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# Chapter 4: Criminal Practice and Procedure

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*CHAPTER 4*

# Criminal Practice and Procedure

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**§ 4.1. Note Taking By Jurors.*** Prior to 1980, the Supreme Judicial Court had addressed the issue of juror note taking on only one occasion, in a case decided at the turn of the century.[1] In *Commonwealth v. Tucker*,[2] the defendant, convicted of murder in the first degree, moved for a new trial because one of the jurors had taken notes during the trial.[3] Although the *Tucker* Court observed that note taking by jurors might not be a "commendable practice," it nevertheless declared that note taking was not illegal and did not require setting aside the verdict.[4] The propriety of juror note taking, the Court ruled, was an issue properly left to the discretion of the trial court.[5] Absent any showing that the juror's conduct prejudiced the defendant, the Court concluded, the verdict should not be disturbed on appeal.[6]

Against this rather meager common law background, the superior court promulgated[7] Rule 8A in 1978.[8] Rule 8A provides that trial judges may, in

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§ 4.1 [1] *See* Commonwealth v. Tucker, 189 Mass. 457, 76 N.E.2d 127 (1905). In Randolf v. O'Riorden, 155 Mass. 331, 29 N.E. 583 (1892), the issue of juror note taking was raised, but the Court dismissed the appeal on procedural grounds. The defendant in *Randolf* raised his objection to juror note taking at his trial for the first time on appeal. *Id.* at 338, 29 N.E. at 584. The Court deemed the defendant's failure to make a timely objection to the note taking at trial to be a waiver of the objection, however, and thus did not address the propriety of the practice. *Id.*, 29 N.E. at 584.

[2] 189 Mass. 457, 76 N.E. 127 (1905).

[3] *Id.* at 496, 76 N.E. at 142.

[4] *Id.* at 497, 76 N.E. at 142.

[5] *Id.*

[6] *Id.*

[7] G.L. c. 213, § 3 authorizes the superior courts of the Commonwealth to make and promulgate uniform rules for regulating the practice of such courts. Pursuant to this rule making power, the superior court promulgated Rule 8A. The relevant text of section 3 is as follows:

> § 3. Rules; power to make and promulgate.
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> The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law.
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> * * *
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> The rules of the superior court, promulgated under the authority of this section, shall be subject to the approval of the supreme judicial court.

G.L. c. 213, § 3.

[8] Superior Court Rule 8A became effective May 6, 1978. Massachusetts Rules of Court 318 (West Publishing 1980).

their discretion, permit jurors to take notes during the presentation of evidence and during the judge's instructions to the jury on the laws.[9] The rule, however, also requires the trial judge to precede the announcement of permission to take notes with "appropriate guidelines."[10] The superior court's rulemaking power is also subject to the limitation that such rules "shall be subject to the approval of the supreme judicial court."[11]

During the *Survey* year, the Supreme Judicial Court had occasion in *Commonwealth v. St. Germain*[12] to address the general issue of juror note taking and the more specific issue of the validity of juror note taking initiated by a judge pursuant to Rule 8A. The Court held that by permitting the jurors to take notes pursuant to Rule 8A, and by accompanying the announcement of permission to take notes with additional instructions, the trial judge committed no error.[13] In sanctioning juror note taking under the guidelines established by Rule 8A, the Court ruled that whether to permit or to prohibit the practice was an issue properly left to the discretion of the trial court.[14] The opinion left no guidelines, however, as to when a trial judge might abuse his discretion under Rule 8A, or as to when note taking would be improper. The Court also entered a caveat to its holding, stating that although it approved note taking by jurors in *St. Germain*, it recognized that "experience or empirical evidence may suggest a need to modify or eliminate the procedures now specified in Rule 8A."[15]

The defendant in *St. Germain* was convicted of murder in the first degree for the slaying of an elderly couple at their home in Newton.[16] At trial, the

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[9] As originally promulgated and effective on May 6, 1978, Superior Court Rule 8A also empowered judges to permit jurors to take notes "during summation by counsel." The rule was amended, however, effective July 1, 1978, to provide for note taking only during the presentation of evidence and during the judge's instructions to the jury. J. Smith & H. Zobel, 6 MASSACHUSETTS PRACTICE 1 (Supp. 1980). As amended, the rule reads as follows:

> In any case where the court, in its discretion, permits jurors to make written notes concerning testimony and other evidence, the trial judge shall precede the announcement of permission to make notes with appropriate guidelines. Upon the recording of the verdict or verdicts, the notes of the jurors shall be destroyed by direction of the trial judge. Jurors may also be granted permission by the trial judge to make notes during the judge's instructions to the jury on the laws.
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> Amended and effective July 1, 1978.

*Id.*

[10] Super. Ct. R. 8A. See note 9 *supra* for the text of Rule 8A.

[11] G.L. c. 213, § 3. See note 7 *supra* for the text of § 3.

[12] 1980 Mass. Adv. Sh. 1807, 408 N.E.2d 1358 (1980).

[13] *Id.* at 1817, 408 N.E.2d at 1366. The original version of Rule 8A, which permitted note taking during "summation by counsel," was in effect at the time of St. Germain's trial. See note 9 *supra*.

[14] *Id.* at 1820, 408 N.E.2d at 1368.

[15] *Id.*

[16] *Id.* at 1807, 408 N.E.2d at 1360. The defendant St. Germain was convicted on two counts of murder in the first degree, one count of armed assault in a dwelling house, and two counts of assault and battery by means of a dangerous weapon. *Id.*, 408 N.E.2d at 1360.

judge permitted jurors to take notes throughout the presentation of evidence, during the opening and closing arguments of counsel, and during the judge's charge.[17] On appeal to the Supreme Judicial Court, St. Germain contended that such note taking constituted prejudicial error and deprived him of his constitutional right to a fair trial.[18] The Court quickly disposed of St. Germain's constitutional argument, stating that it could find no authority for the proposition that juror note taking was unconstitutional.[19] Rather, the Court observed, to the extent the rule against juror note taking still survives in other jurisdictions, it is a creation of the common law.[20] Turning to St. Germain's assertion that granting permission to take notes was prejudicial error, the Court ruled first that the trial judge had complied carefully with the requirements of Rule 8A.[21] Rule 8A leaves the question whether note taking will be permitted to the trial court's discretion, but requires the trial judge to "precede the announcement of permission to make notes with appropriate guidelines."[22] The Court found the guidelines set by the trial judge to be entirely appropriate.[23] The Court noted that the trial judge had explained carefully that no juror was required to take notes.[24] The judge further had cautioned the jurors to keep "brief" any notes they might wish to take, in order to better assess each witness' credibility by observing the manner in which he testified.[25] Each juror's notes, the judge had stressed, were to serve only as "the notes of the individual juror."[26] It would be improper, the judge had added, for "one juror [who] has more training in the taking of notes than the other[s]" to argue, "this is the testimony because it is my notes."[27] Rather, the judge had emphasized, the "collective memory of the jury" should control.[28]

After ruling that the requirements of Rule 8A had been satisfied by the trial court in *St. Germain*, the Court then upheld the validity of juror note taking pursuant to Rule 8A as a matter of Massachusetts law.[29] The Court noted that it previously had considered the general issue of juror note taking in *Commonwealth v. Tucker*.[30] The Court observed that although the *Tucker* Court had left open the question whether note taking by jurors was

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[17] *Id.* at 1816-17, 408 N.E.2d at 1365-66.
[18] *Id.* at 1817, 408 N.E.2d at 1366.
[19] *Id.* at 1817 & n.17, 408 N.E.2d at 1366 & n.17.
[20] *Id.* at 1817 n.17, 408 N.E.2d at 1366 n.17.
[21] *Id.* at 1817, 408 N.E.2d at 1366.
[22] Super. Ct. R. 8A.
[23] 1980 Mass. Adv. Sh. at 1817, 408 N.E.2d at 1366.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1818, 408 N.E.2d at 1366.
[30] *Id.*

a "commendable practice," that Court, nevertheless, had declared that by "the great weight of authority [such note taking] is not illegal, and as a matter of law it does not require the setting aside of the verdict."[31] The Court further noted the *Tucker* Court's ruling that the question of note taking was one properly "left to the discretion of the [trial] court."[32] The Court in *St. Germain* expanded on the observation of the *Tucker* Court by stating that the note taking permitted under Rule 8A, as accompanied by the trial judge's instructions, "also conforms to the 'great weight' of current authority."[33] The Court observed that note taking is universally permitted in federal courts at the discretion of the trial judge.[34] The majority rule in state courts, the Court added, also permits note taking by jurors as a matter of the trial judge's discretion.[35]

Having held that juror note taking pursuant to Rule 8A neither denied the defendant of his constitutional right to a fair trial nor constituted prejudicial error under Massachusetts law, the Court then disposed of the defendant's contention that note taking would disrupt the proper functioning of the jury fact-finding process. St. Germain had argued on several grounds that juror note taking was improper.[36] He contended first that "the best note taker will invariably dominate the jury"; second, that since most jurors are not trained in the art of note taking, they will take down trivial points and overlook vital facts; third, that "a dishonest juror may falsify his notes"; fourth, that the jurors' notes, rather than their independent recollections, would receive "undue attention during deliberations"; and fifth, that note taking would distract the jurors' attention from observing the witnesses' demeanor, or result in them missing other testimony.[37] The Court responded by noting first that St. Germain's arguments were virtually identical to those considered and rejected by the American Bar Association Project on Minimum Standards for Criminal Justice.[38] The Court, however, was unwilling to enter into a substantive discussion concerning the presumed advantages and disadvantages of note taking.[39] Rather, St. Germain's claims were dismissed because they rested on "speculation rather than [on] empirical data."[40] In the absence of empirical data to support such claims, the Court was "inclined to permit the issue of juror note taking to be a matter of judicial discretion."[41]

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[31] *Id.* (quoting Commonwealth v. Tucker, 189 Mass. 457, 497, 76 N.E.127, 142 (1905)).

[32] *Id.* (quoting Commonwealth v. Tucker, 189 Mass. at 497, 76 N.E. at 142).

[33] *Id.*

[34] *Id.* at 1818 & n.20, 408 N.E.2d at 1366-67 & n.20.

[35] *Id.* at 1819, 408 N.E.2d at 1367.

[36] *Id.* at 1819-20, 408 N.E.2d at 1367-68.

[37] *Id.*

[38] *Id.* at 1819 n.22, 408 N.E.2d at 1367 n.22. *See* A.B.A. Standards for Criminal Justice, Standards Relating to Trial by Jury, Comment to Standard 4.2 (Approved Draft, 1968).

[39] 1980 Mass. Adv. Sh. at 1820, 408 N.E.2d at 1368.

[40] *Id.*

[41] *Id.*

The Court's approval of juror note taking in *St. Germain* was acknowledged to be tentative, and essentially uninformed.[42] Just as St. Germain's objections to juror note taking failed because they lacked empirical support, the Court indicated that other claims might succeed if buttressed by such evidence. The Court noted that "experience or empirical data may suggest a need to modify or eliminate the procedures now specified in Rule 8A."[43] The Court indicated that as more information becomes available, it should be used to determine whether juror note taking should be subject to greater constraints than those imposed by Rule 8A, or, in contrast, whether jurors should be permitted to take notes as a matter of right in all cases.[44] The Court concluded its opinion, however, by expressing its fundamental trust in the jury as an institution.[45] It was stated that this confidence in the jury's ability to decide cases fairly on the evidence presented at trial should apply as well to the ability of a jury to take and use notes "without losing sight of their obligations and the gravity of their responsibilities."[46]

In ruling that jurors may take notes at the trial court's discretion, provided that the jurors are given appropriate instructions, the *St. Germain* Court reached an appropriate compromise position on the note taking issue. The decision is certainly in accord with the great weight of authority and learned commentary.[47] Moreover, in the absence of reliable empirical evidence indicating an adverse effect of note taking on jury decisionmaking, entrusting the matter to the trial court's discretion is more appropriate than either prohibiting the practice or permitting the practice as a matter of right in all cases. As trial judges in the commonwealth acquire more experience with juror note taking under Rule 8A, it may be assumed they will be in the best position to determine whether note taking is appropriate in individual cases. In addition, given variations in the character and complexity of different trials, it is difficult to appreciate the wisdom of either a flat ban on note taking or a blanket approval of note taking in all cases.

The courts and commentators who have considered the issue of juror note taking usually enumerate several substantive arguments for and against the practice.[48] The most frequently encountered arguments against jurors taking notes are that the practice exaggerates the layman's "undue

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[42] *Id.*

[43] *Id.*

[44] *Id.* The practice of permitting jurors to take notes as a matter of right in all cases is now in effect in several states, and is advocated by the American Bar Association. *Id.* at 1820-21 & nn. 23-24, 408 N.E.2d at 1368 & nn. 23-24.

[45] *Id.* at 1821, 408 N.E.2d at 1368.

[46] *Id.*

[47] *See id.* at 1819-20 & n.20, 408 N.E.2d at 1366-67 & n.20; Note, *Taking Note of Note Taking*, 10 COLUM. J. OF L. AND SOC. PROB. 565, 587 (1974) [hereinafter cited as Columbia Note]; Note, *The Problem of Note Taking by Jurors*, 18 U. PITT. L. REV. 800, 801, 803, 806-07 (1957) [hereinafter cited as Pittsburg Note].

[48] Columbia Note, *supra* note 47, at 574.

reverence for the written word," thus making it possible for a case to turn on an imperfectly written note;[49] that jurors will take down trivial matters and overlook vital facts, thus laying undue emphasis on one feature of the case over others;[50] that taking notes will distract the juror, rendering him unable to assess accurately the demeanor of witnesses;[51] and that dishonest jurors may falsify their notes.[52] Finally, it is asserted that skilled note taking jurors will overreach their peers and exert undue influence on the jury's deliberations.[53] These arguments all reflect a basic lack of confidence in the jury's ability to incorporate note taking into the fact-finding process.

In contrast, arguments in favor of note taking have as their foundation a basic confidence in the jury as an institution[54] and the belief that notes can be a valuable aid in recollecting evidence.[55] Moreover, proponents of the practice argue that the possibility of undue influence by note taking jurors is unlikely today when the vast majority of jurors are literate.[56] In contrast to a former era, when illiteracy was prevalent, today each juror could support his own position by reference to his own notes.[57] In any event, proponents contend, certain jurors are always likely to be more influential than others.[58] As to the contention that cases might turn on an imperfectly written note, one commentator has observed that "this argument begs the question."[59] A case might likewise turn on imperfect memory.[60] Similarly, while it is claimed that note taking will result in jurors emphasizing one feature of the case over others, this danger is inherent in the jury system, and is not increased by jurors taking notes.[61] Jurors, it is argued, necessarily must emphasize certain facts or versions of facts in order to arrive at a conclusion.[62] Doing so by means of notes no more distorts a view of the whole picture than if the conclusion is reached solely by recourse to memory.[63] Proponents continue by asserting that, rather than distracting the juror, note taking focuses attention on relevant testimony.[64] Finally, as to the conten-

[49] *See* Columbia Note, *supra* note 47, at 574; Pittsburg Note, *supra* note 47, at 808.

[50] *See* Columbia Note, *supra* note 47, at 575; Pittsburg Note, *supra* note 47, at 808-09.

[51] *See* Columbia Note, *supra* note 47, at 575-76.

[52] *See* Pittsburg Note, *supra* note 47, at 809.

[53] *See* Columbia Note, *supra* note 47, at 576-77, 603.

[54] *See* Columbia Note, *supra* note 47, at 579-80, 603.

[55] *See* Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 458 (1960) [hereinafter cited as Judicial Conference Report].

[56] *See* Columbia Note, *supra* note 47, at 578; Judicial Conference Report, *supra* note 55, at 459; Pittsburg Note, *supra* note 47, at 811.

[57] *See* Pittsburg Note, *supra* note 47, at 809, 811.

[58] *See* 32 J. Am. Jud. Soc'y 57, 58 (1948).

[59] Pittsburg Note, *supra* note 47, at 808.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Columbia Note, *supra* note 47, at 578.

tion that dishonest jurors may falsify notes, proponents respond that influence may be exerted by a juror for a corrupt purpose equally well by means of the spoken word as by means of a written memo.[65] Given the basic trust we must place on the jury as an institution, the proponents of note taking effectively rebut the arguments raised against the practice. The Court's ruling in *St. Germain*, therefore, enjoys the support of the better reasoned arguments in the debate on the issue of juror note taking.

There is also merit in the Court's decision in *St. Germain* to allow its ruling to stand vulnerable to attack by empirical evidence. If studies show that the results of cases in which notes are taken are somehow impermissibly skewed, the practice of note taking should be discontinued. If studies show to the contrary that the practice uniformly results in a more accurate assessment of the evidence by juries, then note taking should be allowed as a matter of right in all cases.

In upholding the validity of Rule 8A, the Court in *St. Germain* sanctioned juror note taking at the trial court's discretion. Although the court did not provide any guidelines in its opinion as to when note taking would be allowed properly, several types of cases would appear to be particularly appropriate contexts in which to permit note taking. For example, if a case involved complex fact patterns, or many figures, such as in a civil damage action, then counsel would be well advised to request that the judge permit jurors to take notes during the presentation of evidence. Likewise, where the applicable law was complicated, counsel might move that the judge permit note taking during the judge's instructions to the jury.

The above suggestions are premised on the notion that a more precise understanding of the facts or the law by the jury would help counsel's case. Where the emotional appeal of a case is in counsel's favor, however, so that a more technical reading of the facts and law might hurt his case, then juror note taking would not be desirable. Counsel might object in such cases that granting permission to take notes constitutes an abuse of the trial court's discretion, arguing that the case is not complex enough to warrant note taking. Counsel also should take care to object at trial if he thinks note taking is improper. Under *Commonwealth v. Tucker*,[66] failure to object to note taking at trial may be deemed a waiver of the right to object on appeal, unless counsel satisfies the appellate court that he had been reasonably diligent in observing juror conduct but still had failed to notice that jurors were taking notes.[67] Because Rule 8A requires that a trial judge announce his permission to take notes and precede the announcement with "appropriate guidelines,"[68] it would seem impossible for counsel to avoid

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[65] Pittsburg Note, *supra* note 47, at 809.

[66] 189 Mass. 457, 76 N.E. 127 (1905).

[67] *Id.* at 496-97, 76 N.E. at 142.

[68] Super. Ct. R. 8A.

waiver by satisfying the diligence requirement without first raising his objection at trial. Counsel also should be aware that note taking under Rule 8A is permitted in both civil and criminal trials.[69]

As a final matter, it should be noted that the Court left open the issue of what might constitute an "abuse of discretion" when a judge permits jurors to take notes pursuant to Rule 8A. Indeed, the *St. Germain* Court did not even address the issue whether the trial judge had exercised his discretion properly in permitting jurors to take notes. The Court did emphasize, however, the "additional instructions" given by the trial judge to the jury concerning the purpose and function of note taking.[70] Several of those instructions and admonitions were designed to obviate the dangers that critics of note taking find objectionable about the practice.[71] Under the prevailing view in states which permit note taking at the trial court's discretion, the exercise of that discretion will be upheld on appeal unless it has prejudiced "the substantive rights involved."[72] It is likely that the Court in *St. Germain*, in conformity with this standard, reasoned that the instructions provided by the trial judge to the jury concerning their taking of notes obviated any chance of prejudice to the defendant. Thus, there could be no finding of abuse of discretion.[73] In conclusion, the *St. Germain* Court indicated that it would grant wide discretionary powers to trial judges acting pursuant to Rule 8A, provided that their "additional instructions" to the jury were at least as adequate as were those of the trial judge in *St. Germain*.

**§ 4.2. Peremptory Juror Challenges on Racial Grounds.*** Prior to the *Survey* year, the Supreme Judicial Court had addressed the constitutionality of using peremptory juror challenges by a prosecutor to exclude members of

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[69] *Id.*

[70] 1980 Mass. Adv. Sh. at 1817, 408 N.E.2d at 1366.

[71] *See id.* at 1817, 1818 & n.21, 408 N.E.2d at 1366-67 & n.21; *see also* notes and text at notes 49-54.

[72] *See* Columbia Note, *supra* note 47, at 590.

