policy, if the parties cannot afford or otherwise fail to hire the appropriate tax experts, support awards calculated using the first test may be so high that they disincentivize payors' continued employment.

Types of Income to be Included in Child Support Calculations

The *Cavanagh* Court considered the following different types of income, and determined whether they should be included in calculating child support:

- In-kind income: Referencing the Child Support Guidelines ("CSG"), the SJC noted that "perquisites or in-kind compensation" should be included "to the extent they represent a regular source of income." Applying this rule to the case on appeal, the SJC held that the trial judge properly excluded in-kind income from wilderness medicine adventure trips from the father's income because it did not constitute a regular source of income to the father.

- Interest and dividends: Again referencing the CSG, the SJC explained that interest and dividends are to be included within income without qualification; that is, regardless of whether they are a regular source of income. Accordingly, the trial judge erred by excluding income from the father's savings and 401k plan to the extent such income included interest and dividends.

- Capital gains: Noting that the CSG state that capital gains need only be treated as a regular source of income where they relate to "real and personal property transactions," the SJC clarified that they should otherwise be included in income even when not regular. The trial judge therefore erred by excluding capital gains on the father's savings and 401k plan to the extent they included capital gains on transactions other than those related to real and personal property.

- Income from second job: Insofar as the parties' separation agreement provided that income from the father's second job "shall not be utilized to calculate any future support obligations, whether child support or alimony," the SJC held that this provision was void because "[p]arents may not bargain away the rights of their children to support." *Id.* at 422 (internal citation omitted). It remained within the trial judge's discretion to consider this income when calculating child support.

- Employer contributions to retirement accounts: In an issue of first impression in the Commonwealth, the SJC held that employer contributions to retirement accounts constitute income for purposes of calculating child support. The SJC found persuasive the reasoning of a Pennsylvania court, which held, "if we were to determine that an employer's matching contributions are not income, it would be possible for an employee to enter into an agreement with his employer to take less wages in exchange for a heightened matching contribution.

This would effectively permit an employee to shield his income in an effort to reduce his child support obligation." *Id*. at 424 (internal citation omitted). The trial judge, therefore**,** did not abuse her discretion in including these contributions in the father's income. Notably, the SJC did not explain how it is equitable to order a payor to pay support in present dollars on income that the payor cannot access without penalty until the payor reaches retirement age.

- Employer contributions to health savings accounts: The SJC held that because employer contributions to health savings accounts ("HSAs") are considered part of an employee's compensation package, they properly constitute income for purposes of calculating child support. Again, the trial judge did not abuse her discretion in including these contributions in the father's income.

In a recent decision, the Appeals Court has already relied on the *Cavanagh* decision for the proposition that "principles restricting consideration of income derived from assets received in divorce for purposes of alimony have 'no bearing' on consideration of such income for purposes of child support." *Duval v. Duval*, 101 Mass. App. Ct. 752, 763 (2022) (holding that on remand the trial court was free to consider husband's dividend income from his business interest in connection with the support of the children).

Conclusion

It remains to be seen how closely trial judges and the family law bar will hew to the new *Cavanagh* methodology for calculating alimony and child support. More guidance from the SJC and the Appeals Court will be needed as to how to determine which approach to support is "most equitable," and how to deal with the tax consequences of different awards. Until such guidance is received, the family law bar will have to do its best to grapple with this sweeping new development in the law.

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[1] The SJC's decision, addressing a modification judgment involving alimony, child support, legal fees and a determination on where a child would attend school, additionally weighed in on other topics of importance to family law practitioners. Although beyond the scope of this article, the *Cavanagh* Court specifically: (i) cautioned parties to include in the record appendix the judgment of divorce that incorporated a separation agreement; (ii) interpreted what it found to be an ambiguous provision in the parties' separation agreement regarding payment of a child's preparatory school costs; (iii) held that parties may not agree that a child is emancipated under conditions broader than those provided for by G. L. c. 208, § 28 so parties' emancipation language in separation agreements does not control; (iv) held that a child who was attending West Point is principally dependent on the U.S. military, and not on either parent and is, therefore, emancipated; (v) held that the trial judge made her reduction in child support retroactive to the wrong date; (vi) emphasized that judges must adhere to the issues defined in pretrial orders unless justice requires that they be altered; and (vii) held that, where an action involves a separation agreement made by the parties, it falls within the contract exception to the testimonial rule of spousal disqualification, thus permitting the parties to testify about private marital communications concerning the relevant portion**s** of their separation agreement.

[2] The SJC issued a revised version of its opinion on September 9, 2022 and changed the language of this third step to clarify that a trial judge is not required to choose either the orders from prong 1 or prong 2 of the test and can, instead, fashion different orders.

Legal Analysis

The Massachusetts Trade Secrets Act, Four Years On – What to know

By Dawn Mertineit & Kate Perrelli

Just over four years ago, the Massachusetts legislature finally passed a bill long in the works addressing non-compete agreements and replacing the Commonwealth's trade secret misappropriation statute with a version of the Uniform Trade Secrets Act (the "UTSA"), referred to herein as "MUTSA." *See* M. G. L. c. 93, § 42-42G. While the Commonwealth's "new" non-compete law has received the most attention, the adoption of the UTSA was also notable. Even though Massachusetts is the 49th state to adopt the UTSA, MUTSA differs from other states' versions of the UTSA. This piece will discuss the differences in pre- and post-MUTSA jurisprudence and what issues may be implicated by the law.

