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Rethinking *Batson-Soares*

Brian A. Wilson

As the American trial by jury system approaches its 400th year, unlawful discrimination in the selection of jurors remains a pressing issue. The peremptory challenge process – by which a party may object to the seating of a juror for virtually any reason without having to explain its motivation – has faced increasing scrutiny in the criminal trial context. Though not constitutionally guaranteed, the peremptory challenge has been hailed as having an "important role in assuring the constitutional right to a fair and impartial jury," enabling a defendant to eliminate prospective jurors "whom he perceives to be prejudiced against him" or who may be "harboring subtle biases."[1] It has simultaneously been criticized as a means by which prosecutors and defense attorneys engage in racial discrimination with virtual impunity, be it purposeful or motivated by implicit bias.

The Current *Batson-Soares* Framework

Over the past four decades Massachusetts has stood at the forefront of reform aimed at curbing discriminatory jury selection practices. Seven years before the United States Supreme Court held that a challenge based solely on race violates the Fourteenth Amendment's Equal Protection Clause,[2] and fifteen years before it deemed solely gender-based challenges to be similarly unconstitutional,[3] the Supreme Judicial Court (SJC) held in *Commonwealth v. Soares*, 377 Mass. 461, *cert. denied*, 444 U.S. 881 (1979), that Article 12 of the Massachusetts Declaration of Rights precludes the exclusion of jurors on the basis of "sex, race, color, creed or national origin."[4] *Soares* established a method for analyzing the validity of a peremptory challenge that would influence the Supreme Court's creation of its landmark framework in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Massachusetts's "*Batson-Soares*" analysis presumes that parties exercise peremptory challenges lawfully, but permits a party to object to a strike on grounds that it was motivated by unlawful discrimination. A timely objection entitles that party to an immediate "three-step" hearing. At step one, the objecting party bears the burden of establishing a *prima facie* case that the strike was "impermissibly based on race or other protected status by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." If the objecting party satisfies this "minimal" requirement, the hearing proceeds to step two and the burden shifts to the party that lodged the strike to justify it on "group-neutral" grounds. So long as that party offers a reason that is group-neutral on its face, the hearing proceeds to step three, at which the judge determines whether the explanation is "both adequate and genuine." If the judge so finds, the peremptory challenge stands and the prospective juror is excluded; otherwise the strike is denied, and the juror is seated.[5]

Commonwealth v. Sanchez: A Proposal to Eliminate Step One

Acknowledging the possibility of confusion regarding the *Batson-Soares* first step burden, in *Commonwealth v. Sanchez*, 485 Mass. 491 (2020), a decision authored by Justice Gaziano, the SJC clarified that the objecting party need only demonstrate an "inference," rather than a "likelihood," of discriminatory purpose and no longer would it need to show a "pattern" of discrimination.[6] The case was significant for another reason, however: it marked the first time that a justice proposed, in a published opinion, eliminating step one entirely. Justice Lowy in his

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concurrence recommended that "upon timely objection to a peremptory challenge made on the basis of race or another protected class, [the judge] should conclude that that party has met the first prong of the *Batson-Soares* test." Justice Lowy argued this would "impose a process that recognizes not just the perniciousness of racial discrimination, but implicit bias as well"; create "a fairer process for the parties, attorneys, prospective jurors, and the court"; and "result in fewer avoidable reversals of convictions."[7] (This last point is discussed in more detail below.) In a separate concurrence, Chief Justice Gants agreed that "there are sound reasons to consider abandoning the first prong of the *Batson-Soares* test," but only "in a case where the question is squarely presented" and where the Court would "have the benefit of briefing by the parties and amici."[8]

The majority was "unconvinced that removing the first step entirely is quite as simple or salutary as [Justice Lowy's] concurrence suggests." The majority voiced concern that since "every potential juror is a member of some discrete race or gender, every peremptory strike then would be subject to challenge and explanation." This, it opined, would lead to two possibilities: (1) that the Court would require a party to have a good faith basis for objecting to a challenge, which "merely would reinstate the first step of the *Batson* inquiry in a different guise," or (2) that it would impose no such requirement, which would create "a strong incentive to challenge every peremptory strike" because even an unsuccessful objection, "at a minimum, could reveal something of the opposing trial strategy." The latter course, the majority warned, "would alter the nature of a peremptory challenge so fundamentally that it would raise the question whether peremptory challenges simply should be abolished."[9]