[73] Although this reasoning is implicit, rather than explicit, in the Court's opinion, it parallels the Court's reasoning with regard to the issue whether the trial judge committed reversible error in permitting jurors to take notes during opening statements by counsel. At the time of the defendant's trial, Rule 8A permitted note taking by jurors during "summation by counsel." See note 9 *supra*. The trial judge interpreted "summation by counsel" to include opening statements as well as closing arguments. 1980 Mass. Adv. Sh. at 1816 n.16, 408 N.E.2d at 1366 n.16. On appeal the Court noted that "it is possible" that the rule was not intended to authorize note taking during opening statements. *Id.* Nevertheless it concluded that in view of the judge's cautionary instructions that the opening statements were not evidence, "even if the rule is read as not specifically authorizing note taking during opening statements, we find no error." *Id.* Subsequent to the trial, Rule 8A was amended, effective July 1, 1978, to permit note taking at the trial court's discretion only during the presentation of evidence and the judge's instructions to the jury on the laws. See note 9 *supra*. Thus, the issue addressed by the *St. Germain* Court in footnote 16 of its opinion is now moot.

a specific racial group. In *Commonwealth v. Soares*,[1] decided in 1979, the Court ruled that such a pattern of challenges was impermissible under the Declaration of Rights of the Massachusetts Constitution.[2] The *Soares* Court established a standard to which both prosecution and defense attorneys were to conform in making peremptory juror challenges. During the *Survey* year, in *Reddick v. Commonwealth*, a question arose as to whether the Court should apply the *Soares* standard retroactively by allowing post-conviction challenges to jury selection procedures.

The *Soares* case involved the stabbing murder of a white Harvard football player, Andy Puopolo, following a post-season "celebration" in Boston's "Combat Zone."[3] Three black men, Soares, Allen, and Easterling, were charged with first-degree murder.[4] The prosecution advanced the theory that the three defendants had "engaged in a joint enterprise to commit murder with deliberate premeditation and malice aforethought."[5] To support this argument, the prosecution demonstrated that all three defendants had participated in a melee with the victim and a group of other Harvard students just prior to the fatal stabbing, and that they all had assaulted and threatened Puopolo and his friends.[6]

The three defendants went to trial in the Superior Court of Suffolk County.[7] Under Massachusetts law, each defendant was entitled to sixteen peremptory juror challenges while the prosecution was entitled to forty-eight such challenges.[8] The *Soares* prosecutor used twelve of these challenges to dismiss ninety-two percent—all but one—of the potential black jurors in the pool, but used challenges of this type to dismiss only thirty-four percent of the available white jurors.[9] The defendants Easterling and Allen, through their attorneys, complained of the prosecutor's systematic rejection of black jurors, but their objection was to no avail. The predominantly white jury eventually found all of the defendants guilty of first-degree murder.[10] On appeal, the defendants again attacked the jury selection process, arguing that it had, for all practical purposes, deprived

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§ 4.2 [1] 1979 Mass. Adv. Sh. 593, 387 N.E.2d 499.

[2] *Id.* at 627, 387 N.E.2d at 516.

[3] *Id.* at 596-601, 387 N.E.2d at 503-505.

[4] *Id.* at 593, 387 N.E.2d at 502.

[5] *Id.* at 602, 387 N.E.2d at 506.

[6] *Id.* at 596-601, 387 N.E.2d at 503-05. The Harvard students had been pursuing a prostitute who allegedly had stolen one of the student's wallets. Allen, a "bouncer" at a local establishment, had blocked their pursuit at one point, and Soares and Easterling alternately had cursed at and fought with the white athletes. *Id.* at 596-99, 387 N.E.2d at 503-505.

[7] *Id.* at 593, 387 N.E.2d at 499.

[8] The prosecutor was allowed sixteen challenges for each defendant. *Id.* at 607 n.6, 387 N.E.2d at 508 n.6 (citing G.L. c. 234, § 29).

[9] *Id.* at 608, 387 N.E.2d at 508.

[10] *Id.* at 594, 608 n.8, 387 N.E.2d at 502, 508 n.8.

them of their right to a fair trial and to a trial before an impartial jury, in violation of articles 12 and 15 of the Declaration of Rights of the Massachusetts Constitution.[11]

In response to the defendants' appeals, the commonwealth argued that the standard developed by the Supreme Court in *Swain v. Alabama*[12] should be incorporated, in effect, into the Massachusetts Constitution.[13] In *Swain*, the Supreme Court had held that in most cases, the striking of black jurors did not violate the equal protection clause of the fourteenth amendment.[14] Under this standard, it was presumed that a prosecutor, in exercising his peremptory challenges, was "acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged."[15] In order to successfully attack the prosecution's peremptory challenges on this basis, then, it was necessary to rebut this presumption, which at the time of the *Soares* appeal no defendant had done successfully.[16]

The Supreme Judicial Court noted that the *Soares* defendants did not rely solely on rebutting this *Swain* presumption but instead presented alternate grounds of relief.[17] The defendants argued that the use of peremptory challenges to exclude ninety-two percent of the eligible black jurors in this case violated Article 12 of the Declaration of Rights of the Massachusetts Constitution, by denying the defendants their right to a trial before a jury of their peers.[18] The Court accepted this argument, stressing that a fair jury must represent a true cross-section of the community, and that the jury selection process must not be in the least tainted by discrimination.[19] In addition, the *Soares* opinion relied upon and cited extensively the case of *People v. Wheeler*,[20] in which the California Supreme Court had invalidated racially-based juror challenges as violative of the state Constitution.[21] Similarly, the Massachusetts Court recognized the necessity of maintaining a cross-section of the community in the jury room, and to achieve that end it could not permit an attorney to exercise the peremptory challenge "with absolute and unbridled discretion."[22]

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[11] *Id.* at 608, 387 N.E.2d at 508.

[12] 380 U.S. 202 (1965).

[13] 1979 Mass. Adv. Sh. at 609, 387 N.E.2d at 509.

[14] 380 U.S. at 221-22.

[15] *Id.* at 223.

[16] 1979 Mass. Adv. Sh. at 611 n.10, 387 N.E.2d at 509 n.10.

[17] *Id.* at 612, 387 N.E.2d at 510.

[18] *Id.*

[19] *Id.* at 614, 387 N.E.2d at 510-511. The Court cited several decisions to demonstrate this interest in a fairly selected jury. Commonwealth v. Rodriquez, 364 Mass. 87, 300 N.E.2d 192 (1973); Commonwealth v. Martin, 357 Mass. 190, 257 N.E.2d 444 (1970); Commonwealth v. Ricard, 355 Mass. 509, 246 N.E.2d 433 (1969).

[20] 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[21] *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

[22] 1979 Mass. Adv. Sh. at 623, 387 N.E.2d at 514.

In order to achieve the desired representation on Massachusetts juries, the Court held that it would not permit the "exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group."[23] Thus, group membership, i.e. sex, race, color, creed, or national origin, could not be used as the sole basis for exclusion from a jury.[24] A defendant could rebut the presumption of the proper use of peremptory challenges by demonstrating a "pattern of conduct" and a "likelihood"[25] that the dismissal of a body of jurors was based on their membership in one of these discrete groups.

In the *Soares* case, the Court concluded that the large percentage of black jurors challenged and the disparity between that percentage and the ratio of eligible white jurors discharged showed that this "pattern of conduct" and "likelihood" were indeed present.[26] Thus, the Court, noting the defendant's timely request at trial to forbid this pattern of challenges, set aside the convictions and ordered a new trial to be conducted under the revised standard of jury selections.[27] The Court was to face difficulties, however, in applying this standard in instances where a defendant had not entered such a "timely" challenge of the jury selection procedure at his trial. This problem was demonstrated in a subsequent Supreme Judicial Court case, *Commonwealth v. Reddick*,[28] decided during the *Survey* year.

In *Reddick*, a defendant convicted of murder attempted to challenge his conviction by invoking the newly-created *Soares* principle.[29] Reddick petitioned the Supreme Judicial Court for a writ of error on the basis of the allegedly unconstitutional exclusion of blacks from his trial jury.[30] The defendant had not raised these arguments on direct appeal of his conviction.[31] Nevertheless, he claimed that the *Soares* holding operated retroactively so as to invalidate his 1970 conviction by a purportedly unconstitutionally selected jury.[32]

The Court proceeded with the assumption that the prosecution's juror challenges had indeed been racially motivated. It then defined the primary issue in the case as being "whether the rule announced in the *Soares* opinion should be applied to [a] trial that took place almost nine years before the

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[23] *Id.* at 627, 387 N.E.2d at 516.

[24] *Id.* at 628, 387 N.E.2d at 516. The Court adopted these "group classifications" from the Equal Rights Amendment. *Id.*

[25] *Id.* at 629, 387 N.E.2d at 517.

[26] *Id.* at 629-30, 387 N.E.2d at 517. The Court also indicated that "common group membership of a defendant and those jurors excluded ... is a factor to be considered by the judge when he assesses whether the presumption of propriety has been rebutted." *Id.*

[27] *Id.* at 633, 387 N.E.2d at 518.

[28] 1980 Mass. Adv. Sh. 1959, 409 N.E.2d 764.

[29] See text at notes 23-25, *supra.*

[30] *Id.* at 1959, 409 N.E.2d at 765.

[31] *Id.*

[32] *Id.* at 1960, 409 N.E.2d at 765.

*Soares* opinion was released."[33] The Court decided that the *Soares* holding should not be applied retroactively as a general rule and cited language from the opinion itself to support its conclusion.[34] In particular, the Court felt that it would be inappropriate to overturn a conviction such as Reddick's. The Court determined that race was not proved a factor at his trial, while racial considerations conceivably could have played a part in the *Soares* verdict.[35] The Court then dealt with the applicability of *Soares* to the type of attack mounted in the *Reddick* case.

The *Reddick* Court first cited the Supreme Court's decision in *Linkletter v. Walker*[36] to demonstrate that, generally, newly created constitutional principles should not be applied automatically in cases of postconviction or collateral attack.[37] It embraced the Supreme Court's idea that the most important aspect of a new rule, in deciding whether to apply it in a case of collateral attack, is the extent to which the new rule is designed "to improve the integrity of the fact-finding process."[38] The *Reddick* Court noted that only in a few specialized instances had the Supreme Court given full retroactive effect to a newly expounded constitutional rule.[39] In determining whether to give retroactive effect to the new decision on peremptory juror challenges, the *Reddick* Court looked to see whether the challenges at Reddick's trial severely impaired the court's truth-finding function, and whether "the clear danger of convicting the innocent"[40] was present. The Supreme Judicial Court found that such threats to the defendant did not exist in the *Reddick* case. Thus, it was not appropriate to give retroactive effect to the *Soares* ruling for Reddick's benefit.[41]

The Court found it important that the conduct of Reddick's trial had exhibited no overt racial tensions or prejudices.[42] On appeal Reddick had made no explicit showing that the jurors eventually chosen for his trial had

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[33] *Id.* at 1960, 409 N.E.2d at 765-66.

[34] *Id.* at 1960, 409 N.E.2d at 766. The Court in *Soares* stated: "[t]he rule adopted today applies to the defendants in these cases and to the defendants in all cases now pending on direct appeal where the record is adequate to raise the issue." 1979 Mass. Adv. Sh. at 633 n.38, 387 N.E.2d at 518 n.38.

[35] 1980 Mass. Adv. Sh. at 1962-63, 409 N.E.2d at 767. In *Reddick*, the defendant *and* the victim were black, as were the majority of the prosecution witnesses. *Id.* at 1960 n.1, 409 N.E.2d at 766 n.1.

[36] 381 U.S. 618 (1965).

[37] *Id.* at 627.

[38] Johnson v. New Jersey, 384 U.S. 719, 727-28 (1966).

[39] 1980 Mass. Adv. Sh. at 1961, 409 N.E.2d at 766. These instances included a case involving an indigent's right to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963), and the accused's right to exclude an involuntary confession from trial, Jackson v. Denno, 378 U.S. 368 (1964).

[40] 1980 Mass. Adv. Sh. at 1962, 409 N.E.2d at 767 (quoting Johnson v. New Jersey, 384 U.S. 719, 728 (1966)).

[41] *Id.* at 1963, 409 N.E.2d at 767. The Court believed that the "integrity of the fact-finding process was not affected." *Id.*

[42] *Id.* at 1963, 409 N.E.2d at 767.

been incapable of reaching a fair and impartial verdict.[43] Therefore, the Court concluded that there was no reason to believe that the allegedly improper make-up of the panel had increased the risk of an erroneous conviction in any significant way.[44] As a result, the Court reasoned that the prosecution's use of peremptory challenges to exclude black individuals had not impugned the integrity of the fact-finding process.[45]

Other factors also were relevant in determining whether to give retroactive effect to the new constitutional rule, according to the *Reddick* Court. These included: "(a) the purpose of the new rule, (b) the extent of reliance by law enforcement authorities on the old rule, and (c) the effect that retroactive application would have on the administration of justice."[46] The Court found in the *Reddick* case that all of these factors indicated that it should not give retroactive effect to the *Soares* holding in the instance of a postconviction attack.

The Court reasoned that the primary design of the *Soares* rule was to deter attorneys from improperly influencing the composition of juries, and that making this principle retroactive would not further the goal of bettering future jury selections.[47] It acknowledged that the *Soares* holding also was intended to correct the unfairness of discriminatory prosecutorial actions. Because of the absence of racial "tensions" in Reddick's trial, however, no such concern was present there.[48] In addition, everyone included in the original trial had relied upon the Court's holding in pre-*Soares* cases,[49] and the *Reddick* Court reasoned that it would be unfair to "require clairvoyance on the part of the prosecutors."[50] Finally, the Court felt that an application of *Soares* principles in this case would affect adversely the administration of justice. It stressed that "[t]here must be a reasonable moment for a judgment to become final and a time beyond which further challenges must be barred."[51] Thus, in a case in which the integrity of the fact-finding process was not affected, the Court expressly declined to apply the *Soares* principles to a post conviction collateral attack.[52]

Although the *Reddick* Court's decision to deny retroactive application of the *Soares* holding may be very practical, its reasoning does not reflect the profound concern for racially-balanced juries shown by the *Soares* opinion. The Court in *Reddick* adopted an appropriate standard for giving retroac-

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* (quoting Stovall v. Denno, 388 U.S. 283, 297 (1967)).

[47] *Id.* at 1963, 409 N.E.2d at 767.

[48] *Id.*, 409 N.E.2d at 767-68.

[49] *Id.* at 1963-64, 409 N.E.2d at 768. The Court mentioned in particular, Commonwealth v. Mitchell, 367 Mass. 419, 326 N.E.2d 6 (1975), and Commonwealth v. King, 366 Mass. 6, 313 N.E.2d 869 (1974).

[50] Commonwealth v. Stokes, 374 Mass. 583, 374 N.E.2d 87 (1978).

[51] 1980 Mass. Adv. Sh. at 1964, 409 N.E.2d at 768.

[52] *Id.*

tive effect to new constitutional rules by giving a rule such impact only if it was designed to improve the integrity of the fact-finding process.[53] The Court then indicated that the *Soares* rule does not bolster the process' integrity in cases such as *Reddick*, where the victim of a crime and the accused are both of the same color.[54] This reasoning is inconsistent with the *Soares* Court's emphasis upon obtaining the interaction of a cross-section of members of the community in the jury room.[55] Under the *Soares* rationale, the fact-finding process would be affected adversely by counsel's racially-based challenges, regardless of the lack of other "racial tensions" in the trial.[56]

In addressing the other factors relevant to determining the retroactivity of *Soares*, the *Reddick* Court misinterpreted the thrust of the *Soares* opinion. It acknowledged that a major purpose of *Soares* may have been to correct the unfairness of discriminatory prosecutorial actions,[57] but saw no such unfairness in the *Reddick* procedures in the absence of any overt racial conflict at trial. Again, the *Soares* Court had stressed that the true unfairness in the unconstitutional use of peremptory challenges lay in the unrepresentative make-up of the jury panel.[58] Reddick's failure to press the jury selection issue at trial may indicate, however, that he did not feel that his rights were being violated. As the *Reddick* Court noted, the decision in a case must and should become final at some finite point after the defendant has exhausted his valid claims.

It appears, then, that although the rationale used by the *Reddick* Court is not philosophically reconcilable with that behind the *Soares* decision, it may still possess some strengths from a purely practical viewpoint. In addition, the *Reddick* Court stands on firm ground when it demonstrated reliance by the prosecution at Reddick's trial upon prior juror challenge decisions which had not yet embraced the *Soares* approach.[59] In the final analysis, then, as a result of *Reddick*, only on direct appeal may a Massachusetts defendant validly attack the prosecution's use of peremptory juror challenges as a general rule. The result arrived at by the *Reddick* Court is practically justifiable, but not on the basis of the reasoning outlined in the *Reddick* opinion itself.

**§ 4.3. Prisoner's Dock.*** The commonwealth's traditional practice of seating a criminal defendant in the prisoner's dock[1] during his or her trial was reevaluated by the Supreme Judicial Court in the recent case of *Com-*

[53] See text at note 37 *supra*.

[54] See note 34 *supra*.

[55] 1979 Mass. Adv. Sh. at 621, 387 N.E.2d at 513.

[56] 1980 Mass. Adv. Sh. at 1963, 409 N.E.2d at 768.

[57] *Id.* at 1963, 409 N.E.2d at 767-68.

[58] 1979 Mass. Adv. Sh. at 619, 387 N.E.2d at 512.

[59] 1980 Mass. Adv. Sh. at 1963, 409 N.E.2d at 768.

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[1] § 4.3 — *See* Commonwealth v. Moore, 1979 Mass. Adv. Sh. 2334, 393 N.E.2d 904. Most

*monwealth v. Moore*.[2] In *Moore*, the Court held that "ordinarily" a criminal defendant must be permitted to sit at counsel's table, rather than in the prisoner's dock.[3] During the *Survey* year, the Court suggested, in *Commonwealth v. Lockley*,[4] that seating options other than the prisoner's dock exist for the less docile defendant. This section will examine *Moore* and *Lockley* and the issues raised therein. This examination will include a discussion of the proper procedures to be followed by a trial judge in selecting seating arrangements for a criminal trial.

The defendant in *Moore* was convicted of first degree murder.[5] During the defendant's two and one half week trial, he was confined to the prisoner's dock[6] despite the request of his counsel that he be permitted to sit at counsel's table.[7] In support of this request, the defendant argued both that a hearing condition required that he sit close to his counsel in order to communicate with his counsel during trial,[8] and that his placement in the dock eroded the presumption of innocence.[9] In reviewing the trial court's denial of the defendant's request, the Supreme Judicial Court noted that in several of its previous cases it held that such requests were to be left to the discretion of the trial court.[10] The Court was willing, however, to reexamine

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courtrooms in the commonwealth used for criminal sessions contain a prisoner's dock. *Id.* at 2336, 393 N.E.2d at 906. The dock is a small wooden structure, four or five feet square, in which a criminal defendant may be seated during trial. *Id.* The dock is open at the top, and when a defendant is seated in it, his upper torso is visible to the other persons in the courtroom. *Id.* at 2336-37, 393 N.E.2d at 906-07.

[2] 1979 Mass. Adv. Sh. 2334, 393 N.E.2d 904.

[3] *Id.* at 2339, 393 N.E.2d at 2340. The Court held that when security reasons require the defendant to be restrained, use of the dock still would be permitted. See text at notes 15-16 *infra*.

[4] 1980 Mass. Adv. Sh. 1699, 408 N.E.2d 834.

[5] 1979 Mass. Adv. Sh. at 2334, 393 N.E.2d at 906.

[6] *Id.* at 2336, 393 N.E.2d at 906.

[7] *Id.*

[8] *Id.*

[9] See *id.* at 2336-38, 393 N.E.2d at 906-07. Although not explicitly provided for in the federal constitution, the presumption of innocence has long been regarded as a basic element of a fair trial under our system of criminal justice. *See* Coffin v. United States, 156 U.S. 432, 453 (1895). *See also* Estelle v. Williams, 425 U.S. 501, 503 (1976).