Comparing the Text of MUTSA to its Predecessor

Prior to MUTSA's enactment, parties alleging trade secret misappropriation relied on both common law and statutory law. Oddly enough, the pre-MUTSA statute never specifically defined "misappropriation." Instead, the statute provided that anyone who "embezzles, steals or unlawfully takes, carries away, conceals, or copies, or by fraud or by deception obtains" a trade secret "with intent to convert to his own use," regardless of the value of the trade secret, is liable for the resulting damages. In contrast, MUTSA provides a specific (albeit lengthy) definition of "misappropriation":

> (i) an act of acquisition of a trade secret of another by a person who knows or who has reason to know that the trade secret was acquired by improper means; or
> (ii) an act of disclosure or of use of a trade secret of another without that person's express or implied consent by a person who
>
> (A) used improper means to acquire knowledge of the trade secret or
> (B) at the time of the actor's disclosure or use, knew or had reason to know that the actor's knowledge of the trade secret was
>
> (I) derived from or through a person who had utilized improper means to acquire it;
> (II) acquired under circumstances giving rise to a duty to limit its acquisition, disclosure, or use; or
> (III) derived from or through a person who owed a duty to the person seeking relief to limit its acquisition, disclosure, or use; or
>
> (C) before a material change of the actor's position, knew or had reason to know that it was a trade secret and that the actor's knowledge of it had been acquired by accident, mistake, or through another person's act described in clause (A) of paragraph (ii) or subclauses (I) or (II) of clause (B) of said paragraph (ii) of the definition of Misappropriation.

Similarly, the definition of a "trade secret" in the pre-MUTSA statute merely refers to another statute, M. G. L. c. 266, § 30, which defines a trade secret as "anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement." MUTSA, meanwhile, defines "trade secrets" as:

> specified or specifiable information, whether or not fixed in tangible form or embodied in any tangible thing, including but not limited to a formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data that
>
> > (i) at the time of the alleged misappropriation, provided economic advantage, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who might obtain economic advantage from its acquisition, disclosure or use; and
> > (ii) at the time of the alleged misappropriation was the subject of efforts that were reasonable under the circumstances, which may include reasonable notice, to protect against it being acquired, disclosed or used without the consent of the person properly asserting rights therein or such person's predecessor in interest.

One significant change that the statute makes compared to pre-MUTSA jurisprudence is the ability to obtain an injunction for "actual *or threatened* misappropriation" (emphasis added). MUTSA's predecessor only permitted "an aggrieved person" to seek an injunction, leaving out any mention of prohibiting threatened misappropriation. Additionally, MUTSA provides that even after the trade secret has ceased to exist, the injunction may be continued for an "additional reasonable period of time" to "eliminate any economic advantage that otherwise would be derived from misappropriation." The pre-MUTSA statute contained no such language. Perhaps most notably, the older statute did not require a plaintiff to identify trade secrets with particularity prior to engaging in discovery, whereas MUTSA includes such an affirmative duty, described in more detail below.

Another change that MUTSA precipitated is the specification of recoverable damages for misappropriation. The pre-MUTSA statute provided for recovery of damages resulting from misappropriation without specificity as to how those damages would be calculated and permitted a court to double the amount of damages in its discretion. MUTSA is a bit more specific (and closely tracks the UTSA): the new statute permits recovery of damages in the form of the "actual loss caused by misappropriation" as well as the unjust enrichment caused that is not accounted for in computing the actual loss. As an alternative, MUTSA allows for damages in the form of a "reasonable royalty" for the misappropriator's unlawful use or disclosure of the trade secret, which is not explicitly identified as a measure of damages in the pre-MUTSA statute (although a handful of pre-MUTSA cases in Massachusetts have indicated a willingness to use the reasonable royalty damages framework). MUTSA also allows for exemplary damages in an amount up to twice the award allowed for actual loss plus unjust enrichment or reasonable royalty, whichever applies.

Comparing MUTSA to the UTSA

Ironically, despite the goal of uniformity (not to mention the name itself), the various states including Massachusetts that have implemented a version of the UTSA have not done so uniformly. A few notable differences include:

Unlike the UTSA, MUTSA requires that a trade secret be "specified or specifiable" information and includes in the definition of a trade secret the following categories of information: "business strategy, customer list, invention or scientific, technical, financial or customer data,"

provided such information satisfies the remainder of the definition of a trade secret. The remaining definition requires that a trade secret provide economic advantage at the time of misappropriation and be subject to reasonable measures to protect its secrecy.

MUTSA also provides that in considering an injunction to prevent actual or threatened misappropriation, the court should consider "prior conduct and the circumstances of potential use," a clause that is absent from the UTSA. In addition to the circumstances in which the UTSA provides for attorneys' fees, MUTSA adds two scenarios in which fees will be granted: where a claim of misappropriation is *defended* (not just prosecuted) in bad faith and where a motion to *enter* (not just terminate) an injunction is made in bad faith.**[1]** MUTSA also adds that in considering whether to award attorneys' fees under these circumstances or where it can be proven that the misappropriation was willful and malicious, a court may "take into account the claimant's specification of trade secrets and the proof that the alleged trade secrets were misappropriated."

The duty to identify trade secrets is highlighted elsewhere in MUTSA. It provides that "a party shall state with reasonable particularity the circumstances [of misappropriation], including the nature of the trade secret and the basis for its protection." The statute goes on to require that before commencing discovery, the party claiming misappropriation "shall identify the trade secret with sufficient particularity" to permit a court to "determine the appropriate parameters of discovery and to reasonably enable other parties to prepare their defense." This requirement is noticeably absent from the UTSA (and as noted above, the pre-MUTSA statute in Massachusetts), and appears to be borrowed from a California statute that similarly requires identification of trade secrets with "reasonable particularity" before discovery can commence in a misappropriation action under its own version of the UTSA.