Eliminating step one would put Massachusetts in the company of only six jurisdictions – Connecticut, Florida, Missouri, South Carolina, Washington, and the United States Court of Military Appeals – that have departed from the *Batson* framework and require only that a defendant object on grounds of unlawful discrimination to satisfy the *prima facie* burden and trigger step two of the hearing.[10] As significantly as it would alter the *Batson-Soares* test, however, Justice Lowy's proposal does not represent as radical a departure from Massachusetts practice as it may seem. For years the Commonwealth's judges have, upon objection to a challenge, remained free to bypass step one *sua sponte*; the SJC has "persistently urged, if not beseeched, judges to reach the second prong and elicit a group-neutral explanation regardless of whether they find that the objecting party has satisfied the first prong."[11] In fact, Massachusetts stands among a handful of states that empower a trial judge to object to a challenge *sua sponte*, thereby triggering a *Batson* hearing even where the non-challenging party remains silent.[12]

Legislative Intent to Eliminate Step One

A bill entitled "An Act Addressing Racial Disparity in Jury Selection" (Senate Bill 918), which would create a new statutory framework for analyzing the validity of peremptory challenges, is currently under consideration in the Massachusetts Legislature. Virtually identical to a court rule Washington enacted in 2018, the law would essentially eliminate step one of the *Batson-Soares* test by mandating that, upon a timely objection by the opposing party or the judge *sua sponte*, the proponent of the strike "shall articulate the reasons the peremptory challenge has been exercised."[13] Following what is essentially step two in its current form, the judge would then conduct the equivalent of step three and "evaluate the reasons given to justify the peremptory

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challenge in light of the totality of circumstances."[14] Factors the judge would consider in determining their validity include, but would not be limited to:

> [1] the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; . . . [2] whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; [3] whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; [4] whether a reason might be disproportionately associated with a race or ethnicity; and [5] whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.[15]

The trial judge would ultimately determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." If so, the judge would deny the challenge, even in the absence of a finding of "purposeful discrimination."[16]

The bill enumerates seven reasons deemed "presumptively invalid," all of which the Washington rule recognizes as "historically . . . associated with improper discrimination in jury selection":

> (1) having prior contact with law enforcement officers; (2) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (3) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (4) living in a high-crime neighborhood; (5) having a child outside of marriage; (6) receiving state benefits; and (7) not being a native English speaker.[17]

The bill also acknowledges, as does the Washington rule, the concern that attorneys often cite a venireperson's behavior in court to disguise a racially motivated strike. The bill mandates that any challenge "based on the prospective juror's conduct (i.e. sleeping; inattentive; staring or failing to make eye contact; exhibiting a problematic attitude, body language, or demeanor; or providing unintelligent or confused answers) . . . must be corroborated by the judge or opposing counsel or the reason shall be considered invalid."[18]

One Further Consideration

While several states are debating whether to continue following the *Batson* protocol, whether Massachusetts retains step one is a critical issue in part because of the legal consequences of a "first-step error" relating to a prosecutor's peremptory challenge. The SJC deems an incorrect ruling that the defendant failed to establish a *prima facie* case of unlawful discrimination a "structural error" that automatically requires a new trial. The Court consistently declines to follow the practice of federal and most state appellate courts, which typically remand for a hearing to allow the trial judge to conduct the belated step two and step three analyses.[19] Therefore, the erroneous termination of the inquiry at step one and resulting absence of any explanation from the prosecutor – which is wholly within the province of the trial judge to order *sua sponte* – necessarily

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results in a conviction being vacated, even where eliciting a legitimate race-neutral reason might be possible on remand. This rule mandated the reversal of three first-degree murder convictions within a fifteen-month span in 2017 and 2018, which Justice Lowy cited as proof of step one's "unnecessary and inefficient" nature.[20]

Conclusion

Though the Court has not revisited the question since *Sanchez*, the viability of *Batson-Soares* in its current form remains a live issue. It appears the Judiciary, the Legislature, or both will decide before long whether to retain the "minimal" burden of proving a *prima facie* case of unlawful discrimination, to eliminate step one entirely, or to adopt some middle ground. Meanwhile trial judges across the Commonwealth will, unlike in most other states, enjoy broad discretion to require an attorney to justify a challenge even in the absence of an objection. As such, Massachusetts remains at the forefront of the movement to end unlawful discriminatory selection practices.