[10] *Id.* at 2338, 393 N.E.2d at 907. For example, in Commonwealth v. Walker, 370 Mass. 548, 350 N.E.2d 678, *cert. denied*, 429 U.S. 943 (1976), the defendant objected to the use of the dock on the ground that it eroded the presumption of innocence, interfered with his ability to consult with counsel, and prejudiced the defendant in connection with identifications of him by witnesses who viewed him isolated in the dock. *Id.* at 573, 350 N.E.2d at 695. The Supreme Judicial Court rejected these challenges stating that the trial court had not abused its discretion by seating the defendant in the prisoner's dock. *Id.* at 574, 350 N.E.2d at 696. On the identification issue, the Court noted that use of the dock was not prejudicial where crucial identification testimony came from accomplices to the crime. *Id.* In Commonwealth v. MacDonald (No. 2), 368 Mass. 403, 333 N.E.2d 194 (1975), the Supreme Judicial Court affirmed the denial of a motion to seat the defendant at his counsel's table instead of in the prisoner's dock where the powerfully built defendant previously had been convicted of first degree murder and where the only basis for security forces was Boden-stated. *Id.* at 408-09, 333 N.E.2d at 198. The trial

the use of the dock in light of a decision by the United States Court of Appeals for the First Circuit which questioned the constitutionality of the device. In *Walker v. Butterworth*,[11] the First Circuit stated, albeit in dictum, that "confinement in the prisoner's dock is unnecessary to accomplish any important state interest and may well dilute the presumption of innocence."[12]

After considering the First Circuit's decision in *Walker*, the Supreme Judicial Court in *Moore* ruled that "[o]rdinarily, a criminal defendant should be permitted to sit at counsel table."[13] The Court did not indicate, however, that this ruling was required under the federal constitution.[14] Moreover, the Court stated that under some circumstances the use of the prisoner's dock may still play a legitimate role in the conduct of a criminal trial. The Court noted that where security reasons require imposing restraints in the defendant's movement, the dock can provide the necessary

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court chose to use the dock rather than hand-cuffs. *Id.* at 408, 333 N.E.2d at 198. The Supreme Judicial Court noted that the defendant could have requested a cautionary jury instruction. *Id.* at 409, 333 N.E.2d at 198. In Commonwealth v. Bumpus, 362 Mass. 672, 290 N.E.2d 167 (1972), *judgment vacated and remanded on other grounds*, 411 U.S. 945 (1973), *aff'd on rehearing*, 365 Mass. 66, 309 N.E.2d 491 (1974), the defendant raised the same objections to the use of the dock that were raised in *Walker*. *Id.* at 680, 290 N.E.2d at 174. In rejecting these challenges, the Court stated that the jury is entitled to know who stands before it. *Id.* In Commonwealth v. Jones, 362 Mass. 497, 287 N.E.2d 599 (1972), the defendant in a robbery case wanted to be seated among the courtroom spectators during the testimony of eye witnesses who would be asked to identify the culprit, rather than in the dock *or* at counsel's table. *Id.* at 500-01, 287 N.E.2d at 602. The Court found no error in seating the defendant in the dock during this testimony, since there was no showing that the identifying witnesses were unduly impressionable or otherwise unreliable. *Id.* at 501, 287 N.E.2d at 602.

[11] 599 F.2d 1074 (1st Cir. 1979).

[12] *Id.* at 1081. *Walker* involved a petition to the First Circuit for a writ of habeas corpus. *Id.* at 1075. The petitioner was the defendant in the Massachusetts case of Commonwealth v. Walker, discussed in note 10 *supra*. The First Circuit ordered that the writ should issue because the trial court had required the defendant, during the proceedings to determine his sanity, to exercise his peremptory challenges personally, instead of through his counsel. *Id.* at 1081-84. The petitioner in *Walker* also claimed that the practice of seating a defendant in the prisoner's dock was analogous to making the defendant wear prison garb, a practice that was found unconstitutional for its dilution of the presumption of innocence in Estelle v. Williams, 425 U.S. 501, 504-05, *rehearing denied*, 426 U.S. 954 (1976). *See* 599 F.2d at 1080. In its discussion of the prisoner's dock, the First Circuit stated that "the Massachusetts prisoner dock must be considered, as a general matter, to be an unconstitutional practice" because of its potential impact on the presumption of innocence. *Id.* at 1081. All of the First Circuit justices felt that the practice raised constitutional issues. *See id.* at 1081 n.7. One justice would have found independent reversible error in the use of the dock. *Id.* Another did not join the portion of the court's opinion dealing with the dock, however, because it was unnecessary to the disposition of the case. *Id.*

[13] 1979 Mass. Adv. Sh. at 2339, 393 N.E.2d at 908.

[14] *See id.* at 2339-41, 393 N.E.2d at 908.

protection much less obtrusively than alternative security devices can.[15] In the future, the Court stated, a trial court should grant a request to seat the defendant at counsel's table unless some security measures are necessary.[16] If the request is denied, the reasons for the denial should appear in the record.[17] Where additional security is needed, the Court stated that the prisoner's dock should be used only if it is the "least restrictive measure available."[18]

Despite the *Moore* Court's creation of a policy to avoid the use of the prisoner's dock, it did not find the use of the dock in *Moore* to be reversible error.[19] The Supreme Judicial Court ruled that the dock had not prejudiced the defendant.[20] Although the trial court had not specifically stated the reasons for denying the defendant's request, the Supreme Judicial Court gleaned from the record that the lower court had been concerned with security.[21] Although it was not clear whether the dock was the least restrictive security measure available, the Court found no possibility that the defendant had been prejudiced because the trial court had "forcefully" instructed the jury that no inference of guilt was to be drawn from the use of the device.[22] Thus, while the *Moore* Court established a policy against the use of the prisoner's dock, it did not explicitly state that this policy has a constitutional dimension. Furthermore, the Supreme Judicial Court's failure to find prejudicial error in *Moore* demonstrated a deference toward the trial court's choice of seating arrangements not unlike that present in the Court's earlier decisions involving the prisoner's dock.[23]

The issue of the prisoner's dock was again presented to the Supreme Judicial Court during the *Survey* year in *Lockley*. The defendant in *Lockley* was convicted of robbery.[24] He was required to sit in the prisoner's dock[25] despite his motion that he be allowed to sit at counsel table.[26] The trial court

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[15] *Id.* at 2339-40, 393 N.E.2d at 908. The Court identified the threat of escape and the need to protect others in the courtroom as potential security problems which would permit some sort of restraint. *Id.* at 2339, 393 N.E.2d at 908.

[16] *Id.* at 2340, 393 N.E.2d at 908.

[17] *Id.*

[18] See *id.* The Supreme Judicial Court stated that when additional security measures are necessary, they should be imposed in light of the procedural standards set out in the case of Commonwealth v. Brown, 364 Mass. 471, 305 N.E.2d 830 (1973). See 1979 Mass. Adv. Sh. at 2340, 393 N.E.2d at 908. The *Brown* case is discussed at text and notes 40-58 *infra*.

[19] 1979 Mass. Adv. Sh. at 2340-41, 393 N.E.2d at 908.

[20] *Id.*

[21] *Id.* at 2340, 393 N.E.2d at 908.

[22] *Id.* at 2341, 393 N.E.2d at 908.

[23] See cases cited at note 10 *supra*.

[24] 1980 Mass. Adv. Sh. at 1699, 408 N.E.2d at 836.

[25] *Id.* at 1707, 408 N.E.2d at 840.

[26] *Id.*

denied the defendant's motion because it felt that the defendant was a security threat,[27] as he was then serving a sentence for an unrelated criminal offense.[28] The Supreme Judicial Court reversed his conviction and ordered a new trial on the unrelated ground that the trial court erred in denying the defendant's motion for a polygraph test.[29] Because a new trial was necessary, the Court addressed the issue of what seating arrangements were to be used at the new trial.[30] After reiterating its holding in *Moore*,[31] the Court stated that trial judges have options in seating criminal defendants in addition to placing them in the prisoner's dock or at counsel's table.[32] The Court suggested that if some security measures are needed, the intermediate step of seating the defendant on a chair or bench at the rear of the enclosure in front of the bar may be more appropriate and less restrictive than use of the prisoner's dock.[33] The Court believed that such an arrangement would be less likely to dilute the presumption of innocence than using the dock.[34] As in *Moore*, the Supreme Judicial Court in *Lockley* did not indicate that its consideration of seating arrangements involved constitutional issues.[35]

The Court did not order any particular seating arrangements to be used at the new trial.[36] Instead, it instructed the trial court to determine what seating would be proper under the procedures set forth in *Moore* and in *Commonwealth v. Brown*,[37] an earlier decision which analyzed the procedures imposing security measures to restrain criminal defendants during trial.[38] In fact, the Court's decision in *Moore* itself looked toward the *Brown* opinion as a source of the procedures to be employed in deciding what seating arrangements would be proper during trial.[39]

*Brown* involved a maximum security prisoner convicted of assaulting a prison guard.[40] The defendant, who had been involved in two escape attempts,[41] was shackled during trial by means of handcuffing his wrists and

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 1701-07, 408 N.E.2d at 837-40. The Court held that the trial judge did not give sufficient consideration to the question of whether the defendant, an indigent, should have been provided the polygraph examination. See *id.* at 838-39. For a discussion of the evidentiary issues decided by the Court in *Lockley*, see § 1.2, *supra*.

[30] 1980 Mass. Adv. Sh. at 1707, 408 N.E.2d at 840.

[31] *Id.* at 1707-08, 408 N.E.2d at 840.

[32] *Id.* at 1708, 408 N.E.2d at 840.

[33] *Id.*

[34] *See id.*

[35] *See id.*

[36] *Id.* at 841.

[37] 164 Mass. 471, 305 N.E.2d at 830 (1973).

[38] 1980 Mass. Adv. Sh. at 1708, 408 N.E.2d at 841.

[39] 1979 Mass. Adv. Sh. at 2340, 393 N.E.2d at 908.

[40] 364 Mass. at 471-72, 305 N.E.2d at 831.

[41] *Id.* at 474, 305 N.E.2d at 833.

attaching the handcuffs to a waist belt.[42] The defendant challenged these security measures as excessive and claimed they improperly diluted the presumption of innocence.[43] The defendant moved for a mistrial on these grounds, but the motion was denied by the trial court.[44] In its discussion of the defendant's claim, the *Brown* Court noted that shackling and other such security measures are to be avoided whenever possible.[45] Nevertheless, the Supreme Judicial Court recognized a duty on the part of trial judges "to do what may be necessary to prevent escape, to minimize danger of harm to those attending trial as well as to the general public, and to maintain decent order in the courtroom."[46] The Court stated that a trial judge possesses broad discretion in determining what sort of security measures are proper, and that a conviction will not be overturned due to allegedly excessive measures unless the defendant demonstrates that the trial judge's decision was "arbitrary or unreasonable."[47] Because the facts of the *Brown* case demonstrated the need to take security measures,[48] and because the judge had cautioned the jury against bias,[49] the Supreme Judicial Court could not find that the trial court had abused its discretion in imposing the hand security restraints on the defendant.[50]

Although the Supreme Judicial Court affirmed the defendant's conviction in *Brown*, it also attempted to define the procedure a trial judge should use in deciding where to seat a defendant. In *Brown*, the trial judge had consulted privately with the sheriff concerning the need for restraining the defendant[51] but had not made any formal statement for the record of the reasons behind his decision to shackle the defendant.[52] The Court stated

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[42] *Id.* A codefendant, who was acquitted, *id.* at 472, 305 N.E.2d at 832, and certain defense witnesses, all of whom were inmates in the same prison in which the defendant was confined, also were shackled during the trial. *Id.* at 473-74, 305 N.E.2d at 833. The trial court decided to shackle the defendant because of his criminal record and escape attempts, the sheriff's determination that the defendant was a serious security threat and the sheriff's recommendation that the shackles be used. *Id.* at 474, 305 N.E.2d at 833. The jurors were able to observe these restraints on the defendant during his trial. *Id.*

[43] *See id.* at 472, 305 N.E.2d at 832.

[44] *Id.*

[45] *Id.* at 475, 305 N.E.2d at 833.

[46] *Id.* at 475, 305 N.E.2d at 834 (footnote omitted).

[47] *Id.* at 476, 305 N.E.2d at 834 (footnote omitted).

[48] *See id.* at 473-76, 305 N.E.2d at 833-35. In addition to the defendant's record of conviction and escape attempts, the Court noted that it was proper to "attach significance" to the report and recommendation of the official charged with custody of the defendant, here the sheriff. *Id.* at 475, 305 N.E.2d at 834. The Court stated, however, that the trial judge may not abdicate his decision-making duty on this matter to that official. *Id.*

[49] *Id.* at 477, 305 N.E.2d at 835.

[50] *Id.*

[51] *Id.* at 474, 305 N.E.2d at 833.

[52] *See id.* at 478-79, 305 N.E.2d at 835-36.

that requiring a judge to "give reasons and respond to possible criticisms by counsel" would promote better decision-making regarding the restraints on criminal defendants.[53] The Court, therefore, sketched a "more circumspect" procedure to be followed in future cases.[54] The Court stated that, before trial, the judge should inform the defendant and his counsel of the reasons for imposing additional security measures.[55] The trial court should then hear any objections to the security measures from the defendant.[56] If such objections are made, a hearing, which may be informal, should then be held to consider them.[57] The Court stated that while ordinarily rules of evidence need not be followed in such a hearing, a record should be produced.[58]

Both *Moore* and *Lockley* pointed to the *Brown* decision as a procedural guide for determining whether the prisoner's dock should be employed in a criminal trial.[59] The *Moore* Court stated that the defendant should be permitted to sit at counsel's table unless procedures of *Brown* are followed in imposing the dock.[60] Because both *Moore* and *Lockley* relied on *Brown*, these two cases do not seem to place a heavy burden on a trial judge who determines that security reasons justify a refusal to seat a defendant at counsel table. The reliance on *Brown* suggests only that the defendant must be afforded the opportunity to present oral objections to the alternative arrangements,[61] and that the trial judge must demonstrate that these objections received consideration by stating the reasons for his decision on the record.[62] Both *Moore* and *Lockley* do require that there be security reasons for employing an alternative seating arrangement, and it seems implicit in

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 479, 305 N.E.2d at 836.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See* Commonwealth v. Moore, 1979 Mass. Adv. Sh. at 2340, 393 N.E.2d at 908; Commonwealth v. Lockley, 1980 Mass. Adv. Sh. at 1709, 408 N.E.2d at 841.

[60] 1979 Mass. Adv. Sh. at 2340, 393 N.E.2d at 908. It is unclear whether in either *Moore* or *Lockley* an informal hearing of the type sketched in *Brown* was held. The trial court in *Moore* entertained argument from the defendant's counsel concerning the adverse effects of the use of the prisoner's dock. *See id.* at 2336, 393 N.E.2d at 906. The trial judge stated that he would consider the defendant's request, but that he would make inquiries of the sheriff " 'because the Sheriff has, of course, the responsibility of security.' " *Id.* It is unclear whether the trial judge believed that the decision was to be left to the sheriff. *See id.* The *Brown* Court indicated that the trial judge may "attach significance" to the security officer's recommendation, but must make an independent decision on the matter. See note 48 *supra*. In *Lockley*, on the other hand, the trial court entertained arguments from the defendant's counsel, and the trial court's reasons for denying the defendant's motion apparently appeared in the record, since they were reported by the Supreme Judicial Court's opinion. *See* 1980 Mass. Adv. Sh. at 1707, 408 N.E.2d at 840.

[61] *See* Commonwealth v. Brown, 364 Mass. at 478-79, 305 N.E.2d at 835-36.

[62] *See id.* at 479, 305 N.E.2d at 836.

both opinions that the exigencies of security are the only justifications which will permit the use of an alternative.[63] The *Brown* Court, however, stated that the standard of review to be applied to the trial judge's decision regarding security restraints is to determine whether that decision was arbitrary or unreasonable.[64] Therefore, the traditional discretion of the trial courts in imposing security measures, including restrictive seating arrangements,[65] probably will continue to be respected by the Supreme Judicial Court.

This notion that the trial courts will retain discretion in selecting seating arrangements receives additional support in the Supreme Judicial Court's refusal to find error in the use of the prisoner's dock in the *Moore* case. The Court was willing to assume that the trial court had valid security reasons for utilizing the dock, and the Court was not concerned about the lack of clarity in the record as to whether a less restrictive alternative was available.[66] The Court simply stated that "[i]f there was error, we are unable to discover any risk of prejudice."[67]

Such deferential treatment of a trial judge's decision on seating arrangements is inappropriate if the presumption against the use of the prisoner's dock rests on a constitutional requirement. Although the First Circuit decision which prompted the Supreme Judicial Court's reevaluation of the use of the prisoner's dock raised constitutional questions about the use of the device,[68] neither *Moore* nor *Lockley* expressly indicates a constitutional dimension to the preference for seating a defendant at counsel's table.[69] Thus, where a trial judge indicates that there is a rational, security-related reason for employing the prisoner's dock or another seating device, it is unlikely that a criminal conviction will be reversed merely on the ground that such an alternative was employed.

Thus, the significance, for the present, of *Moore* and *Lockley* is problematical. The constitutionality of the prisoner's dock is unclear, and it is possible that if the Supreme Judicial Court continues to refrain from deciding the issue, the First Circuit will strike down the device on constitutional grounds. Both *Moore* and *Lockley* stated that in the "ordinary" case a criminal defendant should be allowed to sit at the counsel's table.[70] It would appear that unless a defendant poses a genuine security problem, a

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[63] *See* Commonwealth v. Moore, 1979 Mass. Adv. Sh. at 2339-40, 393 N.E.2d at 908; Commonwealth v. Lockley, 1980 Mass. Adv. Sh. at 1707-08, 408 N.E.2d at 840.

[64] See text at note 47 *supra*.

[65] *See* cases cited at note 9 *supra*.

[66] *See* 1979 Mass. Adv. Sh. 2340-41, 393 N.E.2d at 908.

[67] *Id.* at 2340, 393 N.E.2d at 908.

[68] See note 12 *supra*.

[69] *See* Commonwealth v. Moore, 1979 Mass. Adv. Sh. at 2339-41, 393 N.E.2d at 907-08; Commonwealth v. Lockley, 1980 Mass. Adv. Sh. at 1707-08, 408 N.E.2d at 840.

[70] *See* Commonwealth v. Moore, 1979 Mass. Adv. Sh. at 2339, 393 N.E.2d at 908; Commonwealth v. Lockley, 1980 Mass. Adv. Sh. at 1707-08, 408 N.E.2d at 840.

trial court would have no discretion on the choice of seating. Even if a security threat is presented, *Lockley* indicates that a seating arrangement other than the prisoner's dock should be considered by the trial court as an alternative. It is likely, however, that the trial court's initial determination whether the defendant poses a security threat will withstand challenges based upon the use of an alternative seating device. Therefore, the practitioner who is unable to convince a trial judge that an alternative seating arrangement is unnecessary should not expect to convince appellate courts in this commonwealth that use of such an alternative was reversible error.

**§ 4.4. Trial of a Juvenile as an Adult.*** Under Massachusetts law, juveniles under the age of eighteen generally are not subject to criminal prosecution.[1] Instead, cases involving such juveniles are heard by a juvenile court in a non-criminal proceeding.[2] Nevertheless, certain circumstances may allow a juvenile court to find that the interests of the child and the public are best served if the accused child stands trial, as an adult would, in a criminal prosecution.[3] The Massachusetts legislature has stated, however, that as far as is practicable, juveniles should be treated "not as criminals, but as children in need of aid, encouragement, and guidance."[4] Consequently, the transfer of a juvenile complaint to a criminal court is warranted

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§ 4.4. [1] G.L. c. 119, § 53 provides:

> Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

*Id.*

[2] *Id.*

[3] G.L. c. 119, § 61 provides in part:

> If it is alleged in a complaint made under sections fifty-two to sixty-three, inclusive, that a child *(a)* who had previously been committed to the department of youth services as a delinquent child has committed an offense against a law of the commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison; or *(b)* has committed an offense involving the infliction or threat of serious bodily harm, and in either case if such alleged offense was committed while the child was between his fourteenth and seventeenth birthdays, and if the court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public as demonstrated by the nature of the offense charged and the child's past record of delinquent behavior, if any, and is not amenable to rehabilitation as a juvenile, the court may, after a transfer hearing held in accordance with such rules of court as shall be adopted for such purpose, dismiss the complaint....