Finally, it bears noting that the few courts that have addressed MUTSA preemption have interpreted that issue narrowly. Unlike many other states, Massachusetts courts have determined that while MUTSA preempts other remedies (including via common law) for causes of action addressing misappropriation of trade secrets, it does *not* preempt causes of action for theft or misuse of confidential information that does not rise to the level of a trade secret.

Have Things Actually Changed?

Despite MUTSA being on the books for four years now, the question remains: has anything really changed? MUTSA only applies to misappropriation that *commenced* on or after October 1, 2018 and does not include misappropriation that commenced earlier, even if it continued after October 1, 2018. There have been relatively few cases decided under MUTSA in the four years since its effective date. A review of those cases reveals that at least some judges continue to rely on case law under the previous framework.

For example, a 2021 case, *Sensitech Inc. v. LimeStone FZE***[2]**, considered a trade secret misappropriation claim under both the Defend Trade Secrets Act (the "DTSA") and MUTSA, given that the alleged misappropriation had commenced after MUTSA's effective date. In so doing, the Court relied on pre-MUTSA (and pre-DTSA) law in the Commonwealth, citing to the 2011 case *Optos, Inc. v. Topcon Medical Sys., Inc.***[3]**, for the elements of misappropriation, which itself quoted a case that is over 50 years old — *J.T. Healy & Son., Inc. v. James A. Murphy & Son, Inc.***[4]** Notably, when the United States District Court reconsidered the *Sensitech* decision earlier this year**[5]**, the Court again cited to *Optos* and *J.T. Healy*. Many other recent cases addressing

misappropriation claims under MUTSA have also relied heavily on pre-MUTSA jurisprudence, including in considering the specificity with which a party must identify its trade secrets, whether a party has alleged that it took appropriate measures to protect the alleged trade secret, and more. This indicates that courts will likely continue to rely at least partially on pre-MUTSA law, even in cases analyzing misappropriation that occurred after 2018.

In our view, the biggest change for misappropriation claims is the requirement that the party asserting the claim identify with "sufficient particularity" the trade secrets at issue before discovery, which was not required under the prior Massachusetts statutory law.**[6]** This change shifts Massachusetts closer to the California model, as noted above. It also arguably adds a new burden for plaintiffs asserting a misappropriation claim and highlights the tension between protecting one's trade secrets from disclosure and vindicating one's rights following theft of those secrets.

It also implicates the challenge of describing trade secrets when there may be somewhat of a knowledge vacuum at the beginning of a case. For example, a company may discover that a former employee downloaded tens of thousands of files shortly before leaving for a competitor. The company will, obviously, wish to move quickly to enjoin the use or further disclosure of such files. But it may require the company quite some time to review all of the downloaded files to determine which are truly trade secrets and describe them for purposes of MUTSA's particularity requirement. A company may have other circumstantial evidence that the former employee absconded with trade secrets — for example, through suspicious evidence of deletion of metadata on computers or other devices or other destruction of evidence — without knowing specifically what the employee took. Most likely, the company could still seek an injunction based on the mere fact of destruction or downloading and highlight a few key documents in the hopes that it will convince a judge. However, it cannot move forward with discovery without meeting the statutory threshold for identification. Such failure may be significant if a judge is on the fence about granting an injunction. In these circumstances, having conducted a trade secrets audit in advance of litigation, or at least having put some work into cataloguing and organizing a company's trade secrets prior to litigation ensuing, will likely make it far easier for a plaintiff to comply with MUTSA's identification requirement.**[7]**

Cases interpreting Massachusetts's new rule regarding pre-discovery identification of trade secrets are few and far between. In *Mirakl, Inc. v. VTEX Commerce Cloud Solutions LLC*,**[8]** while the Court required the parties to engage in discovery that did not implicate plaintiff's misappropriation claim, it also required the plaintiff to submit a list of trade secrets that it had alleged the defendants misappropriated (pursuant to a protective order) prior to conducting discovery on that claim. While a few other cases have touched upon MUTSA's requirement to identify trade secrets with particularly, none other than *Mirakl* have addressed the need to do so prior to discovery commencing. Thus, at present, the Massachusetts bar is in need of guidance regarding what will be deemed "sufficient particularity" justifying the onset of discovery under MUTSA.

Conclusion

Given the relative dearth of case law interpreting MUTSA, plaintiffs asserting misappropriation claims (and parties defending against them) are left to rely largely on pre-MUTSA authorities, which judges continue to rely upon as well. However, practitioners should be

mindful of the differences contained in MUTSA, including, most notably, the requirement for plaintiffs to identify with sufficient particularity the trade secrets alleged to have been misappropriated. As for what will be deemed to be sufficient particularity, time will tell.

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[1] MUTSA also specifically excludes from the definition of "improper means" reverse engineering from properly accessed materials or information, unlike the UTSA.
[2] 548 F. Supp.3d 244 (D. Mass. 2021).
[3] 777 F. Supp.2d 217 (D. Mass. 2011).
[4] 357 Mass. 728 (1970).
[5] Sensitech, Inc. v. LimeStone FZE, 2022 WL 227132 (D. Mass. Jan. 26, 2022).
[6] Based on our experience, certain judges may have required sufficient particularity of the claim for plaintiffs whose claims were on shaky ground.
[7] In addition to the benefit should litigation ensue, such legwork can help an employer in other ways, including determining who has access to sensitive company intellectual property and identifying gaps in protective measures that, when remedied, may prevent misappropriation to begin with.
[8] 544 F. Supp.3d 146 (D. Mass. June 9, 2021).