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[1] *Commonwealth v. Bockman*, 442 Mass. 757, 762 (2004).
[2] *See generally Batson v. Kentucky*, 476 U.S. 79 (1986).
[3] *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
[4] *Soares*, 377 Mass. at 488-89.
[5] *Commonwealth v. Jackson*, 486 Mass. 763, 768 (2021) (internal quotations omitted); *Commonwealth v. Sanchez*, 485 Mass. 491, 510 (2020). *See also Batson*, 476 U.S. at 96-98 (defendant must first demonstrate "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. . . . Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation. . . . The trial court then will have the duty to determine if the defendant has established purposeful discrimination"). Acknowledging "the variety of jury selection practices" followed nationwide, the Supreme Court left the states to decide whether to adopt *Batson*'s procedural framework. *See id.* at 99 & n.24.
[6] *Sanchez*, 485 Mass. at 492.
[7] *Id.* at 515 (Lowy, J., concurring).
[8] *Id.* at 518 (Gants, C.J., concurring).
[9] *Id.* at 513 n.19. Several since-retired justices have called for the elimination of peremptory challenges entirely. *See Commonwealth v. Maldonado*, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (joined by Justices Greaney and Spina in noting that "it is all too often impossible to establish whether a peremptory challenge has been exercised for an improper reason" and declaring it "time to either abolish them entirely, or to restrict their use substantially"); *Commonwealth v. Calderon*, 431 Mass. 21, 29 (2000) (Lynch, J., dissenting) (suggesting that "rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives, we abolish them entirely").
[10] *See State v. Holloway*, 553 A.2d 166, 171 (Conn.), *cert. denied*, 490 U.S. 1071 (1989); *State v. Johans*, 613 So.2d 1319, 1321 (Fla. 1993); *State v. Parker*, 836 S.W.2d 930, 938 (Mo. 1992); *State v. Chapman*, 454 S.E.2d 317, 320 (S.C. 1995); *United States v. Moore*, 26 M.J. 692, 698-700 (A.C.M.R. 1988) (en banc); Wash. Gen. R. 37(d) (2018). California will likewise eliminate step one in criminal trials beginning on January 1, 2022. *See* Cal. Civ. Proc. Code § 231.7 (2020). In Hawaii a *prima facie* case is established where a prosecutor strikes all members of the venire who

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share a common identity group with the defendant. *See State v. Batson*, 788 P.2d 841, 842 (Haw. 1990).

[11] *Sanchez*, 485 Mass. at 515 (Lowy, J., concurring). *See also Commonwealth v. Issa*, 466 Mass. 1, 11 n.14 (2013) (urging judges to "think long and hard before they decide to require no explanation from the prosecutor for the challenge").

[12] *See Commonwealth v. Smith*, 450 Mass. 395, 405, *cert. denied*, 555 U.S. 893 (2008) (where defense counsel does not object to prosecutor's challenge, "a judge may, of course, raise the issue of a *Soares* violation *sua sponte*"); *Commonwealth v. LeClair*, 429 Mass. 313, 322 (1999) ("Whether the [objection to the defendant's peremptory challenge] was initially raised by the Commonwealth or the judge, *sua sponte*, is immaterial").

[13] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(c)&(d).

[14] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(e).

[15] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(g). *See also Sanchez*, 485 Mass. at 518-19 (finding relevant "(1) the number and percentage of group members who have been excluded from jury service due to the exercise of a peremptory challenge; (2) any evidence of disparate questioning or investigation of prospective jurors; (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged (for example, age, educational level, occupation, or previous interactions with the criminal justice system); (4) whether the defendant or the victim are members of the same protected group; and (5) the composition of the seated jury").

[16] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(e).

[17] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(h).

[18] S. Bill 918, 192nd Gen. Ct. (Mass. 2021). *See* Wash. Gen. R. 37(i) (noting those reasons "also have historically been associated with improper discrimination in jury selection").

[19] *See Sanchez*, 485 Mass. at 501-02.

[20] *Id.* at 517 (Lowy, J., concurring). *See Commonwealth v. Ortega*, 480 Mass. 603, 607-08 (2018); *Commonwealth v. Robertson*, 480 Mass. 383, 397 (2018); *Commonwealth v. Jones*, 477 Mass. 307, 325-26 (2017).

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