*Id.*

[4] *Id.*, § 53. See note 1 *supra*.

only in exceptional cases.[5] In such instances, the juvenile court must first determine if there is probable cause to believe that the suspect is guilty.[6] If probable cause is established, the court must then address the question of the transfer itself.[7]

During the *Survey* year, in *A Juvenile v. Commonwealth*,[8] the Massachusetts Supreme Judicial Court considered what type of evidence justifies the transfer of a juvenile complaint. The petitioner in *A Juvenile v. Commonwealth*, a sixteen year old male, was brought before Boston Juvenile Court in May of 1976 on charges of delinquency.[9] The state moved to transfer the proceeding to Superior Court.[10] At the inquiry into probable cause, testimony was introduced which tended to prove the petitioner raped a five-year-old girl at knife-point and left her bleeding in a hallway.[11]

After determining probable cause existed, a hearing was held on the question of the transfer itself.[12] The juvenile court considered reports from the probation department, the Department of Youth Services (D.Y.S.), the court clinic psychiatrist, and the Boston Juvenile Court clinic regarding the petitioner's condition.[13] Testimony also was heard from the petitioner's mother, two family friends, the court liaison with D.Y.S., and the director of a METCO program in which the petitioner was participating concerning their evaluation of the juvenile.[14] The judge then entered his findings and order, which, under Massachusetts law, must be based on "clear and convincing evidence."[15] The court found that the petitioner posed a serious threat to the public and that he could not be rehabilitated within the juvenile justice system.[16]

As a result of the court's findings, the juvenile complaint was dismissed and a criminal complaint against the petitioner was issued.[17] In November of 1976, the petitioner moved to dismiss the indictment which ensued.[18] Petitioner argued that the opinion and order of transfer by the juvenile court violated the standards established by the Supreme Judicial Court in a

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[5] A Juvenile v. Commonwealth, 370 Mass. 272, 281-82, 347 N.E.2d 677, 684 (1976).
[6] G.L. c. 119, § 61.
[7] *Id.*
[8] 1980 Mass. Adv. Sh. 1131, 405 N.E.2d 143.
[9] *Id.* at 1132, 405 N.E.2d at 145.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] G.L. c. 119, § 61; 1980 Mass. Adv. Sh. at 1132, 405 N.E.2d at 145.
[16] 1980 Mass. Adv. Sh. at 1132-33, 405 N.E.2d at 145.
[17] *Id.* at 1133, 405 N.E.2d at 145.
[18] *Id.*

1976 case also entitled *A Juvenile v. Commonwealth*.[19] After three years of procedural delays, the Supreme Judicial Court granted the petitioner's request to review the Superior Court's refusal to dismiss the indictment.[20]

The Court held that, under the guidelines for transfer hearings which it had announced in its 1976 decision of *A Juvenile v. Commonwealth*, the juvenile court's findings were too ambiguous to support a transfer order.[21] According to the Court's prior decision, the crucial question was whether the petitioner was amenable to rehabilitation.[22] The juvenile court had found that the petitioner had no prior delinquency record, that he was a high school student living in a "well intact" family, that the court clinic reported there was no need for psychiatric recommendations for the juvenile, and that D.Y.S. had no recommendation for him.[23] The Supreme Judicial Court stated that such findings suggest a good prognosis for a first offender.[24]

The juvenile court's findings, however, also emphasized the seriousness of the crime of which the petitioner was charged.[25] In addition, the court noted the short time period in which the petitioner could be confined by the D.Y.S., as well as the "semi-secure" nature of D.Y.S.'s facilities.[26] Such statements suggested to the Supreme Judicial Court that the juvenile court was concerned more with protecting the public and with the nature of the crime of which the petitioner was accused than with the petitioner's pros-

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[19] *Id.* (citing A Juvenile v. Commonwealth, 370 Mass. 272, 347 N.E.2d 677 (1976)).

[20] 1980 Mass. Adv. Sh. at 1134, 405 N.E.2d at 146. On September 8, 1977, a superior court judge found the transfer order had inadequate subsidiary findings and remanded the case to the Boston Juvenile Court for further findings. In December of 1978, the petitioner renewed his motion to dismiss the indictment stating that fourteen months had elapsed with no further findings made by the juvenile court. The superior court judge ordered the parties to contact the juvenile court justice who had handled the case. On February 14, 1979, that justice issued findings and order similar to his original, except for an addendum to the sixth subsidiary finding. When the superior court refused to dismiss the indictment, the petitioner requested the Supreme Judicial Court to review the case under its supervisory powers as detailed in G.L. c. 211, § 3. *Id.* at 1133-34, 405 N.E.2d at 145-46.

[21] *Id.* at 1134, 405 N.E.2d at 146.

[22] 370 Mass. at 283, 347 N.E.2d at 685. As for other factors the court should consider in its decision, the statute provides in part:

> If the court so finds, the court shall then consider, but shall not be limited to, evidence of the following factors:
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> *(a)* the seriousness of the alleged offense; *(b)* the child's family, school and social history, including his court and juvenile delinquency record, if any; *(c)* adequate protection of the public; *(d)* the nature of any past treatment efforts for the child, and *(e)* the likelihood of rehabilitation of the child.

G.L. c. 119, § 61.

[23] 1980 Mass. Adv. Sh. at 1139-40, 405 N.E.2d at 149.

[24] *Id.* at 1140, 405 N.E.2d at 149.

[25] *Id.* at 1139, 405 N.E.2d at 149.

[26] *Id.* at 1139-40, 405 N.E.2d at 149.

pects for rehabilitation.[27] The Supreme Judicial Court had held expressly in its 1976 opinion that although the factors of the seriousness of the crime and the public's safety are relevant to the transfer decision, they are inadequate in themselves to support a transfer order.[28] Rather, the Court required a finding that the juvenile either could not be rehabilitated within the present juvenile system, or that the juvenile posed a serious threat to the public in the absence of long-term supervision and security.[29] Subsidiary findings were also required to indicate the basis for such a conclusion.[30] In the present case, the Court observed that a statement by the juvenile court that the D.Y.S. offered no treatment for sexual offenders may have been relevant to the issue of rehabilitation.[31] Nevertheless, because such statements were not reconciled with the earlier hopeful indications, the Court characterized the juvenile court's findings as ambiguous.[32] Such an ambiguous report by the court failed to constitute sufficient subsidiary findings to support the conclusion that the petitioner was not amenable to rehabilitation.[33] The Court therefore found that because of the absence of such findings, the transfer order was without justification.[34]

The infirmities in the transfer procedure, however, did not result in dismissal of the criminal indictment against the petitioner. Instead, the indictment remained in place provisionally while the juvenile court was requested to clarify its findings in light of the Court's decision.[35] If the revised

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[27] *Id.* at 1139, 405 N.E.2d at 149.

[28] In A Juvenile v. Commonwealth, 370 Mass. 272, 282-83, 347 N.E.2d 677, 685 (1976), the Court stated:

> However, we do not believe that a decision to transfer is proper when supported by findings which deal only with the seriousness of the charge and the inadequacy of existing juvenile facilities in terms of safeguarding the public. Despite the importance of these two factors and the weight that they may have in support of a conclusion that there should be a transfer to adult court, there must also be a finding that the juvenile cannot be rehabilitated within the present juvenile structure, or that, in the absence of long-term supervision and security, he poses a serious threat to the public, with subsidiary findings indicating the basis for this conclusion. It cannot be assumed that the nature of the offense demonstrates the need for treatment beyond available juvenile facilities, for this assumption would imply that juvenile facilities will be adequate only if a child is charged with a minor offense and that, by definition, serious offenders must be denied the statutory protections afforded juveniles. Such a conclusion ignores the rehabilitative purposes of our statutes relating to delinquent children and, in effect, restricts without legislative sanction our juvenile system to the treatment of minor offenders.

*Id.*

[29] *Id.* at 282, 347 N.E.2d at 685.

[30] *Id.*

[31] 1980 Mass. Adv. Sh. at 1140, 405 N.E.2d at 149.

[32] *Id.*

[33] *Id.* at 1139, 405 N.E.2d at 148-49.

[34] *Id.*

[35] *Id.* at 1141, 405 N.E.2d at 150.

findings failed to show adequate cause for transfer, the indictment was to be dismissed.[36] If the findings indicated otherwise, the indictment was to stand and the petitioner to face trial.[37] The Court concluded that the "lesson to be learned" from the decision is that "in the relatively few cases in the juvenile courts in which the transfer question arises, the proof should be full, and in the still fewer cases where transfer is ordered, the findings should express the judge's decision in fair detail and with logical cohesion."[38]

The Court's opinion in *A Juvenile v. Commonwealth* is responsive to the policies formulated by the Massachusetts legislature regarding the juvenile justice system. The decision to transfer a juvenile proceeding to criminal court affects important statutory rights of the juvenile. If treated as a juvenile, the individual would have no criminal record,[39] would not be disqualified from public service,[40] would be eligible for rehabilitation under the care and guidance of the Youth Service Board,[41] and would be discharged at the age of eighteen unless there is a finding that his discharge would be physically dangerous to the public.[42]

The Massachusetts legislature has made it clear that non-criminal treatment of juvenile offenders is the favored approach.[43] Consequently, the Court has stated in the past that a transfer should be ordered only when warranted by exceptional circumstances.[44] That the juvenile is accused of a serious crime and may pose a threat to the public does not, without more, constitute such "exceptional circumstances."[45] Rather, an exceptional circumstance is the juvenile's non-amenability to rehabilitation, as found in an explicit, detailed statement by the court.[46]

Unless a juvenile is not amenable to rehabilitation, a decision to try his case in a criminal proceeding contradicts the purpose of the juvenile justice system. The underlying concept of "juvenile justice" is that a juvenile delinquent is fundamentally different from his adult counterpart.[47] The juvenile is viewed as more deserving of help than punishment, primarily because his character is seen as more malleable than that of a hardened adult criminal.[48] Consequently, both society and the individual benefit if a

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1142, 405 N.E.2d at 150.

[40] G.L. c. 119, § 53.

[41] *Id.* § 60.

[42] *Id.* § 58, and c. 120.

[43] *Id.* c. 120, §§ 16, 17.

[44] *Id.* c. 119, § 53. See note 1 *supra*.

[45] 370 Mass. at 281-82, 347 N.E.2d at 684.

[46] *Id.* at 282, 347 N.E.2d at 685.

[47] *Id.*

[48] Institute of Judicial Administration/American Bar Association, JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO TRANSFER BETWEEN COURTS at 3 (1977) (hereinafter cited as Juvenile Justice Standards Project).

juvenile can be diverted from the punitive criminal justice system into a juvenile justice system designed solely to rehabilitate and not to punish.[49] Under this philosophy, the only proper justification for a transfer to criminal court is a finding that neither the juvenile nor society could profit from utilizing the juvenile justice system because the child is not amenable to rehabilitation.

The Court's decision that the juvenile is not amenable to rehabilitation must be supported by subsidiary findings is also consistent with the policies of the legislature regarding juvenile justice. Requiring a judge to provide subsidiary findings which support the transfer order prevents the order from being based upon improper considerations such as the seriousness of the crime, protection of the public, or any other subjective criterion which may influence a judge. Detailed subsidiary findings will ensure that a conclusion of non-amenability to rehabilitation is supported by facts relevant only to the issue of rehabilitation. Expert evaluations of the accused's background, his emotional and psychological condition, as well as an examination of the dispositional alternatives available to the court would all be relevant to such a decision. In addition, if it is the juvenile facilities themselves which make rehabilitation seem unlikely, a transfer order based explicitly on those inadequacies may focus attention on the problem and encourage reform.[50] In contrast, findings which refer only to the seriousness of the crime and protection of the public, as in *A Juvenile v. Commonwealth*, are inadequate to support a transfer order since they do not pertain to the question of rehabilitation.[51]

In summary, the Court's decision in *A Juvenile v. Commonwealth* is in keeping with the policies of the Massachusetts legislature regarding the juvenile justice system. The system was created in order to furnish juveniles with an opportunity to rehabilitate themselves. That opportunity should not be foreclosed unless it appears clear that attempts at rehabilitation would be fruitless.

**§ 4.5. The Officer Safety Exception to the Knock and Announce Rule.*** When making an entry into a dwelling house, police ordinarily must knock, identify themselves, and state their purpose.[1] This requirement rests in part

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[49] *Id.* at n.35. *See also*, J. Gasper and D. Katkin, A Rationale for the Abolition of the Juvenile Court's Power to Waive Jurisdiction, 7 PEPPERDINE L. REV. 937, 951 (1980).

[50] Juvenile Justice Standards Project, *supra* note 48, at 6. The Commission noted that "...the criminal justice system is so inhumane, so poorly financed and staffed, and so generally destructive that the juvenile court cannot do worse." *Id.*

[51] *Id.* at 41. Commenting on the validity of a transfer order supported by a bare finding of nonamenability Judge Bazelon noted, "Perhaps it is only by searching for what we need but do not have that future improvements in knowledge and resources can be hoped for." Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968).

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§ 4.5 [1] *See* Note, *Announcement in Police Entries*, 80 YALE L.J. 139 (1970) [hereinafter cited as Yale Note]; Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626 (1970);

on the principle that every individual is entitled to protection from surprise invasions of the privacy of his home.[2] An exception to this rule recognized in many jurisdictions, however, allows police to omit the announcement of their identity and purpose if exposure of their identity would endanger their safety.[3] During the *Survey* year, the Supreme Judicial Court recognized this exception for the first time in *Commonwealth v. Cundriff*.[4]

In *Cundriff*, defendant Jamie Cundriff and three companions entered a hairdressing salon armed with guns.[5] They took money, jewelry and other items including a backgammon set.[6] Soon after the robbery, the police arrested the defendant's brother, Cedric Cundriff, and found several objects from the robbery in his possession.[7] Two months after the incident, police officers went to defendant Jamie Cundriff's home with an arrest warrant.[8] When they knocked on the door, a woman asked "Who is it?"[9] One officer answered "School bus."[10] The woman opened the door and the officers rushed into the apartment, arrested Jamie Cundriff and seized a backgammon set.[11]

At trial for the robbery of the hair salon, defendant Jamie Cundriff moved to suppress the backgammon set as evidence, arguing that the police officers unlawfully entered Cundriff's apartment without first announcing their identity and purpose.[12] In ruling on the motion, the trial judge acknowledged the general common law rule that officers must knock and announce before entering a dwelling.[13] The judge found, however, that because an announcement under these circumstances would have endangered lives, the officers were justified in failing to make one.[14] The Supreme Judicial Court granted the defendant's request for direct appellate review of the trial court's ruling.[15]

The Court examined the trial judge's finding that there had been a strong possibility that an announcement by the police would have endangered the officers' lives. The Court determined that the finding was supported by the

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[2] *See* Yale Note, *supra* note 1, at 152-53; Oysted v. Shed, 13 Mass. 520, 523 (1816).

[3] Read v. Case, 4 Conn. 166, 170 (1822) (the first American case to recognize an officer safety exception to the knock-and-announce rule); United States v. Scott, 520 F.2d 697, 700-01 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976).

[4] 1980 Mass. Adv. Sh. 2519, 2529, 415 N.E.2d 172, 178.

[5] 1980 Mass. Adv. Sh. 2519, 415 N.E.2d 172.

[6] *Id.* at 2520, 415 N.E.2d at 173.

[7] *Id.*

[8] *Id.* at 2520, 415 N.E.2d at 174.

[9] *Id.* at 2521, 415 N.E.2d at 174.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 2520, 415 N.E.2d at 173.

evidence suggesting that the defendant had participated in an armed robbery and by the testimony of the police indicating that they had considered the defendant armed and dangerous.[16] Accordingly, the Court recognized that under such circumstances an exception to the common law knock-and-announce rule should allow the police to fail to identify themselves and to fail to state their purpose.[17]

In reaching its decision, the Court initially surveyed the history of the common law knock-and-announce rule and observed that three factors spurred the development of the rule in England.[18] First, the rule was intended to limit violence resulting from homeowners attempting to protect their property from unannounced intruders.[19] A policeman's knock and announcement notified homeowners that the person at their door did not intend to commit a crime against their person or property. Second, the rule protected the peace, tranquility and privacy of a homeowner.[20] Finally, the rule sought to prevent policemen from destroying windows and doors to gain entrance to a dwelling[21] while executing warrants. The *Cundriff* Court maintained that these justifications for the rule are as legitimate today as they were in the past.[22]

The Court then examined an exception to this rule which has developed in American law. The Court noted that as early as 1822, American courts had recognized that a knock and an announcement are unnecessary if an officer has reason to believe that an announcement would present imminent danger to human life.[23] In addition, the Court observed that the California Supreme Court had applied this exception to situations where an announcement would increase the officer's peril or would frustrate the arrest.[24]

In light of this background, the Court examined the status of the rule and this exception in Massachusetts. The Court's analysis revealed that early Massachusetts cases had adhered strictly to the common law announcement rule.[25] These cases also demonstrated, however, that the Court had never

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[16] *Id.* at 2529, 415 N.E.2d at 178.

[17] *Id.*

[18] *Id.* at 2522, 415 N.E.2d at 174.

[19] *Id. See* 2 F. POLLOCH & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 41 (2d ed. 1899).

[20] 1980 Mass. Adv. Sh. at 2522, 415 N.E.2d at 174.

[21] *Id.* at 2522-23, 415 N.E.2d at 175. *See* Lee v. Gansel, 98 Eng. Rep. 935, 938 (K.B. 1774). In *Gansel* the court stated that failing to protect against breaking doors and windows would "leave the family within, naked and exposed to thieves and robbers." *Id.*

[22] 1980 Mass. Adv. Sh. at 2528, 415 N.E.2d at 177.

[23] *Id.* at 2528, 415 N.E.2d at 178. *See* Read v. Case, 4 Conn. 166, 170 (1822).

[24] 1980 Mass. Adv. Sh. at 2528, 415 N.E.2d at 178. *See* People v. Maddex, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956).

[25] 1980 Mass. Adv. Sh. at 2527-28, 415 N.E.2d at 177. *See* Commonwealth v. Reynolds, 120 Mass. 190, 196 (1876); Oysted v. Shed, 13 Mass. 520, 523 (1816).

had the chance to accept or reject the officer safety exception to the rule. Accordingly, the Court used the opportunity presented by the *Cundriff* case to endorse more completely the common law development of the rule by applying the exception to the circumstances in the *Cundriff* case. Specifically, the Court held that whenever police attempt to enter a dwelling house with reason to fear for their safety, or for the safety of others, they may utilize the exception by failing to identify themselves and their purpose.[26]

Although the Court implied that its decision merely recognizes a widely accepted exception to the knock-and-announce rule, the case actually carves a broader exception than the widely accepted version. The Court based its holding on both the evidence suggesting that the defendant had participated in an armed robbery and the police testimony stating that they had considered the defendant armed and dangerous.[27] Since such police testimony should logically follow from any armed robbery, the decision rests primarily on the evidence of the defendant's participation in the armed robbery. Thus, in effect, police in Massachusetts no longer need to knock and announce their purpose when attempting to arrest a suspected armed robber in his home.

The authorities cited by the Court to achieve this result, however, do not support such a broad application of the officer safety exception to the knock-and-announce rule. For example, in reaching its decision, the Court cited *Read v. Case*,[28] the first case to apply this exception to the knock-and-announce rule. In *Read*, the Connecticut Supreme Court of Errors excused a failure to announce after finding that the occupant of the invaded home previously had indicated to authorities that he would not give himself up and would use his gun to protect himself if an arrest were attempted.[29] The *Read* court explained that the knock-and-announce rule would be distorted if the court were to extend the rule's benefits to a defendant who had full knowledge of the information he contended should have been communicated to him and "who waited only for a demand, to wreak on his bail the most brutal and unhallowed vengeance."[30] Thus, the *Read v. Case* exception to the knock-and-announce rule does not extend to every situation in which a man is believed to have participated in an armed robbery. Instead, the result in *Read* turns on the home occupant's knowledge of the impending arrest and the police officer's knowledge of likely armed resistance to that arrest.

In the two more recent cases that the *Cundriff* Court cited to support its decision, the circumstances again more clearly suggest danger to the ar-

[26] 1980 Mass. Adv. Sh. at 2529, 415 N.E.2d at 178.

[27] *Id.*

[28] 4 Conn. 166 (1822).

[29] *Id.* at 167.