Point/Counterpoint

Peremptory Challenge Should be Reserved for the Defendant

By Rosemary Scapicchio

Numerous voices have been raised recently regarding eliminating or limiting peremptory challenges in the face of their discriminatory use. I argue that peremptory challenges should be abolished in criminal cases for the prosecution and preserved for the defendant to ameliorate the implicit bias that permeates the criminal justice system.

Current Law Governing Discriminatory Peremptory Challenges

The use of peremptory challenges to exclude prospective jurors solely because of bias presumed to derive from their membership in a discrete protected class is prohibited by both Art. 12 of the Massachusetts Declaration of Rights, *see* *Commonwealth v. Soares*, 377 Mass. 461 (1979), and the Equal Protection Clause of the Fourteenth Amendment, *see* *Batson v. Kentucky*, 476 U.S. 79 (1986). Both the federal and Massachusetts Constitutions prohibit a party from exercising a peremptory challenge based on race. *See* *Commonwealth v. Jones*, 477 Mass 307 (2017) .

"[O]nce a party contesting a peremptory challenge rebuts the ordinary presumption that the challenge was properly used by making a showing of an improper basis for the challenge, the challenging party must provide, if possible, a neutral explanation establishing that the challenge is unrelated to the prospective juror's group affiliation." *Commonwealth v. Harris*, 406 Mass. 461, 464 (1991). The burden of making a prima facie showing "ought not be a terribly weighty one." *Commonwealth v. Jones*, 477 Mass. 307, 321 (2017). It is merely a "burden of production, not persuasion." *Id., quoting*, *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014). "Judges [should] think long and hard before they decide to require no explanation…for [a] challenge." *Id., quoting*, *Commonwealth v. Issa*, 466 Mass. at 11 n.14 (2013). In *Commonwealth v. Carter*, 488 Mass. 91 (2021), Justice Lowy advocated for the elimination of the first step of the *Batson* challenge to protect against unconstitutional peremptory strikes by prosecutors based on sexual orientation.

Factors for courts to consider when determining whether to require a group-neutral reason for a challenge "begin[] with the number and percentage of group members who have been excluded," which, under certain circumstances, is sufficient to make the requisite prima facie showing. *Jones*, 477 Mass. at 322. Other factors include: the possibility of an objective group-neutral reason for the strike or strikes; any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck; differences among various members of the allegedly targeted group who were struck; whether those excluded are members of the same protected group as the defendant or the victim; and the composition of the jurors already seated. *Id.*

Despite all the overturned cases resting upon improper *Batson* and *Soares* challenges, there is little question that prosecutors continue to strike disproportionate numbers of prospective Black and brown jurors from serving on criminal trials. *See* W. DeCamp and E. DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 Journal of Research in Crime and Delinquency Issue I (February 2020); *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, 4 Equal Justice Initiative (2010). Equating a defendant's due process right that his or her jury be bias-free and impartial with the government's interest in the prosecution of

crime ignores the racial bias that is evident in jury selection, and unfairly tips the scale of justice in favor the Commonwealth. With courts having acknowledged how implicit bias infects and interferes with a defendant's right to a fair trial, including the Supreme Judicial Court in a letter to the judiciary and bar on June 3, 2020, it is time to address the legally sanctioned "whitening of the jury," once and for all. *Commonwealth v. Long*, 485 Mass. 711 (2020).

Due Process: The Power of the Government v. The Rights of a Defendant

As an initial matter, the idea that the government is entitled to peremptory challenges is not supported by our Constitution. *See* Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 Geo J. Legal Ethics 1163 (Fall 2014) (hereinafter "Smith"). The Bill of Rights was enacted to invest individual citizens with rights to temper the power of the government. Because the power of the state is plenary, individual citizens needed the means to protect themselves from government overreaching. That protection was given life in the form of the Bill of Rights. Extending individual rights reserved for the people to the very state whose power is thereby intended to be checked unfairly empowers the government and stands the core aspirations of the Constitution on their head.

The history of peremptory challenges illustrates the point. From 1305 to the 1800's, peremptory challenges were permitted exclusively to defendants under both English and American law. *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099 (Summer 1994). By 1800, all thirteen of the original states reserved peremptory challenges for defendants alone. *See* Smith, *supra*. In Virginia, prosecutor peremptory challenges were not allowed until 1919. *Id.* The purpose of reserving peremptory challenges to defendants was not to slant a jury to acquit the defendant, but rather to protect a defendant's right to be tried by a jury that was fair and impartial. *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. Cal. L. Rev. 1019 (May 1987).

The government plainly has no due process right to be tried by a fair and impartial jury. Prosecutors do not need to be protected from the power of the government, because they are the government. There is no need for the government to be protected from an "arbitrary and oppressive government" equal to the need of a defendant to be protected against the government. *See* Smith, *supra*. Giving the government both the power over a defendant and the right to peremptory challenges does not level the playing field; it tilts the playing field in favor the government and denies a defendant his rights to due process and a fair trial.