[30] *Id.* at 170.

resting officers from identifying their presence and purpose than do the circumstances in *Commonwealth v. Cundriff*. For example, the Court cited *Gilbert v. United States*[31] where the Court of Appeals for the Ninth Circuit approved an unannounced entry into an apartment thought to contain one or two armed suspects.[32] The entry took place within hours of a bank robbery and the shooting death of a policeman.[33] The *Gilbert* court held that failure to announce must be excused "where to require it would create palpable peril to the life or limb of the arresting officers."[34] The *Cundriff* Court also cited *United States v. Scott*,[35] where the Ninth Circuit again excused the failure of the police to announce their purpose, although they did knock and announce their identity, when the police were in pursuit of suspected armed robbers two hours after the crime.[36]

Both *Gilbert* and *Scott* allowed exceptions to the knock-and-announce rule in circumstances of fresh pursuit of armed robbers or murderers. While the Court in *Commonwealth v. Cundriff* uses these two cases to support its decision, the facts of *Cundriff* are significantly different from the facts of *Gilbert* and *Scott*. Unlike the officers in *Gilbert* and in *Scott*, the officers in *Cundriff* were not in fresh pursuit. Rather, they approached Cundriff's home early in the morning two months after the robbery. It was, therefore, much less likely in *Cundriff* that the officers would confront armed criminals ready to respond to an arrest attempt than would the officers in *Gilbert* and *Scott*. Indeed, in *Cundriff*, the officer's response of "school bus"[37] to the specific request to identify himself, indicated that the officers expected the Cundriff family to be preparing their daughter for school, rather than preparing to resist an arrest.

Thus, the Supreme Judicial Court in *Commonwealth v. Cundriff* has recognized for the first time not only an officer safety exception to the knock-and-announce rule, but also has endorsed the exception's application in more extended circumstances than those generally recognized in other jurisdictions. While the lack of an announcement may have avoided a danger to the officers in *Cundriff*, the Court in future cases should articulate with greater care the circumstances required to excuse an officer's knock and announcement. Unless the decision is clarified and limited, *Cundriff* erodes the knock-and-announce rule and invites repeated unwarranted invasions of a home dweller's privacy.

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[31] 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 393 U.S. 985 (1968).

[32] 366 F.2d at 932.

[33] *Id.* at 929.

[34] *Id.* at 932.

[35] 520 F.2d 697 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976), *cited in* 1980 Mass. Adv. Sh. at 2529, 415 N.E.2d at 178.

[36] 520 F.2d at 700-01.

[37] See text and notes at note 10 *supra*.

**§ 4.6. The Abolition of the Year-and-a-Day Rule — Ex Post Facto Laws.*** At common law, an indictment for homicide would not stand if the victim had died more than a year and a day after the alleged wrongdoing.[1] This "year-and-a-day" rule developed during a period in which it was difficult to establish a line of causation between a criminal act and a death which occurred more than a year and a day after the criminal act.[2] In this respect, one commentator suggested in 1909 that the rule "was a wise precaution in view of the defectiveness of medical science in medieval days."[3] While many jurisdictions still support this rule,[4] a significant number of jurisdictions recognize that the rule has been rendered anachronistic by advances in medical sciences that allow a victim's life to be sustained for relatively long periods of time.[5] To reflect modern medical experiences, the legislature in at least one jurisdiction has extended the allowable time period between the alleged act and the victim's death.[6] Following similar logic, courts in other jurisdictions have repealed the rule completely.[7] During the *Survey* year, the Supreme Judicial Court, in *Commonwealth v. Lewis*,[8] placed Massachusetts with the growing group of jurisdictions that have abolished the rule.

In *Lewis*, the Court reviewed the homicide indictments pending against defendant Lewis and three co-defendants.[9] The Court also considered a murder charge against defendant Phillips in a consolidated case, *Commonwealth v. Phillips*.[10] Defendant Lewis and his three companions allegedly assaulted their victim on April 19, 1976;[11] the victim died on May 30, 1978.[12] Phillips was indicted for murder after an assault on October 22,

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§ 4.6 [1] *See generally* Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230, 232 (1894); Note, *The Year and a Day Rule: Has Its Time Run Out?*, 12 CREIGHTON L. REV. 683, 683-84 (1978) [hereinafter cited as *The Year and a Day Rule*].

[2] *See* State v. Brown, 21 Md. App. 91, 94-95, 318 A.2d 257, 259-60 (1974).

[3] KENNY, OUTLINES OF CRIMINAL LAW (4th ed. 1909), *cited in* State v. Brown, 21 Md. App. 91, 95, 318 A.2d 257, 260 (1974).

[4] *The Year and a Day Rule*, *supra* note 1, at 685. This note, published in 1978, lists twenty-five jurisdictions that still support the rule. *See* Elliot v. Mills, 335 P.2d 1104 (Okla. Crim. 1959).

[5] *See, e.g.*, State v. Young, 148 N.J. Super. 405, 412-14, 372 A.2d 117, 1121 (1977); Commonwealth v. Ladd, 402 Pa. 164, 173-74, 166 A.2d 501, 506-07 (1960).

[6] The California legislature extended the rule to three years and a day. Cal. Penal Code § 194 (West 1970). The Washington legislature also extended the rule to three years and a day, Wash. Rev. Code § 9.48.010 (1972 Supp.) (repealed 1975), but later deleted the length requirement from its statutory definition of homicide. Wash. Rev. Code Ann. § 9A.32.010 (1977).

[7] State v. Young, 148 N.J. Super. at 412-14, 372 A.2d at 1121; Commonwealth v. Ladd, 402 Pa. at 173-74, 166 A.2d at 506-07.

[8] Commonwealth v. Lewis, 1980 Mass. Adv. Sh. 1973, 1980-81, 409 N.E.2d 771, 775-76.

[9] *Id.* at 1974, 409 N.E.2d at 772.

[10] *Id.*

[11] *Id.*

[12] *Id.*

1977, which resulted in the victim's death on April 27, 1979.[13] During each trial, the respective defendants moved to dismiss the indictments because the victims had died more than a year and a day after the attacks.[14] Upon hearing these motions, the trial court in *Lewis* and in *Phillips* reported questions of law to the Appeals Court as to whether the indictments could be maintained lawfully.[15] Subsequently, the Supreme Judicial Court, upon its own initiative, granted a request for direct review of the question in *Phillips*, and ordered direct review of the motion in *Lewis*.[16]

In its decision, the Supreme Judicial Court first noted that it previously had expressed severe doubts about the modern day utility of the year and a day rule in *Commonwealth v. Golston*.[17] The *Lewis* Court then reiterated its concern that the rule fails to reflect present day medical ability to prolong and sustain life after severe trauma.[18] Thus, the Court found the rule to be "senselessly indulgent toward homicidal malefactors."[19] Before abolishing the rule, however, the Court considered whether it could do so without violating the constitutional prohibitions against ex post facto laws.[20]

In considering the ex post facto law issue, the Court first surveyed other jurisdictions for their reactions to the year-and-a-day rule. The survey indicated that the year-and-a-day rule still exists in many jurisdictions.[21] In explaining why many jurisdictions retain the rule, the Court noted that many courts have not addressed the issue, and that some courts have deferred

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 1973, 409 N.E.2d at 771.

[16] *Id.*

[17] 373 Mass. 249, 366 N.E.2d 744 (1977). In *Golston*, the Court stated that "[w]e take this occasion to announce that if the point [the year and a day rule] comes before us we shall feel free to reexamine the justification for the rule." *Id.* at 255, 366 N.E.2d at 749. The Court avoided deciding whether the rule should be abolished by deciding that the victim's brain death, which occurred within days of Golston's assault, constituted the victim's death for the purposes of the homicide indictment. *Id.* at 253-55, 366 N.E.2d at 748-49. The defendant had argued that under the "heart death" standard the victim might have survived beyond a year and a day. *Id.*

[18] 1980 Mass. Adv. Sh. at 1976-77, 409 N.E.2d at 773.

[19] *Id.*

[20] *Id.* at 1978-80, 409 N.E.2d at 774-75. Although the Court did not specify the source of the ex post facto law problems, ex post facto laws are prohibited by both the United States Constitution and the Massachusetts Constitution. The United States Constitution declares that "No state shall ... pass any ... ex post facto Law.... U.S. Const. art. 1, § 10. The Massachusetts Constitution provides that:

> Laws made to punish for actions done before the existence of such laws and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

Mass. Const. part I, art. 24. *See* Marks v. United States, 430 U.S. 188 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

[21] 1980 Mass. Adv. Sh. at 1977, 409 N.E.2d at 773. See note 4 *supra*.

to their legislatures to alter this longstanding common law rule.[22] Nevertheless, the Court noted that courts in a number of jurisdictions recently have abolished or altered the rule.[23]

The Court then examined the decisions from other jurisdictions that have abolished the year-and-a-day rule.[24] In many of these cases, courts determined whether the rule could be replaced retroactively to the case they were considering or whether retroactive abolition would violate prohibitions against ex post facto laws.[25] A few courts abolished the rule retroactively after characterizing the year-and-a-day rule as a rule of evidence rather than of substance.[26] Changes in rules of evidence, one court maintained, do not invoke the rule against ex post facto laws.[27] The Court in *Lewis*, however, considered this distinction artificial and, therefore, refused to allow this distinction to determine the outcome of the case.[28] The Court also rejected a requirement of justified reliance on the rule by the defendant — a requirement the defendants in these cases clearly could not meet.[29] Instead, the Court focused on the policy behind the ex post facto law prohibition, which is to discourage badly motivated or erratic action by a lawmaker.[30] Thus, the Court concluded that the year-and-a-day rule should continue only to the point where the Court declared the rule vulnerable.[31] As a result, acts committed prior to the Court's statements in *Commonwealth v. Golston* concerning the rule's vulnerability continue to receive the protection of the rule, but acts committed after *Golston* are no longer guarded by this time limitation.[32] Consequently, because the Court had decided *Commonwealth v. Golston* on August 26, 1977,[33] and the assault in *Lewis* was committed on April 19, 1976,[34] the Court dismissed the murder charges against Lewis and his co-defendants.[35] Phillips, however, attacked his victim on October 22, 1977.[36] Hence, the Court allowed the homicide indictment against him to stand.[37]

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[22] *Id.*

[23] *Id.* at 1977-79, 409 N.E.2d at 773-74. See text and notes at notes 5-7 *supra*.

[24] *Id.*

[25] *Id.* at 1978, 409 N.E.2d at 774.

[26] People v. Snipe, 25 Cal. App. 3d 742, 746-48, 102 Cal. Rptr. 6, 9-10 (1972); Commonwealth v. Ladd, 402 Pa. 164, 169-73, 166 A.2d 501, 505-07 (1960).

[27] People v. Snipe, 25 Cal. App. 3d at 746-48, 102 Cal. Rptr. at 9-10.

[28] 1980 Mass. Adv. Sh. at 1980, 409 N.E.2d at 775.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1981, 409 N.E.2d at 776.

[33] 373 Mass. at 249, 366 N.E.2d at 744.

[34] 1980 Mass. Adv. Sh. at 1974, 409 N.E.2d at 772.

[35] *Id.* at 1981, 409 N.E.2d at 776.

[36] *Id.* at 1974, 409 N.E.2d at 772.

[37] *Id.* at 1981, 409 N.E.2d at 776.

Although the Court in *Lewis* abolished the year-and-a-day rule, the Court did not foreclose the possibility of a similar rule with a longer time limitation. The Court acknowledged that there are competing interests in homicide cases where the victim has died an appreciable time after the wrongdoing. First, there is the commonwealth's interest in punishing those who commit homicide.[38] Opposing this interest is the accused's right to be protected from stale claims of homicide.[39] In reaching its decision, the Court noted that the striking of a balance between these interests, by setting a time limit between the wrongful act and the victim's death, is characteristically within the province of the legislature.[40] The Court also mentioned, however, that if the legislature is inactive, the time limit could be set by the Courts.[41] In the *Lewis* case, the Court did not set a time limit. Rather, it allowed homicide defendants, including defendant Phillips, only the right to challenge causation.[42]

While the result in *Lewis* may appear inequitable because it treats defendant Phillips different from the defendants in the *Lewis* case, the decision is, nevertheless, consistent with United States Supreme Court decisions concerning the ex post facto law doctrine. In 1964, the United States Supreme Court determined that "if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect."[43] In a more recent decision, the Supreme Court reiterated the maxim that, for a retroactive change in the law to be upheld, the change must be expected. The Court again noted that the ex post facto law prohibition is based on "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties."[44] Consistent with these principles, the *Lewis* Court abolished the year-and-a-day rule only against defendant Phillips, who clearly could have foreseen this change in the law. Even though the defendants in the *Lewis* case did not rely on the year-and-a-day rule, they were not given fair warning concerning the abolition of the rule. Hence, abolishing the rule in their case would have violated constitutional requirements involving ex post facto laws.

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[38] *Id.* at 1980-81, 409 N.E.2d at 775.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Bouie v. City of Columbia, 378 U.S. 347 (1964). In *Bouie*, the Court reversed the South Carolina State Supreme Court's retroactive application of its new judicial construction of a statute which rendered the petitioner's act in *Bouie* criminal. *Id.* at 349-51. The Court stated that retroactive application of the new interpretation of the statute would violate the petitioner's right to fair warning. *Id.* at 363.

[44] Marks v. United States, 430 U.S. 188, 191 (1977). In *Marks*, the Supreme Court determined that the due process clause of the fifth amendment precludes retroactive application of obscen-

Once the Court in *Lewis* satisfied the ex post facto law considerations, the Court did not show a reluctance to abolish the year-and-a-day rule judicially. In a similar fashion, the Court in recent years has removed the distinction between an invitee and a licensee in determining the duty of a landowner in a negligence action[45] and has abrogated the doctrine of municipal and governmental immunity against recovery for personal injuries and consequential damages.[46] In *Lewis*, the Court again has evidenced both its willingness to change outdated, longstanding common law rules, and its wish to avoid undesirable results while awaiting legislative action.

**§ 4.7. Mental Abnormality Precluding Capacity to Premeditate.*** Massachusetts long has permitted evidence of a defendant's abnormal mental condition to be introduced at trial to show the defendant's legal insanity at the time the charged act was committed.[1] An appropriate showing of legal insanity operates as a complete defense to the crime charged.[2] Prior to the *Survey* year, however, Massachusetts courts had held consistently that evidence of an abnormal mental condition not rising to the level of legal insanity could not be considered by the trier of fact for any purpose.[3] Thus, mental incapacity was viewed as an all-or-nothing defense.[4] If a defendant's mental condition was sufficiently severe, then he would be acquitted by reason of insanity.[5] If a defendant's mental abnormality did not rise to this level, however, he would be held fully responsible for the crime charged.[6] The law afforded no lenience to the mentally impaired defendant who could not establish his legal insanity.

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ity standards which were announced after the petitioner's violation of those standards. *Id.* at 189-97.

[45] Mounsey v. Ellard, 363 Mass. 693, 706-09, 297 N.E.2d 43, 50-52 (1973).

[46] Whitney v. Worcester, 373 Mass. 208, 210, 366 N.E.2d 1210, 212 (1977). In addition, the Court has held that a mother can recover for witnessing the wrongful death of her child. Dziokonski v. Babinean, 1978 Mass. Adv. Sh. 1759, 380 N.E.2d 1297. The Court has also held that a fetus is a person within the meaning of the wrongful death statute. Mone v. Greyhound Lines, Inc., 368 Mass. 354, 355, 331 N.E.2d 916, 917 (1975).

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§ 4.7 [1] *See* Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 502 (1844).

[2] *See, e.g.*, Commonwealth v. Mattson, 1979 Mass. Adv. Sh. 818, 825, 387 N.E.2d 546, 550; Commonwealth v. McHoul, 352 Mass. 544, 546-48, 226 N.E.2d 556, 557-58 (1967).

[3] *See, e.g.*, Commonwealth v. Sires, 370 Mass. 541, 547, 350 N.E.2d 460, 465 (1976); Commonwealth v. Costa, 360 Mass. 177, 185, 274 N.E.2d 802, 807-08 (1971); Commonwealth v. Cooper, 219 Mass. 1, 4-6, 106 N.E. 545, 547 (1914).

[4] *See Diminished Capacity, — Recent Decisions and an Analytic Approach*, 30 VAND. L. REV., 213, 214-15, 222-24 (1977) [hereinafter cited as *Diminished Capacity*]; W. LAFAVE, HANDBOOK ON CRIMINAL LAW, at 327 (1975) [hereinafter cited as LaFave].

[5] *See Diminished Capacity*, *supra* note 4, at 214-15, 222-24; LaFave, *supra* note 4, at 327.

[6] *Id.*

The rule that a sane defendant's mental abnormality may not be considered by the trier of fact in assessing criminal liability had withstood a series of challenges during the past decade. On several occasions, defendants had sought to introduce evidence of mental abnormality short of legal insanity in order to show that they had been incapable of the mental state of deliberate premeditation required for first degree murder. These defendants had argued that, because they had lacked the capacity to premeditate deliberately, verdicts of only second degree murder or manslaughter could be returned. In response to each of these arguments, the Supreme Judicial Court had maintained its position that a defendant's mental condition could be considered only in the context of an insanity defense.[7] The rule that evidence of an abnormal mental condition not amounting to legal insanity was inadmissible for any purpose was not easily reconcilable with prior decisions of the Court concerning the effect of voluntary intoxication in first degree murder cases. Those decisions established that if a defendant was incapable of deliberate premeditation due to his voluntary use of alcohol or drugs, then he could not be found guilty of murder in the first degree, but he could be found guilty of murder in the second degree.[8] The rationale for these cases was apparently the same as that which underlies the insanity defense: a defendant may not be found guilty of a crime unless his act is accompanied by the mental state which is an element of that crime.[9]

During the *Survey* year, the Court once again had occasion to decide whether the mental condition of a defendant charged with first degree murder should be admissible to show that the defendant did not have sufficient mental capacity to deliberate and premeditate. In *Commonwealth v. Gould*,[10] the Court held that juries may consider mental impairment in

[7] *See, e.g.*, Commonwealth v. Sires, 370 Mass. at 547, 350 N.E.2d at 465 (Court rejected defendant's argument that evidence of his mental disease should be admissible in order to prove that he was incapable of deliberate premeditation); Commonwealth v. Costa, 360 Mass. at 185, 274 N.E.2d at 807-08 (Court rejected the contention of a defendant charged with murder that a verdict of no greater than manslaughter was warranted if the jury found that diminished mental capacity not amounting to legal insanity rendered defendant incapable of harboring malice aforethought).

[8] Commonwealth v. Costa, 360 Mass. 177, 186, 274 N.E.2d 802, 808 (1971); Commonwealth v. Delle Chiaie, 323 Mass. 615, 617-18, 84 N.E.2d 7, 8-9 (1949); Commonwealth v. Taylor, 263 Mass. 356, 361-63, 161 N.E. 245, 247-48 (1928).

[9] *Compare* Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 502 (1844) (describing the act of an insane person "as not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it.") *with* Commonwealth v. Mazza, 366 Mass. 30, 34, 313 N.E.2d 875, 878 (1974) (stating that the rule that voluntary intoxication may render defendant incapable of deliberate premeditation and thus not guilty of murder in the first degree "is merely an application of the ordinary rules of law pertaining to the requisite mental state for conviction of a particular crime charged.")

[10] 1980 Mass. Adv. Sh. 1253, 405 N.E.2d 927 (1980).

determining whether the defendant entertained the specific intent required for murder in the first degree.[11] In so holding, the Court departed from the prior Massachusetts rule which had permitted evidence of a defendant's abnormal mental condition to be considered by the jury only for the purpose of establishing the defendant's legal sanity. After *Gould*, if a defendant can show that his impaired mental condition precluded him from deliberating and premeditating the acts charged, he can thereby avoid a conviction for first degree murder. The *Gould* opinion leaves open, however, the question of whether evidence of mental impairment may be introduced to negate the element of specific intent in crimes other than first degree murder.

The facts of *Gould* presented the issue of whether a defendant could be held incapable at deliberating and premeditating a killing due to his mental impairment, despite evidence that he planned the murder and intended to kill the victim. The defendant in *Gould* fatally stabbed his former girlfriend outside a nursing home where she had worked.[12] Witnesses had observed Gould keeping the nursing home under surveillance from a covert position one and a half hours before the stabbing.[13] Another witness named McPherson saw the defendant attack the victim and shouted at Gould to stop.[14] Upon hearing McPherson, Gould dropped the knife and allowed McPherson to seat him some distance from the victim.[15] McPherson then left the defendant to get help for the victim.[16] When he returned, the defendant again was stabbing the victim.[17] McPherson again told the defendant to sit down away from the victim.[18] The defendant did so and remained there until the police came.[19]

At trial on a charge of first degree murder, uncontradicted evidence established that the defendant had had a long-standing and constant delusional belief system.[20] Both the commonwealth and the defense produced expert testimony which was addressed solely to the issue of the defendant's

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[11] *Id.* at 1262, 405 N.E.2d at 932.

[12] *Id.* at 1253, 1254-55, 405 N.E.2d at 927, 928.

[13] *Id.*, 405 N.E.2d at 928.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1256, 405 N.E.2d at 929. Expert testimony in the record defined a delusional belief system as a false set of beliefs which distort reality and which cannot be reasoned away. *Id.* at 1256 n.5, 405 N.E.2d at 929 n.5.

The defendant believed he was the Messiah and the savior of the Jewish people. He also believed he was required by God to kill the victim as part of his divine mission and because she was "impure." *Id.* at 1256, 405 N.E.2d at 929. Between 1973 and 1978, the defendant had been admitted to various institutions for the mentally ill. *Id.* at 1257 & n.6, 405 N.E.2d at 929 & n.6. As a result of treatment with drugs and psychotherapy, Gould was better able to think and to perceive reality, but he never abandoned his delusional beliefs. *Id.* at 1257, 405 N.E.2d at 929.

criminal responsibility.[21] The commonwealth's expert diagnosed the defendant's mental illness as paranoid psychosis.[22] Despite the defendant's statement in interviews with the expert that, as to the killing, he could not "say whether it was wrong or it was right," but could "only sanctify it," the expert concluded that the defendant was legally sane and criminally responsible.[23] The defense produced as experts two psychiatrists, both of whom stated that the defendant was suffering from a severe and long-standing mental illness, which they termed paranoid schizophrenia.[24] Both experts opined that this was a "clear-cut" and "straightforward" case of lack of criminal responsibility.[25] After hearing the evidence and expert testimony, the jury convicted the defendant of murder in the first degree.[26]

On appeal to the Supreme Judicial Court, the defendant argued that as a result of his mental abnormality he could not form the specific intent required for murder in the first degree.[27] The Court framed the issue before it as whether a jury may properly consider a defendant's long-standing mental illness in determining whether the defendant was capable of deliberating and premeditating the acts charged.[28] The Court began its discussion by noting that under its previous decisions,[29] if a defendant was found to be

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[21] *Id.* at 1258, 405 N.E.2d at 930-31.

[22] *Id.* at 1257, 405 N.E.2d at 930. Every other doctor who examined the defendant both before and after the crime diagnosed his illness as paranoid schizophrenia. *Id.* at 1257 n.8, 405 N.E.2d at 930 n.8. On cross-examination, the Commonwealth's expert admitted that the defendant's mental illness "may even be schizophrenia," but maintained that he would need further evidence before he would change his diagnosis. *Id.*

[23] 1980 Mass. Adv. Sh. at 1257, 405 N.E.2d at 930. The Commonwealth's expert concluded that the defendant appreciated at the moment of the homicide that his act was "immoral, wrong and a criminal and illegal thing to do," and that "he was capable of controlling his behavior to such an extent that he could have stopped himself from doing it." *Id.* at 1258, 405 N.E.2d at 930.

[24] *Id.* at 1258, 405 N.E.2d at 930.

[25] *Id.*

[26] *Id.* at 1253, 405 N.E.2d at 927.

[27] *Id.* at 1259, 405 N.E.2d at 931. The defendant urged the Court to exercise its supervisory power under G.L. c. 273, § 33E to either grant him a new trial or reduce his conviction to murder in the second degree. *Id.* at 1253-54, 1260, 405 N.E.2d at 928, 931.

Although it found no error at trial, the Court, pursuant to its power under section 33E, determined that the defendant was entitled to a new trial at which he could produce expert testimony on the issue of whether the impairment of his mental processes precluded him from being able to deliberate and premeditate. 1980 Mass. Adv. Sh. at 1253-54, 1261, 405 N.E.2d at 928, 932.

[28] *Id.* at 1261, 405 N.E.2d at 932.

[29] *See, e.g.*, Commonwealth v. Costa, 360 Mass. 177, 186, 274 N.E.2d 802, 808 (1971) (rule that if the jury found the defendant "so affected by his voluntary use of harmful drugs and narcotics as to be incapable of deliberate premeditation, then the jury would be warranted in returning verdicts no greater than guilty of murder in the second degree."); Commonwealth v. Delle Chiaie, 323 Mass. 615, 617-18, 84 N.E.2d 7, 8-9 (1949) (capacity for deliberate premeditation precluded because of voluntary intoxication).

incapable of deliberately premeditating the acts charged due to his voluntary use of alcohol or drugs, then he could not be convicted of first degree murder.[30] Under the same line of cases, however, the Court noted that such defendants could be found guilty of second degree murder.[31] Some previous cases had intimated that reducing the verdict from first degree murder to some lesser offense when the defendant was incapable of premeditation was based on the law's "kindness" to him in that situation.[32] According to the Court in *Gould*, however, the rule of its prior decisions had been based on an application of the ordinary rules of law pertaining to the requisite mental state for conviction of the particular crime charged,[33] and had not been based on "kindness."

Having made clear the logical foundation for its rule in cases involving the voluntary use of liquor and drugs, the Court proceeded to bring evidence of a defendant's abnormal mental condition within the ambit of that logic. The Court stated that it could find "no justifiable reason to treat the effect of the defendant's involuntary mental illness on his capacity for deliberate premeditation in a manner different from the effect of the voluntary use of liquor or drugs."[34] The commonwealth had argued, in reliance on the Court's prior rulings, that evidence of a defendant's mental illness was admissible only on the issue of criminal responsibility, and not on the issue of specific intent or the degree of murder.[35] The Court rejected this contention, and stated that to the extent its prior cases were inconsistent with *Gould*, it would no longer follow those cases.[36] The Court emphasized the logical incongruity of holding that while the crime of murder in the first degree can be committed only after deliberate thought or premeditated malice, the crime might nevertheless be committed by one lacking the capacity to think deliberately or rationally.[37]

The Court also was satisfied that psychiatric testimony would be competent to determine whether the defendant was capable of forming the specific intent required for the commission of the crime, at least in cases of first degree murder.[38] Such testimony could be offered properly, the Court concluded, "to distinguish between 'intent' in the sense of a conscious desire, 'planning' in the sense of considering the mechanical feasibility of effectuating that desire, and 'premeditation' in the sense of critically evaluating

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[30] 1980 Mass. Adv. Sh. at 1261, 405 N.E.2d at 932.

[31] *Id.*

[32] *See, e.g.*, Commonwealth v. Delle Chiaie, 323 Mass. at 617-18, 84 N.E.2d at 8-9; Commonwealth v. Taylor, 263 Mass. 356, 363, 161 N.E. 245, 248 (1928).

[33] 1980 Mass. Adv. Sh. at 1262-63, 405 N.E.2d at 932.

[34] *Id.* at 1262, 405 N.E.2d at 932.

[35] *Id.* at 1263, 405 N.E.2d at 933.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1263-64, 405 N.E.2d at 933.

the pros and cons of proceeding to effectuate the desire."[39] It was entirely logical, the Court maintained, that a person could entertain an intent, plan the effectuation of that intent, but not deliberately premeditate the objective of that intent.[40]

In ruling that a jury may consider the effect of a defendant's mental illness on his capacity to premeditate deliberately, the Court stressed that it was not thereby "adopting a doctrine of diminished responsibility."[41] Disclaiming reliance on this doctrine, the Court attempted to distinguish the principle on which its decision was based from the theory of diminished responsibility.[42] Thus, in one passage of its opinion, the Court noted that its decision was limited in scope to permitting "jury consideration of mental impairment as well as voluntary intoxication on the issue of deliberate premeditation."[43] In another passage of its opinion, the Court disclaimed reliance on the doctrine of diminished responsibility by emphasizing that its rule "contemplates full responsibility, not partial, but only for the crime actually committed."[44] Because conviction for murder in the first degree requires proof of deliberate premeditation, the Court reasoned that if the defendant's mental condition rendered him incapable of forming that specific intent, then he could not be convicted of the crime.[45] Thus, the Court found logic, and not kindness, to be at the root of its decision.

The Court's insistence that it was not "adopting a doctrine of diminished responsibility"[46] seems to stem from the Court's failure to understand fully the theory of the doctrine. That theory, simply stated, is that if because of mental disease or defect a defendant cannot form the specific intent which is an essential element of a crime, then he may not be convicted of that crime.[47] The defendant unable to form this specific intent, however, may be convicted of a lower grade of the offense which does not require that particular mental state.[48] Thus, the theory is logical, rather than ameliorative.[49]

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[39] *Id.* (quoting G. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 313, 325 (1971)).

[40] 1980 Mass. Adv. Sh. at 1264, 405 N.E.2d at 933.

[41] *Id.* at 1262, 405 N.E.2d at 932. See text and notes at notes 47-49 *infra*, for a discussion of the doctrine of diminished responsibility.

[42] The Court had rejected the doctrine of diminished responsibility on several prior occasions. 1980 Mass. Adv. Sh. at 1268, 405 N.E.2d at 932 (Quirico, J., concurring in part and dissenting in part). *See, e.g.*, Commonwealth v. Sires, 370 Mass. 541, 546-47, 350 N.E.2d 460, 465 (1976).

[43] 1980 Mass. Adv. Sh. at 1262, 405 N.E.2d at 932.

[44] *Id.*

[45] *Id.* at 1263, 405 N.E.2d at 933.

[46] *Id.* at 1262, 405 N.E.2d at 932.

[47] T. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1054 (1975) [hereinafter cited as Lewin].

[48] *Id.*

[49] *See* Lewin, *supra* note 47. at 1056-57, 1063.

It contemplates full responsibility, but only for the crime actually committed.[50] This formulation of the doctrine of diminished responsibility is entirely consistent with the rationale of the *Gould* opinion.

The Court's reasoning was basically that if the crime of first degree murder can "only be committed after deliberate thought and premeditated malice," then defendants "without the mental capacity to think deliberately or determine rationally" cannot be convicted of this crime.[51] This reasoning is also logical, rather than ameliorative. Thus, the rationale of *Gould* seems identical to that which underlines the doctrine of diminished responsibility. This conclusion is supported by the authority which the *Gould* Court cited. For example, in maintaining that its ruling was not "tantamount to adopting the doctrine of diminished responsibility,"[52] the Court quoted from the case of *State v. Padilla*.[53] In that case, however, the New Mexico Supreme Court *adopted* the theory of diminished responsibility.[54] The relevant passage of that opinion reveals, perhaps, that the Court's discomfort with subscribing to the doctrine of "diminished responsibility" was attributable to the label given the theory rather than to the theory itself:

> The doctrine contended for by the defendant is sometimes referred to as that of "diminished" or "partial" responsibility. This is actually a misnomer, and the theory may not be given an exact name. However, it means the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words, *it contemplates full responsibility, not partial, but only for the crime actually committed.*[55]

Thus, although the Court disclaimed reliance on the doctrine of diminished responsibility, the theory underlying its decision was in fact indistinguishable from the theory underlying that doctrine.

There is much to commend about both the Court's ruling and the doctrinal basis upon which it rests. The doctrine which has been called variously partial responsibility, diminished responsibility, and diminished capacity, is logically unassailable. Admitting evidence of a defendant's abnormal mental condition, totally apart from the defense of insanity, appears to be appropriate whenever that evidence is relevant to the issue of whether the defendant entertained the specific intent required for conviction of the

[50] State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959).
[51] 1980 Mass. Adv. Sh. at 1263, 405 N.E.2d at 933.
[52] *Id.* at 1262, 405 N.E.2d at 932.
[53] 66 N.M. 289, 347 P.2d 312 (1959).
[54] *Id.* at 292-96, 317 P.2d at 314-17.
[55] *Id.* at 292, 317 P.2d at 314.

crime charged.[56] If the rule were otherwise, then major crimes specifically requiring a certain evil state of mind would be in effect strict liability offenses as applied to mentally impaired defendants.[57]

Critics of the doctrine of diminished responsibility acknowledge the logical soundness of the doctrine, but point to perceived difficulties in its administration. Thus, it is argued that juries are ill-equipped to understand psychiatric testimony which makes subtle distinctions such as that a defendant's mental impairment prevented him from premeditating and deliberating but not from having an intent to kill.[58] The legislature, however, has drawn the line between first and second degree murder on the basis of the defendant's state of mind. Accordingly, juries must determine the defendant's specific intent before returning a verdict of murder in the first degree. Evidence that a mental disorder precluded the defendant from premeditating or deliberating the killing is undeniably material on the issue of specific intent. Mere difficulty in distinguishing one mental state from another is a dubious ground for denying an otherwise allowable defense.[59] Moreover, "precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy."[60]

Another objection to the doctrine is that it may result in compromise verdicts in cases where the jury is uncertain of the defendant's sanity, or where they cannot agree on a verdict of guilt or innocence.[61] Juries, however, already have wide powers to convict in a lower degree or for a lesser offense than that charged.[62] The danger of compromise verdicts is already so great that opening an additional door will make little difference.[63] Moreover, the possibility that juries may sometimes misuse the rule is no grounds for refusing to apply a doctrine which is legally and logically proper.[64]

A final objection is that the rule would logically extend to all crimes requiring a specific criminal intent.[65] Applying the doctrine of partial respon-

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[56] The Model Penal Code, § 4.02(1) (Proposed Official Draft 1962) permits the admission of such evidence. The Code provides that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." *Id.*

[57] *See* LaFave, *supra* note 4, at 331.

[58] *See* LaFave, *supra* note 4, at 331; H. Weihofen, *Mental Disorder as a Criminal Defense*, at 176-79 (1954) [hereinafter cited as Weihofen].

[59] *See* Weihofen, *supra* note 58, at 186.

[60] Fischer v. United States, 328 U.S. 463, 493 (1946) (Murphy, J., dissenting).

[61] Weihofen, *supra* note 58, at 186.

[62] *Id.* at 186-87.

[63] *Id.* at 187.

[64] *Id.*

[65] *Id.* at 187-88; *see* LaFave, *supra* note 4, at 331.

sibility to all such crimes, it is argued, would result in inadequate protection for the public.[66] It is feared that defendants who formerly would have either been convicted for the crime charged and sentenced to a long prison term or death, or found not guilty by reason of insanity and committed indefinitely, will now serve shorter sentences for lesser offenses or else will be acquitted completely at trial.[67] The specific holding of *Gould* will not create this kind of problem, because it will result only in reducing a conviction of first degree murder to a conviction of second degree murder.[68] Extending the principle underlying *Gould* to other crimes requiring proof of a specific intent, however, could present a real danger if the result was a complete acquittal, or conviction of a relatively minor offense. A possible remedy for this problem is to empower the judge to order the defendant confined as punishment for the offense for which he has been found guilty, and retained for medical care until safe to be at large.[69]

In addition to being logically sound, the doctrine of diminished responsibility as adopted by the Court in the context of first degree murder cases is in harmony with a dominant theme of Anglo-American criminal justice. For over 200 years that system has drawn fine distinctions in grading the severity of crimes in order to punish the criminal not only for his actions but also for the state of mind with which he committed those acts deemed criminal.[70] Accordingly, a premeditated murder is sanctioned more severely than an intentional but unplanned killing. Refusing to allow the jury to consider the effect of a mental impairment on the defendant's capacity to premeditate violates this tradition.

At the time of committing the alleged homicide, a defendant charged with first degree murder may have been suffering from an abnormal mental condition which was not of the kind or character to afford him a successful insanity defense.[71] Although this defendant would be ineligible for a finding of not guilty by reason of insanity, evidence concerning his mental condition would be admissible, under the holding of *Gould*, to determine whether

[66] LaFave, *supra* note 4, at 331; *see* Weihofen, *supra* note 58, at 188.

[67] *See* LaFave, *supra* note 4, at 331.

[68] 1980 Mass. Adv. Sh. at 1261-62, 405 N.E.2d at 932.

[69] *See* Weihofen, *supra* note 58, at 188-89. *See also* United States v. Brauner, 471 F.2d 969, 1001-02 (D.C. Cir. 1972).

[70] *See* Lewin, *supra* note 47, at 1089.

[71] In Commonwealth v. McHoul, 352 Mass. 544, 548, 555, 226 N.E.2d 556, 558-59, 563 (1967), the Court adopted the test for criminal responsibility as set out in E4.01 of the American Law Institute's Model Penal Code (Proposed Official Draft) (1962). Section 401(1) reads as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

he had the specific intent required for first degree murder.[72] Therefore, the *Gould* case will afford mentally impaired defendants charged with first degree murder a separate, limited defense, in addition to the defense of criminal irresponsibility. Practitioners should take note of the different consequences of the two defenses. If a successful insanity defense is interposed, the result must be a finding of not guilty by reason of insanity. Usually, this finding will result in commitment of the defendant.[73] In contrast, a successful showing that the defendant did not premeditate the acts charged will result in a finding of not guilty of first degree murder.[74] Conviction of second degree murder or manslaughter, however, will be likely under most circumstances.[75] The probable consequence of a successful defense of diminished capacity, therefore, will not be commitment, but a sentence of imprisonment following conviction of a lesser offense than originally charged. Thus, defense counsel may make a tactical decision to defend on the grounds of diminished capacity rather than on the grounds of insanity, thereby avoiding the risk of indeterminate commitment.[76] As to the specific intent crime of second degree murder, the *Gould* opinion suggests that this crime already may be within the ambit of the rule of diminished capacity. If this were true defendants could avoid a conviction for second degree murder by maintaining that their mental condition rendered them incapable of harboring malice aforethought. This interpretation of the opinion is suggested by the Court's statement, "[t]o the extent that cases such as *Commonwealth v. Sires* and *Commonwealth v. Costa* are inconsistent with this [ruling], we no longer follow them."[77] In *Costa*,[78] the Court had held that in a trial for first degree murder, a finding of manslaughter would not be permissible even if the defendant's diminished mental capacity rendered him incapable of harboring malice aforethought.[79] By declaring that it will no longer follow *Costa*, the Court appears to have indicated that charges of second degree murder will fall under the rule of *Gould*. The most important issue left undecided by *Gould* is whether the Court will extend the principle of diminished capacity to other crimes requiring proof of specific intent.

The *Gould* opinion also suggests that the Court may be receptive to extending the rule of diminished capacity to non-homicide crimes of specific intent. Evidence that the Court may extend the rule of *Gould* in future cases

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[72] 1980 Mass. Adv. Sh. at 1262-63, 405 N.E.2d at 932.

[73] *See* Lafave, *supra* note 4, at 326 & n.2.

[74] 1980 Mass. Adv. Sh. at 1261-63, 405 N.E.2d at 932-33.

[75] *See* LaFave, *supra* note 4, at 326; *See also*, Lewin, *supra* note 47, at 1055, 1061.

[76] *See* LaFave, *supra* note 4, at 326.

[77] 1980 Mass. Adv. Sh. at 1263, 405 N.E.2d at 933.

[78] 360 Mass. 177, 274 N.E.2d 802 (1971).

[79] *Id.* at 184-86, 274 N.E.2d at 807-09.

can be found in the authority cited by the Court in two passages of its opinion.[80] In the first passage, the Court buttressed its conclusion that there was "no justifiable reason" for not admitting evidence of a defendant's mental abnormality on the issue of premeditation[81] with a rather lengthy quotation from *United States v. Brauner*.[82] In *Brauner*, the Court of Appeals for the District of Columbia had ruled that in a prosecution for *any* crime requiring proof of a specific intent, the defendant may introduce psychiatric evidence to show that he did not have the specific mental condition that is an element of the crime.[83] In another passage of its opinion, the *Gould* Court cited section 4.02 of the Model Penal Code as support for its statement that convicting a defendant of first degree murder when he was unable either to premeditate or to deliberate would be a "legal as well as a logical incongruity."[84] Section 4.02 states that "[e]vidence that the defendant suffered from a mental disease or defect is admissible *whenever* it is relevant to prove that defendant did or did not have a state of mind which is an element of the offense."[85] Both the Model Penal Code and *Brauner* have taken the position that the doctrine of diminished responsibility should apply to any crime of specific intent. The Court's reliance on these authorities indicates that it may extend the scope of the doctrine beyond the context of first degree murder in future cases.