The Imbalance in Power Has Resulted in the Government Exercising Race-Based Challenges that Violate a Defendant's Right to Due Process and a Fair Trial

When the government has both the power and the right to exercise peremptory challenges, it does so in a way that is unfairly adverse to a defendant. There are counties where prosecutors have excluded nearly 80% of African Americans qualified for jury service. *See* Smith, *supra*. Because prosecutors continue to strike disproportionate numbers of prospective African-American jurors from service on criminal trials, Black and brown defendants continue to be tried by all-white or majority-white juries in the 21st century. *See Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

In *Flowers v. Mississippi*, 588 U.S. __, 139 S. Ct. 2228 (2019), the Supreme Court acknowledged that Batson recognized the need to protect defendants from the power of the government. The *Flowers* Court also acknowledged that the central goal of the Fourteenth Amendment was to end racial discrimination by governmental actors. *Id*. *Batson* and *Soares* challenges, however, have failed to protect defendants from implicit racial bias on the part of the government. Justice Marshall recognized the flaws in *Batson* and noted that the decision's greatest defect is its assumption that the courts are capable of detecting race-based challenges to Afro-American jurors. *See* Smith, *supra*. By assuming good faith on the part of all involved, *Baston*'s mandate requires the parties to confront and overcome their own racism. *Batson*, 476 U.S at 102 (Marshall concurring). If the courts themselves are tainted with implicit bias, a trial judge's ability to recognize such bias in a prosecutor's exercise of a peremptory challenge appears questionable at best. By courts failing to recognize and correct race-based challenges by prosecutors, "whitened" juries are stripped of minority representation, do not represent a fair cross-section of the community, and fail the test of fairness and impartiality commanded by our Constitution.

The Elimination of All Peremptory Challenges Infringes on a Defendant's Right to Due Process and a Fair Trial

Eliminating all peremptory challenges for both the government and the defendant is not the answer. Depriving defendants of peremptory challenges will leave the criminally accused at the mercy of the vast power of the government. In general, defense peremptory challenges do not tend to be exercised against Black and brown venire-persons. *See* Smith, *supra*. On this basis alone, preserving the peremptory for defendants while denying it to prosecutors should lessen the incidence of racial discrimination in jury selection.

The Elimination of Prosecutor Peremptory Challenges Promotes Bias-Free Jury Selection

The one-way elimination of peremptory challenges for the government will restore the defendant's right to a fair and impartial jury. It is well documented that prosecutors use peremptory challenges to strike prospective jurors who are African American. And it is beyond peradventure that race matters in jury selection. Verdicts rendered by diverse juries are more thoughtful and reliable than those of overwhelmingly white juries. *See* Smith, *supra*. A disproportionate number of Black and brown defendants are tried by non-diverse juries. *See* Samuel R. Sommers, *Race & the Decision Making of Juries*, 12 Legal & Criminological Psychol. 171, 181 (2007). The racism thus embedded in the criminal justice system plays a significant role in jury empanelment.

In Massachusetts, for example, prosecutors are allowed to run the criminal history records of prospective jurors, over the defendant's objection, and then seek to challenge a juror for cause based on his or her criminal record. If the "cause challenge" is denied, a prosecutor is then permitted to exercise a preemptory challenge to that juror. See *Commonwealth v. Grier*, 490 Mass. 455 (2022). Because Massachusetts courts have recognized the over-criminalization of Black and brown citizens and acknowledged that Black and brown citizens are more likely to be detained and arrested than white ones, *see Commonwealth v. Long*, 485 Mass. 711 (2020), allowing the Commonwealth to run juror records and then strike for cause on such basis is itself a form of self-perpetuating racism. Non-diverse juries are more likely to convict Black and brown defendants, and the striking of those with criminal records from jury service via the

peremptory challenge diminishes the likelihood of diversity on the jury. This is the stuff of systemic racism in criminal justice.

If the goal of the Fourteenth Amendment is to root out race discrimination by government actors, then prohibiting the government from exercising preemptory challenges known to reflect racial bias is a sensible way to further this important constitutional interest.

For decades now, the court system has caused an unconstitutional skewing of the rights of the criminally accused by adopting the notion that a fair trial requires the rights reserved for individual defendants be extended to the government. The elimination of all government peremptory challenges, which are far too often raced-based, will result in more diverse juries and protect a defendant's constitutional right to a fair and impartial jury.

Rosemary Curran Scapicchio is a highly experienced criminal defense attorney in Boston, Massachusetts. She has been trying serious felony cases in the State and Federal court for 30 years. She also has a very successful appellate practice.

Point/Counterpoint

Let's Not Throw the Baby Out with the Bathwater

By Judge Linda E. Giles (Ret.)

The peremptory challenge has been a recognized part of our American jury system for more than 232 years. Law of April 30, 1790, c. 10, sec. 3, 1 Stat. 119 (1790). It was not until 36 years ago, however, that the United States Supreme Court, in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), first articulated a standard for addressing the illegitimate use of peremptory challenges to discriminate against protected classes. As jurists and practitioners know, cutting the Gordian knot of unbiased jury selection has been a lengthy process. Based on my own 29 years of experience as a trial judge, I can attest that it also has been a difficult one.