**§ 4.8. Sadomasochism: Assault and Battery or Protected Sexual Conduct?*** In Massachusetts, the offense of assault and battery by means of a dangerous weapon is punishable either by imprisonment for not more than ten years or by a fine of not more than one thousand dollars under General Laws chapter 264, section 15A (hereinafter section 15A).[1] The statute does not, however, identify the elements of this crime[2] and, therefore, leaves the courts free to develop their own definition. Until this *Survey* year, the Supreme Judicial Court had not articulated specifically the elements of the crime of assault and battery by means of a dangerous weapon. Although the Court had not defined this crime previously, it had defined other similar crimes. For example, the Court has defined assault by means of a dangerous weapon[3] as an attempt to commit a battery or as an unlawful act placing another in reasonable apprehension of receiving an immediate battery by

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[80] *See* 1980 Mass. Adv. Sh. at 1262, 1263, 405 N.E.2d at 932, 933.
[81] *Id.* at 1262, 405 N.E.2d at 932.
[82] 471 F.2d 969 (D.C. Cir. 1972).
[83] *Id.* at 1002.
[84] 1980 Mass. Adv. Sh. at 1263, 405 N.E.2d at 933.
[85] Model Penal Code, § 4.02 (Proposed Official Draft 1962).
* By Peter E. Gelhaar, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.
§ 4.8 [1] G.L. c. 265, § 15A (1970).
[2] *Id.*
[3] *Id.* § 15B.

means of a dangerous weapon.[4] The Court also has defined assault and battery as "the intentional and unjustified use of force upon the person of another, or the intentional doing a wanton or grossly negligent act causing personal injury to another."[5] During the *Survey* year, in *Commonwealth v. Appleby*,[6] the Court took the opportunity to define the crime of assault and battery by means of a dangerous weapon under section 15A as an assault and an intentional, unjustified touching, however slight, by means of a dangerous weapon.[7]

The *Appleby* case involved two men, Kenneth Appleby (Appleby) and Steven Cromer (Cromer), who engaged in a homosexual, sadomasochistic relationship for over two years.[8] While living with defendant Appleby, Cromer performed household services and other duties for Appleby.[9] During the course of their master-servant relationship, Appleby frequently would beat Cromer with objects such as a baseball bat, a bullwhip, and a leather riding crop.[10] Cromer alleged that these beatings were administered when Appleby was dissatisfied with Cromer's performance as a servant.[11] Cromer also maintained that Appleby enjoyed inflicting such violence and that these acts appeared to be sexually motivated.[12] There was conflicting evidence as to whether Cromer ever protested Appleby's sadistic conduct.[13]

On August 31, 1976, Cromer served Appleby some melted ice cream.[14] This enraged Appleby to such an extent that he beat Cromer with a leather riding crop, landing several severe blows.[15] Cromer fled from the premises.[16] Thereafter, Cromer presumably pressed criminal charges against Appleby.[17] Appleby was charged with three counts of assault and battery by means of a dangerous weapon and tried in superior court before a jury.[18] The jury convicted Appleby on one of the three counts of assault and battery with a dangerous weapon.[19]

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[4] Commonwealth v. Henson, 357 Mass. 686, 692, 259 N.E.2d 769, 773-74 (1970).

[5] Commonwealth v. McCan, 277 Mass. 199, 203, 178 N.E. 633, 634 (1931).

[6] 1980 Mass. Adv. Sh. 867, 402 N.E.2d 1051 (1980).

[7] *Id.* at 877, 402 N.E.2d at 1058.

[8] *Id.* at 867, 402 N.E.2d at 1053.

[9] *Id.* at 868, 402 N.E.2d at 1053.

[10] *Id.* at 868, 402 N.E.2d at 1054.

[11] *Id.* at 868, 402 N.E.2d at 1053.

[12] *Id.* at 870, 402 N.E.2d at 1054.

[13] *Id.*

[14] *Id.* at 869, 402 N.E.2d at 1054.

[15] *Id.*

[16] *Id.*

[17] *Id.* It is not clear from the case whether Cromer actually pressed charges against Appleby or whether charges were brought by a relative on Cromer's behalf. *Id.*

[18] *Id.* at 867 & n.1, 402 N.E.2d at 1053 & n.1. The three indictments stemmed from three different beatings on different occasions involving a baseball bat, a bullwhip, and a leather riding crop. *Id.*

[19] *Id.* at 867, 402 N.E.2d at 1053.

Appleby appealed directly to the Supreme Judicial Court,[20] alleging error in the trial court judge's denial of a directed verdict and in the judge's instructions to the jury on the issues of consent and intent.[21] On appeal, the Court identified three questions central to the assignment of error: (1) whether the riding crop was a "dangerous weapon" under section 15A, (2) what criminal intent is required by section 15A to sustain a conviction, and (3) whether Appleby's defense of consent on Cromer's part was legally sufficient to prevent conviction.[22]

The Court first addressed the issue of whether a riding crop is a "dangerous weapon" under section 15A. The Court observed that dangerous weapons usually fall into two categories: those weapons which are dangerous *per se* and those which are dangerous as used.[23] A dangerous weapon *per se* is an instrument designed and constructed to produce death or serious bodily injury.[24] In contrast, a weapon that is dangerous as used is an instrument which is not designed or constructed for the purpose of producing serious bodily injury but is capable of being used in a manner which may cause great harm or death.[25] The Court noted that the riding crop obviously was not designed to inflict serious bodily harm on persons and thus was not dangerous *per se*.[26] The Court then examined the characteristics of the riding crop to determine whether a riding crop could be considered dangerous as used.[27] The riding crop in this case was approximately eighteen inches long and one inch in diameter at its thickest point.[28] The Court likened the riding crop to a short whip and concluded that such a riding crop is capable of being used in a manner which could inflict serious bodily harm.[29] The Court held, therefore, that as a matter of law, a riding crop can be a dangerous weapon as used.[30] Nevertheless, the Court maintained that whether a weapon which is not dangerous *per se* was employed as a dangerous weapon is a question of fact to be decided by objective standards.[31] Accordingly, in order to convict Appleby under section 15A, the jury must find that the crop in this case was in fact dangerous as used.[32]

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[20] *Id.* G.L. c. 278, §§ 33A-33G set out the appeal procedure to the Supreme Judicial Court in criminal cases involving felonies.

[21] 1980 Mass. Adv. Sh. at 867, 402 N.E.2d at 1053.

[22] *Id.* at 873-74, 402 N.E.2d at 1056.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 874, 402 N.E.2d at 1057.

[26] *Id.* at 874, 402 N.E.2d at 1056.

[27] *Id.* at 875, 402 N.E.2d at 1057.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 876, 402 N.E.2d at 1058 (quoting Commonwealth v. Tarrant, 367 Mass. 411, 416, 326 N.E.2d 710, 714 (1975)).

[32] 1980 Mass. Adv. Sh. at 875, 402 N.E.2d at 1057.

Thus, the victim's subjective apprehension of danger cannot determine the characteristics of the weapon as dangerous as used.[33] The Court held, however, that there was sufficient evidence for the jury to find that the riding crop was a dangerous weapon as used by Appleby.[34]

The Court relied on evidence offered by Cromer at trial that Appleby was in a fit of rage when he repeatedly beat Cromer with the crop.[35] Appleby contended that the blows were not severe but only caused redness.[36] In response to this claim, the Court emphasized that ***any*** touching with a potentially dangerous weapon is sufficient for purposes of section 15A and the law need not wait until serious bodily harm in fact does occur by means of the instrument before labeling the instrument as dangerous.[37]

Having addressed the meaning of section 15A's dangerous weapon requirement, the Court turned its attention to ascertaining the criminal intent necessary to satisfy the statute. It noted that in Massachusetts, assault and battery with a dangerous weapon is a "general intent" crime.[38] Accordingly, section 15A only requires a general intent to do the act which causes injury and does not require a specific intent to injure.[39] In this case, Appleby admitted that he beat Cromer almost daily.[40] Nevertheless, Appleby maintained that his sole intent was to provide Cromer with sexual gratification.[41] Because he intended to benefit Cromer in this way, Appleby argued, he did not possess the requisite criminal intent to be convicted under section 15A.[42] The Court rejected this claim, noting first that section 15A's general intent requirement is satisfied by proof of intent to commit the lesser included crime of assault with a dangerous weapon.[43] To satisfy the intent requirement for the lesser crime of assault with a dangerous weapon, the actor need

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[33] *Id.* at 876, 402 N.E.2d at 1058 (quoting Commonwealth v. Tarrant, 367 Mass. 411, 416, 326 N.E.2d 710, 714 (1975)).

[34] *Id.* at 877, 402 N.E.2d at 1058.

[35] *Id.* at 869, 402 N.E.2d at 1054.

[36] *Id.* at 872, 402 N.E.2d at 1056.

[37] *Id.* at 877-78, 402 N.E.2d at 1058.

[38] *Id.* at 878, 402 N.E.2d at 1058. A crime can be defined either by requiring an intent to engage in specific conduct or an intent to produce a specified result. An example of the former is the common law crime of forcible rape which requires that the rapist intend only to engage in sexual intercourse. Such a crime is referred to as a "general intent" crime. It is called a "general intent" crime in order to distinguish it from the "specific intent" which a crime "may specifically, by its definition, require, over and above any required intention to engage in the forbidden conduct...." W. LaFave and A. Scott, HANDBOOK ON CRIMINAL LAW § 28, at 196 (1972). An example of a specific intent crime is burglary which requires the specific intent to commit a felony by breaking and entering. *Id.*

[39] 1980 Mass. Adv. Sh. at 878, 402 N.E.2d at 1059.

[40] *Id.* at 871, 402 N.E.2d at 1055.

[41] *Id.* at 868, 402 N.E.2d at 1053.

[42] *Id.* at 883, 402 N.E.2d at 1061.

[43] *Id.* at 878, 402 N.E.2d at 1059.

only intend to *threaten* to use an instrumentality in a dangerous fashion.[44] Thus, although the crime of assault and battery with a dangerous weapon requires that the threat be consummated by the application of any force upon the victim by means of the instrument, the intent requirement can be satisfied by a showing of intent to threaten rather than an intent to consummate the threat.[45] The intent to commit the battery is then inferred from the intent to commit the lesser crime of assault by means of a deadly weapon.[46]

Regardless of whether the intent requirement is fulfilled by proof of intent to assault or intent to batter, the actor must intend to use the instrument in a dangerous or a potentially dangerous fashion.[47] The Court stated that even if Appleby subjectively intended to use the riding crop for his own or Cromer's sexual gratification, he still could have possessed the requisite intent to use the riding crop in a dangerous fashion.[48] Thus, a jury properly could find that Appleby intentionally placed Cromer in fear and struck him with the riding crop in a dangerous manner.[49] Accordingly, the Court upheld the jury's finding that Appleby possessed the intent to threaten to use the riding crop in a dangerous manner and the intent requirement of section 15A was therefore satisfied.[50] The battery element of the offense was completed when the threatened force was actually applied to Cromer.

After finding that Appleby used a dangerous weapon with the requisite intent for purposes of section 15A, the Court considered Appleby's third defense, Cromer's consent. Throughout the proceedings, Appleby maintained that Cromer requested to be beaten[51] and thereby consented to the beatings for Cromer's own sexual gratification.[52] The Court considered two interpretations of this evidence which might sustain Appleby's defense: (1) that Cromer had consented to his overall relationship with Appleby or (2) that based on Cromer's past behavior, Appleby subjectively believed that Cromer would consent to this particular beating.[53]

With regard to Cromer's general consent to the relationship, the Court considered whether a state, through the use of assault and battery statutes, can regulate violent behavior occurring in private consensual sexual relationships.[54] The Court noted that in the 1974 case of *Commonwealth v.*

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[44] *Id.* at 878-79, 402 N.E.2d at 1059.
[45] *Id.* at 879, 402 N.E.2d at 1059.
[46] Commonwealth v. Randall, 70 Mass. 36, 38-39 (1855).
[47] 1980 Mass. Adv. Sh. at 879, 402 N.E.2d at 1059.
[48] *Id.* at 882, 402 N.E.2d at 1061.
[49] *Id.* at 882-83, 402 N.E.2d at 1061.
[50] *Id.*
[51] *Id.* at 871, 402 N.E.2d at 1055.
[52] *Id.* at 868, 402 N.E.2d at 1053.
[53] *Id.* at 879-80, 402 N.E.2d at 1059-60.
[54] *Id.* at 880, 402 N.E.2d at 1060.

*Balthazar*,[55] a statutory prohibition on "unnatural and lascivious" acts[56] was found inapplicable to private, consensual conduct between adults.[57] Although not defined in chapter 272, section 35, "unnatural and lascivious acts" has been interpreted as the irregular indulgence in sexual behavior, illicit sexual relations, and infamous conduct which is lustful, obscene, and in deviation of accepted customs and manners.[58] In effect, the *Balthazar* Court recognized consent as a complete defense to that crime. Nevertheless, the Court in *Appleby* refused to extend this defense to crimes commited under section 15A. The Court found that the underlying public policy of section 15A prohibits an individual from consenting to become a victim of an assault and battery with a dangerous weapon.[59] The Court maintained that any right to sexual privacy is outweighed in a constitutional balancing scheme by a state's interest in preventing violence upon its citizens.[60] To support this conclusion, the Court cited the New York case of *New York v. Onofre*[61] which held that because certain sexual conduct is potentially harmful, the right to sexual privacy is not absolute and a state may restrict such harmful conduct.[62]

The Court employed a similar analysis in determining that Cromer's consent to the specific act of being beaten could not serve as a viable defense. Once again, the Court held that a state may protect its citizens against physical harm even if the violence is related to consensual sexual activity.[63] Thus, a victim's consent is, as a matter of law, both ineffective and immaterial as a defense to prosecution under section 15A.[64] Cromer's alleged consent, therefore, could not absolve Appleby if Appleby had otherwise satisfied the requisite intent and instrumentality elements of section 15A. The Court therefore affirmed Appleby's conviction.[65]

As demonstrated in the *Appleby* decision, the defense of consent to illegal sexual conduct has been a problematic area of criminal law. This problem is well illustrated by the crime of rape. By definition, consent by a youth can never be an effective defense to the crime of statutory rape.[66] The accepted rationale for criminalizing intercourse with a minor is that minors must be protected from their own poor judgment and failure to realize the harm-

[55] 366 Mass. 298, 318 N.E.2d 478 (1974).
[56] G.L. c. 272, § 35 (1970).
[57] 366 Mass. at 302, 318 N.E.2d at 481 (1974).
[58] Jaquith v. Commonwealth, 331 Mass. 439, 442, 120 N.E.2d 189, 192 (1954).
[59] 1980 Mass. Adv. Sh. at 881, 402 N.E.2d at 1060.
[60] *Id.* at 880-81, 402 N.E.2d at 1060.
[61] 72 App. Div.2d 268, 424 N.Y.S.2d 566 (1980).
[62] *Id.* at 271, 424 N.Y.S.2d at 568.
[63] 1980 Mass. Adv. Sh. at 881, 402 N.E.2d at 1060.
[64] *Id.* at 881-82, 402 N.E.2d at 1060-61.
[65] *Id.* at 883, 402 N.E.2d at 1061.
[66] W. LaFave and A. Scott, HANDBOOK ON CRIMINAL LAW § 57, at 408 (1972).

fulness of the conduct.[67] A similar policy has been advanced as a justification for disallowing the defense of consent to violent sexual acts between adults in cases like *Appleby*. For example, the California appellate case of *People v. Samuels*[68] involved two males who engaged in sadomasochistic conduct during the production of a movie. One male was charged with aggravated assault.[69] The defendant argued that a victim's consent constitutes an absolute defense to the charge.[70] The California Court of Appeals, however, rejected the defense citing the generally held proposition that consent is not a defense to assault or battery.[71] The court stated that the California statute obviously was designed to prohibit individuals from severely or mortally injuring others.[72] This may be construed as acknowledging that an individual's right to sexual privacy is subordinate to the state's interest in peaceful behavior.

In *Appleby*, the Court applied a similar rationale when it stated that the commonwealth can protect its citizens from injury sustained through violent sexual activity by vitiating a victim's consent to such conduct.[73] In the earlier case of *Commonwealth v. Balthazar*,[74] however, the Court held that consent is a defense to the crime of committing "unnatural and lascivious" sexual acts between adults within the meaning of chapter 272, section 35.[75] The *Balthazar* Court based its decision in part on the constitutional right to privacy which frees the individual from unwarranted governmental regulation of certain sex-related activities.[76] The *Balthazar* Court held that because of both the constitutional right to privacy and the liberalization of community values on the subject of permissible sexual conduct, chapter 272, section 35, could not apply to private, consensual conduct.[77] Thus, in view of the *Balthazar* decision, the *Appleby* Court essentially was required to distinguish "unnatural and lascivious" sexual acts from those same acts accompanied by violence in order to find that the state's interest in preventing violent sexual conduct superseded the individual's right to privacy.

In so doing, the Supreme Judicial Court in *Appleby* reaffirmed its position in *Balthazar*, finding that the right to privacy requires that consent operates as a defense to nonviolent lascivious conduct.[78] It refused,

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[67] *Id.*
[68] 250 Cal. App.2d 501, 58 Cal. Rptr. 439 (1967), *cert. denied*, 390 U.S. 1024 (1968).
[69] *Id.* at 503, 58 Cal. Rptr. at 441.
[70] *Id.* at 513, 58 Cal. Rptr. at 447.
[71] *Id.*
[72] *Id.* at 514, 58 Cal. Rptr. at 447.
[73] 1980 Mass. Adv. Sh. at 881, 402 N.E.2d at 1060.
[74] 366 Mass. 298, 318 N.E.2d 478 (1974).
[75] *Id.* at 302, 318 N.E.2d at 481.
[76] *Id.* at 301, 318 N.E.2d at 480.
[77] *Id.* at 302, 318 N.E.2d at 481.
[78] 1980 Mass. Adv. Sh. at 880, 402 N.E.2d at 1060.

however, to extend the consent defense to acts that are coupled with violence. The *Appleby* court distinguished the purpose of section 15A from that of chapter 272, section 35, noting that the former is not designed to regulate sexual conduct while the latter is.[79] Moreover, the Court stressed that Appleby was not tried for the sexual act of sadomasochism but for the crime of assault and battery with a dangerous weapon.[80] Thus, the *Appleby* Court addressed only the question whether a state can regulate violent conduct and did not consider a state's ability to regulate deviant sexual behavior.

By considering only the violent aspects of the conduct at issue, the Court was able to find support for its decision in the United States Supreme Court's holding in *Roe v. Wade*.[81] In *Roe v. Wade*, the Supreme Court held that a right to privacy exists but that this right is not absolute.[82] Rather, at some point, the state's interest in protecting the health and safety of the individual predominates and thereby limits the individual's ability to assert his privacy right.[83] Accordingly, the *Appleby* Court concluded that a state may prevent violence even though such violence is clothed in the cloak of privacy in sexual relations.[84]

Just as the Court attempted to distinguish Appleby's violent behavior from his deviant sexual behavior, the Court also sought to separate the intent to commit assault and battery with a dangerous weapon from the intent to perform acts of sexual gratification. Throughout the trial and the subsequent appeal, Appleby admitted that he beat Cromer but contended that Cromer initiated the sadomasochistic activities.[85] Thus, Appleby claimed that he intended the beatings for Cromer's sexual gratification and his own sexual gratification which he received through Cromer's enjoyment of the beatings.[86] The Court rejected this claim reasoning that, regardless of Appleby's sexual intentions, a jury could find that he possessed the requisite intent to use the riding crop in a dangerous manner.[87] Thus, in evaluating Appleby's conduct, the Court attempted to reduce to mere unpermitted contact the complicated mixture of sex and violence which characterizes sadomasochism. Viewed in this way, there can be no dispute that Appleby intended to touch Cromer in a threatening manner and, having done so, violated section 15A.