The oft-cited case of *Commonwealth v. Jones*, 477 Mass. 307 (2017), is illustrative. (This author was the trial judge.) In reversing the defendant's first-degree murder conviction, the Supreme Judicial Court relied on an unheralded, *habeas* review opinion of the federal First Circuit Court of Appeals, *Sanchez v. Roden*, 753 F.3d, 279 (1st Cir. 2014), to conclude that, henceforth, trial judges must consider six factors when evaluating whether the party challenging a peremptory strike has made a *prima facie* showing of impropriety. *Jones*, 477 Mass. at 322.**[1]** Throughout his lengthy, multi-court odyssey, the defendant preserved his *Batson-Soares***[2]** objection and maintained that the Commonwealth had exercised strikes of young Black men from the jury unconstitutionally. Nevertheless, a Massachusetts Superior Court judge and a Massachusetts Appeals Court panel on direct review thereafter, *see Commonwealth v. Sanchez*, 79 Mass. App. Ct. 189 (2011); a United States District Court judge on remand from the First Circuit Court of Appeals, *see Sanchez* v. *Roden*, 2015 WL 461917 (D. Mass. Feb. 4, 2015); and even the First Circuit Court of Appeals itself on its second look, *see Sanchez* v. *Roden*, 808 F. 3d (1st Cir. 2015), all determined that the defendant had failed to establish a *Batson-Soares* violation. Not until the Supreme Judicial Court reviewed the defendant's subsequent motion for post-conviction relief did Mr. Sanchez prevail. *See Commonwealth* v. *Sanchez*, 485 Mass. 491 (2020). Even then, the Court acknowledged that "it is easy to see how the [pattern of conduct] language of *Soares* continues to sow confusion." *Id.* at 510.

The difficulty in applying the *Batson-Soares* framework faithfully, however, does not lead me to believe that we should throw the baby out with the bathwater and eliminate peremptory challenges altogether. First, challenges for cause are inherently limited in scope: such challenges require a stated reason. Preserving peremptory challenges allows the trial attorneys to retain some measure of control over jury selection, especially in cases where they intuit that the venireperson is being disingenuous or deluded about her/his/their ability to be fair. Second, peremptory strikes afford litigants a chance to exclude jurors they believe will be unfavorable to their side and thereby achieve a fairer and more "middle ground" jury. Third, maintaining only challenges for cause vests all the power in the hands of well-intentioned but fallible judges, who know far less about the upcoming evidence than the attorneys. Peremptory challenges serve as a fail-safe measure when a judge is (or reasonably is perceived as) just not getting it. Fourth, eliminating all peremptory strikes arguably infringes on the defendant's due process right to a fair trial. *See* *Commonwealth v. Benoit*, 452 Mass. 212, 218 n.6 (2008); *Soares*, 377 Mass. at 488. Finally, abolishing peremptory challenges may chill an attorney's ability to advocate prospectively for the expansion of protected classes, *e.g.*, to persons of a particular political ideology or socioeconomic class. *Cf. Commonwealth v. Carter*, 488 Mass. 191, 201 (2021).

To promote the workability of the current peremptory challenge framework, however, I make the following recommendations.

> (1) Encourage during jury empanelment the robust use of both attorney *voir dir*e, *see* *Commonwealth v. Steeves*, 490 Mass. 270, 287 (2022); American Bar Association, Principles for Juries and Jury Trials, Principle 11(B)(3) (rev. 2016) (*voir dire* should be "sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges"), and probing juror questionnaires over and above those contemplated under G. L. c. 234A, sec. 22.
>
> (2) Eliminate the first step in the *Batson-Soares* test, which requires that the party objecting to a peremptory challenge make a *prima facie* showing of discrimination, *see Sanchez*, 485 Mass. at 515 (Lowy, J., concurring); after all, the Supreme Judicial Court has urged "judges to think long and hard before they decide to require no explanation . . . for [a] challenge," *Jones*, 477 Mass. at 321, quoting *Commonwealth v. Issa*, 466 Mass. 1, 11 n.14 (2013). To this end, Superior Court judges should also consider reporting to the Appeals Court, pursuant to G. L. c. 231, sec. 111 and Massachusetts Rule of Criminal Procedure 34, the issue of abandoning the first prong of the *Batson-Soares* test. *See Sanchez*, 485 Mass. at 518 (Gants, C.J., concurring) (the Court should consider departing from its current jurisprudence "in a case where the question is squarely presented and where we have the benefit of briefing by the parties and amici").
>
> (3) Abolish the requirement that opposing counsel (or the judge *sua sponte*) must object whenever a peremptory is lodged, for a failure to object may be a function of the opponent's own implicit bias or reluctance to offend.
>
> (4) Advocate for the passage of a revised Senate Bill 918, which proscribes the improper use of peremptory challenges, so long as it is made applicable to gender and sexual orientation (not just race and ethnicity) and scraps the objection requirement.

After more than 200 years of jurisprudence, only one state so far, Arizona, has abolished the use of peremptory challenges, per the order of its Supreme Court. That is hardly a ringing endorsement for the proposal. By contrast, section leaders of the American Bar Association "generally agree that eliminating peremptory challenges may not be the best way to empanel an impartial and fair jury." Kelso L. Anderson, *Will Striking Peremptory Challenges Remove Bias in Juries?*, Litigation News, Vol. 47, No. 2, Winter 2022, at 10-13 (American Bar Association Litigation Section). Subject to the foregoing reforms, I say we give the attorneys, who are in the trenches of courtroom practice daily, as much freedom as possible to achieve the legitimate results they desire when picking a jury.

Judge Linda E. Giles was engaged in the private practice of law, specializing in trial practice, before joining the bench. In 1991, she was appointed to be an Associate Justice of the Boston Municipal Court; and, in 1998, she was elevated to the Superior Court. Before retiring from the Superior Court in December 2020, Judge Giles participated in many educational programs for judges and lawyers over the years on a variety of topics, such as the enhancement of the judicial system, access to justice, domestic violence, and criminal law. She continues to work as Adjunct Professor of Law at Suffolk University Law School.

[1] The prescribed factors are: "(1) 'the number and percentage of group members who have been excluded'; (2) 'the possibility of an objective group-neutral explanation for the strike or

strikes'; (3) 'any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck'; (4) 'differences among the various members of the allegedly targeted group who were struck'; (5) 'whether those excluded are members of the same protected group as the defendant or the victim'; and (6) 'the composition of the jurors already seated.'" *Commonwealth v. Henderson*, 486 Mass. 296, 311-312 (2020), *quoting Jones*, 477 Mass. at 322.

[2] See *Batson*, 476 U.S. 79 (1986); *Commonwealth v. Soares*, 377 Mass. 461 (1979).

Point/Counterpoint

Overcoming the Peremptory's Greatest Challenge

By Brian A. Wilson

Four decades after the Supreme Judicial Court ("SJC") first proscribed certain group-based peremptory challenges, eradicating unlawful discrimination in jury selection has gained renewed interest. Yet so long as Massachusetts retains the inherently flawed three-step "Batson-Soares" test, lawyers seeking to exclude jurors for impermissible reasons will proceed virtually undeterred.

The solution is not to abolish peremptory challenges, as Arizona did in 2022. When exercised lawfully, they enable litigants to remove jurors they legitimately perceive as biased where a challenge for cause, due to its narrow scope, legally cannot. Eliminating peremptories would provide the parties little opportunity to influence who decides the case, yielding that power to the one person with no stake in the verdict and who before trial is unaware of the precise evidence, arguments, and jurors' reactions thereto that will follow.

Nor is the answer in a criminal case to strip prosecutors of peremptories, a notion even Justice Thurgood Marshall—the Supreme Court's most outspoken critic of peremptories—rejected. There is no more justice in permitting a defense attorney to discriminate against individuals because of their race, ethnicity, gender, or sexual orientation than in allowing a prosecutor to do the same. Furthermore, as the Supreme Court noted in *Georgia v. McCollum*, 505 U.S. 42 (1992), just as a conviction tainted by discriminatory jury selection erodes society's faith in the system, its confidence is "undermined where a defendant, assisted by [group-based] discriminatory peremptory strikes, obtains an acquittal." Attorneys on both sides of the aisle have an equal responsibility to eradicate, not perpetuate, unlawful discrimination.

Instead, the key to curbing discriminatory peremptory challenges is to root out those motivated by implicit, not merely explicit, bias by compelling attorneys to justify them with immediate explanations, and to overhaul the means by which trial and appellate judges evaluate their legitimacy.

Batson-Soares' Greatest Flaw

Batson-Soares' most fundamental flaw is its ignorance of the role implicit bias plays in the peremptory challenge process, a phenomenon courts nationwide have only recently acknowledged. Unconscious biases may cause the most scrupulous attorney to view jurors of a certain race, ethnicity, gender, or sexual orientation differently than others, leading the lawyer to exercise a challenge without realizing that its basis is rooted in such prejudice. Yet by requiring the opposing party to prove at step one an "inference" that the peremptory has "discriminatory purpose," and at step three that it was in fact intentional, *Batson-Soares* grants virtual immunity to challenges motivated by unconscious bias. It does so even though the harm to the excluded juror, to the community, and, if lodged by the prosecutor, to the defendant is the same as if the discriminatory motivation had been conscious.

Ending Step One

Merely modifying step one, however, to require an inference of "explicit or implicit

discrimination" rather than "discriminatory purpose" before mandating an explanation would miss the mark. Despite the SJC intending the threshold burden to be modest, step one in any form hinders the discovery at step two of what is often the most incriminating evidence of prejudice: the purported rationale for the challenge. Though critics note that any lawyer "can easily assert facially neutral reasons for striking a juror," *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring), it is the proffered reason itself which often reveals it to be based on the person's protected identity—such as where a prosecutor claims the juror would favor the defendant by virtue of their shared identity, or defense counsel argues the same regarding the victim. Or, a rationale may be so implausible that it betrays the discrimination it intends to conceal, such as the oft-cited example from *Purkett v. Elem*, 514 U.S. 765 (1995), where the prosecutor claimed he struck two Black venire-members because their facial hair appeared "suspicious" and one had "long, unkempt" hair. Under *Batson-Soares*, such spurious reasons might never be exposed if an inference of discriminatory intent were not first proven; eliminating step one would lift this shroud of secrecy.

Doing so would not only expose but deter discriminatory challenges. Requiring attorneys to justify their peremptories will compel them to examine their inner biases and consider whether their challenges might be based on unlawful considerations they overlooked initially.

This measure also would put an end to convictions being vacated where a judge erroneously finds that the defendant failed to establish the required inference, which in Massachusetts mandates a new trial.

Efforts to eliminate step one in the Commonwealth are already underway. Justice Lowy first recommended doing so in *Commonwealth v. Sanchez*, 485 Mass. 491 (2020), reiterating his proposal in *Commonwealth v. Carter*, 488 Mass. 191 (2021). Massachusetts Senate Bill 918, currently under consideration, proposes the same. Similar to rules recently enacted in Washington, California, New Jersey, and Connecticut, it would require one lodging a peremptory challenge to offer a reason upon either the opposing party or the judge objecting. In fact, removing step one would not change the process radically, given that Massachusetts law not only permits but encourages judges to forego step one and proceed to step two sua sponte.

Ending the Real First Step

Eliminating step one, however, will only go so far in curbing unlawful discrimination in jury selection. Senate Bill 918 and measures taken by other states operate on the same flaw: the failure to recognize that "step one" is not actually the first step in the process. The *Batson-Soares* inquiry does not even begin unless a "timely objection" is lodged. Thus, whether a discriminatory challenge is exposed or proceeds unimpeded depends on whether opposing counsel, or the judge sua sponte, objects to it.

While one might expect any attorney or judge to object unhesitatingly to a discriminatory challenge, there are many reasons why one might not. Just as implicit bias may motivate exercising a peremptory, the unconscious biases of opposing counsel and the judge might prevent them from recognizing its discriminatory nature. Unfamiliarity with the developing intricacies of the law in this context might also play a role. Even the most astute lawyer or judge who perceives a potentially unlawful challenge may resist raising an objection. One might be reluctant to lodge what is essentially a public accusation that the lawyer harbors prejudice against

a certain group, or at least engages in conduct that discriminates against its members, particularly if uncertain whether implicit rather than explicit bias motivated the peremptory. Since step three involves a determination of whether the rationale is genuine, an opposing lawyer or judge might also hesitate to imply that the lodging attorney will lie to the court about a challenge's basis. Reluctance to object may likewise be grounded in a concern that an accusation could subject the lodging attorney to an ethics inquiry or other reputational harm, that the attorney otherwise commands respect in the legal community, or that it would sour the relationship between the lawyers and the judge, particularly if they frequently have cases together. A lawyer prone to engaging in similar conduct, whether in the instant trial or others, might fear being exposed by a counter-accusation. Even a lawyer with no such culpability may fear unfounded retaliation. One might also believe an objection would be futile because, under the circumstances of the case, the *Batson-Soares*' intent requirement renders meeting the step three standard, or even step one's, virtually impossible.

Eliminating the objection requirement and requiring the party to offer its rationale whenever a peremptory challenge is lodged, would avoid the possibility that a discriminatory strike evades review. While doing so would, to be sure, change the nature of the peremptory significantly, it would help accomplish what Batson and Soares set out to do.

Requiring every peremptory to be explained and ruled upon would require patience, particularly in murder trials in which each party is granted as many as sixteen (or even more for the Commonwealth in a trial of multiple defendants) as opposed to the far fewer allotted in other criminal and civil cases. Yet, if Massachusetts is serious about implementing meaningful reform, concerns regarding the expenditure of time and resources should take a back seat to evidence that unlawful discrimination infects the trial process.

Mending Step Three

Step three of *Batson-Soares* is even more problematic, starting with confusion as to the precise standards. While recent SJC cases describe it as a judicial determination of "whether the explanation is both adequate and genuine," the Court's most recent decision, *Commonwealth v. Grier*, 422 Mass. 455 (2022), adds that the judge must decide whether the opponent "has proved a discriminatory purpose." Meaningfully restructuring the test will require removing the "purpose" requirement altogether, and replacing it with an unambiguous mandate that the judge deny a challenge motivated by either explicit or implicit bias. It also serves no legitimate purpose for step three to impose the burden of proof on the opposing party, which flows from the longstanding but archaic principle that peremptory challenges are presumed to be valid. See *Commonwealth v. Carter*, 488 Mass. at 196. *Batson-Soares*'s step three also lacks guidance as to what standard of proof the judge must apply, noting only that the judge "must evaluate whether the proffered reasons were adequate and genuine." *See id.* As it does not specify the extent to which the opposing party's proof must convince the judge, such as by a preponderance of the evidence or by clear and convincing evidence, *Batson-Soares* risks producing inconsistency in the way judges apply it.

Senate Bill 918 would make drastic changes to the way peremptory challenges are assessed at step three. As with the four states noted above, the proposed legislation fittingly states that a judge "need not find purposeful discrimination" to reject the challenge, thereby rendering those peremptories motivated by implicit bias equally unlawful. The bill, however, proposes an

unworkable step three standard: the trial judge would be required to deny the challenge if "an objective observer could view race or ethnicity as a factor in [its] use." Creating a hypothetical "objective observer" is unnecessary since the judge, as in any other context, must view the evidence objectively. It would only present an additional point over which legislators might disagree, which risks hindering its passage and delaying progress. Moreover, the standard sets too low a bar by essentially mandating the rejection of the challenge if there exists any possibility that an objective person might believe it was motivated by discrimination. Put another way, a judge could allow a peremptory challenge only if convinced there exists no possibility whatsoever that it was based on improper considerations, a standard even more exacting than proof beyond a reasonable doubt. A more effective standard would require the judge to deny a peremptory challenge upon finding by a preponderance of the evidence that explicit or implicit bias regarding the juror's race, ethnicity, gender or sexual orientation was a factor in exercising it.

Most glaringly, like three of the four states' rules mentioned above, Senate Bill 918 applies to race- and ethnicity-based peremptories only, leaving those based on gender and sexual orientation to be assessed via the flawed *Batson-Soares* test. Acknowledging the pervasiveness of and taking a true stand against gender- and sexual orientation-based discrimination requires that the law be applied to all four protected identities.

Conclusion

Unequivocally deeming explicit and implicit discrimination unlawful and providing the proper tools to identify invidious bias that lawyers, courts and society too often overlook, is the key to meaningful peremptory challenge reform. Any sacrifice in judicial economy comes not at a price, but as an investment in the integrity of our system of justice. Nearly five decades ago, *Soares* was instrumental in paving a path for *Batson* to outlaw race-based peremptories. Massachusetts once again has a unique opportunity to do what other jurisdictions have not.

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