[79] *Id.* at 881, 402 N.E.2d at 1060.
[80] *Id.*
[81] 410 U.S. 113 (1973).
[82] *Id.* at 155.
[83] *Id.*
[84] 1980 Mass. Adv. Sh. at 880-81, 402 N.E.2d at 1060.
[85] *Id.* at 871, 402 N.E.2d at 1055.
[86] *Id.* at 872-73, 402 N.E.2d at 1056.
[87] *Id.* at 882, 402 N.E.2d at 1061.

The distinction between the sexual and violent aspects of sadomasochism, however, may be somewhat artificial. During the trial, a behavioral expert offered testimony which tended to show that the beatings were inseparable from the sexual aspects of the men's relationship.[88] Indeed, the sexual gratification derives from the harm or the threat of imposing harm. Although the Court did not refer to this testimony in its analysis of the case, it did seem to offer a reason for separating the sexual intent from the criminal intent of the case. At one point the Court observed that the law need not wait until an instrument actually causes harm before declaring it a dangerous weapon.[89] This statement was made during the Court's analysis of whether a riding crop is a dangerous weapon, but also holds true for the issue of intent. Although Appleby intended the beatings for his own and Cromer's sexual gratification, it is foreseeable that such lustful behavior can cause serious bodily injury.[90] Perhaps the Court preferred not to wait until serious injury occurred as a result of a sadomasochistic relationship. In essence, the perpetrator of these beatings may not use his right to sexual privacy to shield him from prosecution should injury occur solely because the violence relates to sexual conduct. Consequently, in order to prevent severe injury precipitating from sexual conduct, the Court will look at violent sexual conduct as *violent* conduct regardless of its content and punish that conduct accordingly.

Thus, *Commonwealth v. Appleby* presented the Supreme Judicial Court with the difficult task of applying a statute prohibiting assault and battery by means of a dangerous weapon to a situation where the violence was intertwined with a protected right to sexual privacy. In order to advance the state's interest in deterring and punishing violence while respecting the individual's right to privacy, the Court attempted to separate the sexual aspect from the violence aspect of the case. Although this distinction may be somewhat illusory, the Court was forced to do so because of Appleby's right to sexual privacy. The Court correctly noted that the right to privacy was not absolute and that a state may protect its citizens from harm. Thus, regardless of the sexual conduct, consent was held not to be a valid defense to an action arising under section 15A.

**§ 4.9. Administrative Search Warrants.*** During the *Survey* year, in *Commonwealth v. Accaputo*,[1] the Supreme Judicial Court had its first opportunity to apply the recent decisions of the Supreme Court of the United

[88] *Id.* at 873, 402 N.E.2d at 1056.

[89] *Id.* at 877, 402 N.E.2d at 1058.

[90] Indeed, on one other occasion after Cromer was beaten with a baseball bat, he sustained a fractured kneecap. As a result, Cromer was forced to undergo surgery. *Id.* at 868, 420 N.E.2d at 1054.

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§ 4.9 [1] 1980 Mass. Adv. Sh. 1009, 404 N.E.2d 1204.

States which defined the permissible limits of an administrative search.[2] The Court applied these decisions in *Accaputo* to invalidate an administrative search warrant which failed to define narrowly the scope of the authorized search.[3] The Court also held that facial inadequacies of a search warrant may be cured by incorporation of information from an extrinsic document only when the document is attached to the warrant and when the warrant contains "suitable words of reference which incorporate" the extrinsic document.[4] The incorporation holding of the *Accaputo* decision should extend beyond the narrow sphere of administrative searches and apply to any attempt to incorporate an extrinsic document into a search warrant. This section will examine both holdings of the *Accaputo* decision.

The defendant in *Accaputo* was indicted for various narcotics violations following a search of his pharmacy.[5] The search was conducted by police officers pursuant to an administrative search warrant.[6] The warrant was issued under the commonwealth's Controlled Substances Act,[7] which sets forth procedures regarding the inspection of "controlled premises," a category including pharmacies dispensing prescription drugs.[8] The warrant

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[2] An administrative search (alternatively called an administrative inspection) refers to a search conducted by a regulatory agency pursuant to its organic statute in order to determine whether the subject of the search is in compliance with or in violation of the relevant statutory guidelines or prohibitions. *See* Camara v. Municipal Court, 387 U.S. 523, 525-28, 531-34 (1967). The Supreme Court decisions which the *Accaputo* Court applied have dealt with the permissibility of warrantless searches, the standard for probable cause when an administrative warrant is sought, and the scope of the search permitted by such a warrant. In *Camara*, the Court held that a homeowner could refuse to admit a municipal housing inspector who lacked a warrant to inspect the premises. *Id.* at 534. The Court determined that such a warrantless search would be unreasonable and in contravention of the fourth amendment. *Id.* In the companion case of See v. City of Seattle, 387 U.S. 541 (1967), the Court held that the warrant requirement also applied to administrative inspections of commercial premises. *Id.* at 543. The *Camara* decision also determined that the standard of probable cause governing the issuance of administrative search warrants is less stringent than that which must be demonstrated to search for evidence in a criminal investigation. 387 U.S. at 538. Probable cause exists for the issuance of an administrative search warrant if "reasonable legislative or administrative standards for conducting an area inspection are satisfied" with respect to a particular establishment or premises. *Id.* The Court also held that because there was a lesser standard of probable cause for an administrative warrant, the scope of an administrative warrant must be drawn more narrowly than the scope of a criminal investigation. *Id.* at 537. A decade after *Camara*, the Supreme Court reaffirmed that case's validity, holding in Marshall v. Barlow's, Inc., 436 U.S. 307, that the portion of the Occupational Safety and Health Act permitting warrantless searches was unconstitutional. *Id.* at 325.

[3] 1980 Mass. Adv. Sh. at 1016-17, 404 N.E.2d at 1210.

[4] *Id.* at 1019, 404 N.E.2d at 1211.

[5] *Id.* at 1009-1010, 404 N.E.2d at 1206.

[6] *Id.*

[7] G.L. c. 94C.

[8] G.L. c. 94C, § 30(a) includes in the definition of "controlled premises": "any place or area . . . in which persons registered under the provisions of this chapter or required thereunder

did not contain a statement delineating the purposes of the inspection,[9] describe the items to be seized, nor even mention the power to seize any contraband.[10] Neither the application for the warrant nor the supporting affidavit for the warrant were attached to the warrant.[11]

The Court began its analysis by examining the fourth amendment standards which control the issuance and execution of administrative search warrants.[12] It noted that generally a warrant must be obtained in order to conduct an administrative search, even where "controlled premises" are involved.[13] The Court recognized that certain "pervasively regulated businesses" may be subject to warrantless inspections despite the general warrant requirement,[14] and that the defendant arguably was involved in a business which came under that exception.[15] Nevertheless, the Court concluded that the search of the defendant's pharmacy could not be justified under the "pervasively regulated business" exception.[16] The Court reasoned that that exception was not relevant where the statute authorizing the search prohibited warrantless inspections.[17]

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to keep records are permitted to hold, manufacture, compound, process, distribute, deliver, or administer any controlled substance or in which such persons make or maintain records pursuant thereto." *Id.* § 30(b) states that probable cause: exists upon a showing of a reasonable and valid public interest in the effective enforcement of this chapter ... under a general plan sufficient to justify administrative inspection of an area ... in the circumstances specified in the application or such moment. *Id.* Section 30(c) requires that the warrant identify "the area, premises, buildings or conveyances to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be seized, if any." *Id.* Section 30(c) also states: Such warrant shall: ... (2) command the person to whom it is directed to inspect *the area ... identified for the purpose specified* ... (3) *describe* the items or types of property to be inspected or *seized, if any. Id.* (emphasis supplied).

[9] 1980 Mass. Adv. Sh. at 1016, 404 N.E.2d at 1210.

[10] *Id.* at 1016-17, 404 N.E.2d at 1210. The warrant was no more specific in these respects beyond permitting an inspection "[p]ursuant to said SECTION 30 of CHAPTER 94C," during normal business hours. *Id.* at 1017 n.10, 404 N.E.2d at 1210 n.10.

[11] *Id.* at 1019, 404 N.E.2d at 1211.

[12] *Id.* at 1010-16, 404 N.E.2d at 1206-09.

[13] *Id.* at 1010-11, 404 N.E.2d at 1206-07.

[14] The Supreme Judicial Court cited United States v. Biswell, 406 U.S. 311 (1972) (the firearms industry), and Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) (the liquor industry). *See* 1980 Mass. Adv. Sh. at 1011-12, 404 N.E.2d at 1207. The basis for such an exception is that the history of extensive regulation of these industries together with the public interests involved outweigh the considerations which normally make a warrant necessary, thus making warrantless inspections reasonable under the fourth amendment. *See Biswell*, 406 U.S. at 315-16.

[15] 1980 Mass. Adv. Sh. at 1012, 404 N.E.2d at 1207.

[16] *Id.*

[17] *Id.* The exact relation of the fourth amendment to the inpsection procedures established legislatively in the Controlled Substances Act is not entirely clear. The Court cited United States v. Montrom, 345 F. Supp. 1337, 1340 n.1 (E.D. Pa. 1972) *aff'd* 480 F.2d 919 (3d Cir. 1973). *See* 1980 Mass. Adv. Sh. at 1012, 404 N.E.2d at 1207. *Montrom*, which involved the

The *Accaputo* Court recognized that the standard for probable cause required to obtain an administrative search warrant is "less stringent" than the probable cause necessary for granting a warrant in a criminal investigation.[18] The Court also noted that "[i]nexorably linked" to this lower threshold for probable cause is the requirement that a search under an administrative warrant be limited in scope.[19] The Court found that the procedures contained in the Controlled Substances Act closely resemble and adequately apply the federal constitutional standards for defining probable cause and limiting the scope of an administrative search of controlled premises.[20] The Court concluded, therefore, that an inspection exceeding the limits of the statute violates both the Act and the fourth amendment requirements which the Act reflects.[21]

The Court stated that the Act and the fourth amendment require that a warrant used in an administrative search must define the bounds of the search with adequate specificity.[22] The Court recognized two policies behind this requirement: to ensure that the owner of the premises be apprised of the reasons and lawful limits of the search[23] and to circumscribe the discretion of the executing officers.[24] Since the warrant in *Accaputo* did not adequately define or limit the scope of the inspection it purported to authorize, the Supreme Judicial Court held that the warrant could not support the seizure of the evidence taken from the defendant's pharmacy.[25]

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pharmaceutical industry, indicated that although Congress constitutionally could have eliminated the warrant requirement for administrative inspections of such industries, express statutory language permitting warrantless inspections is required. 345 F. Supp. at 1340 n.1. *Montrom* is probably an accurate statement of the law. *See* United States v. Biswell, 406 U.S. 311, 317 (1972); Colonade Catering Corp. v. United States, 397 U.S. 72, 77 (1969). Nevertheless, it is arguable whether legislative approval of warrantless inspections alone, without a determination that the statute regulates a "pervasively regulated business" would be sufficient to overcome objections on fourth amendment grounds. See text and note at note 14 *supra*.

[18] 1980 Mass. Adv. Sh. at 1013, 404 N.E.2d at 1208. The Supreme Judicial Court adopted the "reasonable legislative or administrative standards" test of *Camara*. See note 2 *supra*.

[19] *Id.* at 1014, 404 N.E.2d at 1208.

[20] *Id.* at 1014-15, 404 N.E.2d at 1208-09. The statute is discussed at note 8 *supra*.

[21] *Id.* at 1015-16, 404 N.E.2d at 1209.

[22] *Id.* at 1016, 404 N.E.2d at 1209.

[23] *Id.*

[24] *Id.* at 1017-18, 404 N.E.2d at 1210.

[25] *Id.* at 1018-20, 404 N.E.2d at 1210-11. The defendant's challenge was limited to a claim that the warrant was insufficient to support any seizures. *Id.* at 1017, 404 N.E.2d at 1210. He did not claim that the warrant was insufficient to support the inspection. *Id.* & n.11. This may have been a serious tactical error on the part of defendant's counsel. Because the inspection was not challenged *per se*, the Court could not find that the officers were wrongfully on the premises. *Id.* Hence, the Court was able to rule that those items which would have been lawfully seized under the plain view doctrine could be lawfully admitted against the defendant. *Id.* at 1020-24, 404 N.E.2d at 1211-14. The Court also ruled that certain inculpatory statements made by the defendant in response to questioning regarding certain of the items which were seized

The *Accaputo* decision accurately applies the relevant requirements of the fourth amendment. In so doing, *Accaputo* supersedes prior Massachusetts case law which permitted warrantless administrative searches under statutory provisions which did not contain a warrant requirement.[26] In *Commonwealth v. Dixon*,[27] the Supreme Judicial Court stated, albeit in dictum, that a statute permitting entries by fire department inspectors[28] sanctioned warrantless searches for fire code violations.[29] That statute remains substantially unchanged, but its validity is clearly open to constitutional challenge in light of *Accaputo* and the recent decisions of the United States Supreme Court. Such statutes and local ordinances have been rendered constitutionally suspect unless the "pervasively regulated business" exception[30] applies. Thus, although the *Accaputo* Court recognized that the standards for obtaining an administrative warrant are not difficult to satisfy,[31] the practitioner may assume confidently that, in the ordinary case, an administrative search conducted without a warrant is invalid and that evidence obtained thereby is suppressible.

The more practical question for the attorney is what form the lower threshold for probable cause will take. The standard applied in *Accaputo*, " 'reasonable legislative or administrative standards for conducting an area inspection,' "[32] is not self-defining. Since Massachusetts law on this subject is yet to be developed, federal case law reviewing administrative searches may serve as a guide in predicting what will be required in Massachusetts for both establishing probable cause and limiting the permissible scope of administrative searches.

Under federal law it is clear that the warrant application need not demonstrate probable cause to believe that a violation of the relevant

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could be admitted against the defendant in response to questioning regarding certain of the items which were seized could be admitted against the defendant despite the fact that *Miranda* warnings had not been given. *Id.* at 1025, 404 N.E.2d at 1214-15. The Court held that the defendant, who "was questioned at his pharmacy amidst employees and occasional customers," had not been subjected to " 'custodial interrogation' " and hence his *Miranda* rights had not yet attached. *Id.* at 1025, 404 N.E.2d at 1214. Both the plain view issue and the *Miranda* issue are beyond the scope of this section.

[26] Commonwealth v. Dixon, 352 Mass. 420, 423, 225 N.E.2d 919, 921; Commonwealth v. Hadley, 351 Mass. 439, 442-43, 222 N.E.2d 681, 685-86 (1966), *vacated and remanded*, 388 U.S. 464 (1967). This change in the law was recognized by the Massachusetts Appeals Court in Boston v. Ditson, 4 Mass. App. Ct. 323, 327-28, 348 N.E.2d 116, 118-19 (1976), *appeal dismissed* 429 U.S. 1057 (1977).

[27] 352 Mass. 420, 225 N.E.2d 919 (1966).

[28] G.L. c. 148, § 4.

[29] 352 Mass. at 423, 225 N.E.2d at 921.

[30] See text and note at note 14 *supra*.

[31] See text at note 18 *supra*.

[32] 1980 Mass. Adv. Sh. at 1013, 404 N.E.2d at 1208 (quoting Camara v. United States, 387 U.S. at 538).

statute exists.[33] The Supreme Court, in *Marshall v. Barlow's, Inc.*,[34] stated that the premises may be selected for an inspection on the basis of a "general administrative plan" for enforcing the relevant statute derived from "neutral sources."[35] This neutral criteria test was examined in *United States v. Greenberg*,[36] a Pennsylvania district court decision which reviewed an administrative search warrant granted under a federal narcotics statute containing substantially the same procedures as the Massachusetts Controlled Substances Act.[37] The district court found that criteria such as a substantial passage of time since the last inspection or an absence of previous inspections of the premises could establish probable cause for such a search.[38] Cases involving searches conducted under the Occupational Safety and Health Act also shed light on the neutral criteria test. In *Stoddard Lumber Co. v. Marshall*,[39] the United States Court of Appeals for the Ninth Circuit ruled that an administrative search plan based on general safety data for an entire industry, rather than on specific data about the safety record of the company to be inspected, would establish probable cause for a search of that individual company's plants.[40]

These federal cases demonstrate that probable cause for making routine inspections under the relevant statute ordinarily will exist if established administrative criteria which can be considered "neutral" call for an inspection. The requisite neutrality may exist due to the presence of a factor as basic as the mere passage of time. Thus, if a pharmacy had never been inspected, or if a suitable period of time defined by administrative rules had passed since the last inspection, probable cause for an administrative search might exist based on these factors alone.

As the *Accaputo* Court recognized, because the threshold for probable cause is lower in the area of administrative searches, the scope of such searches is, at least in theory, to be defined narrowly.[41] Federal cases, however, demonstrate that the permissible scope of administrative searches can be expanded by the relevant statutes. These cases have permitted theoretically limited searches to become quite extensive where the relevant statutory provisions are broadly written. In *Burkart Randall v. Marshall*,[42]

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[33] Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978).

[34] 436 U.S. 307 (1978).

[35] *Id.* at 321.

[36] 334 F. Supp. 364 (E.D. Pa. 1971).

[37] 21 U.S.C. § 880(d) (1976).

[38] 334 F. Supp. at 367; *see also* United States v. Prendergast, 585 F.2d 69, 70 (3d Cir. 1978); United States v. Goldfine, 538 F.2d 815, 818-19 (9th Cir. 1976).

[39] 627 F.2d 985 (9th Cir. 1980).

[40] *Id.* at 988-89; *see also* Marshall v. Chromalloy American Corp., 589 F.2d 1335, 1342-43 (7th Cir. 1979).

[41] 1980 Mass. Adv. Sh. at 1014, 404 N.E.2d at 1208.

[42] 625 F.2d 1313 (7th Cir. 1980).

for example, the Seventh Circuit ruled that in light of the broad purposes of the Occupational Safety and Health Act, a warrant granted pursuant to an employee complaint need not be confined to the subject matter of that complaint.[43] Thus, a warrant which permitted a search beyond the subject matter of the complaint was not invalid.[44] Similarly, in *Chromalloy American Corp. v. Marshall*,[45] that same court stated that the scope of an administrative search warrant "must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by the legislature and the reasonableness requirement of the Fourth Amendment."[46]

Therefore, it is probable that a broadly drawn statute will support an extensive administrative search, and a search which remains within the statutorily defined limits will not run afoul of the fourth amendment. Thus, although the *Accaputo* Court stated that the scope of an administrative search is to be narrow,[47] the practitioner should recognize that the scope of such a search may be quite expansive if the statute providing for the inspection is subject to a broad interpretation. A broad search conducted pursuant to such a statute will not be invalid provided the warrant is drawn to conform with the statutory limits.[48] In *Accaputo* the warrant failed to conform with these statutory limits because it did not adequately limit the scope of the search it purported to authorize.[49] If the scope had been described with sufficient specificity, there would have been no sustainable challenge to the validity of the search of the defendant's pharmacy.

In *Accaputo*, the commonwealth attempted to cure this defect in the warrant by incorporating into it the application made to obtain it.[50] The Supreme Judicial Court took the opportunity to discuss when extrinsic documents may be incorporated into a defective warrant to cure its defects. The Court held that an extrinsic document may not be incorporated if it was not physically attached, and if the warrant did not use "suitable words of reference which incorporate" the extrinsic document.[51] The Court made no

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[43] *Id.* at 1326-27.

[44] *Id.*

[45] 589 F.2d 1335 (7th Cir. 1979).

[46] *Id.* at 1343. On the other hand, if the scope of the warrant exceeds what is permitted by the statute, that portion of the search which exceeds the statutory limit will be declared invalid. In *In re* Establishment Inspection Portex, Inc., 595 F.2d 84 (1st Cir. 1979), the court held that a warrant could not authorize the seizure of an item, where the item did not fall within the inspection provisions of the statute. *Id.* at 85-86.

[47] 1980 Mass. Adv. Sh. at 1014, 404 N.E.2d at 1208.

[48] *See id.* at 1015-16, 404 N.E.2d at 1209. This requirement serves the two policies of notifying the subject of the search's limits and the executing officer of the bounds of his authority. *Id.* at 1016, 404 N.E.2d at 1209-10. See text at notes 23-24 *supra*.

[49] *Id.* at 1016-17, 404 N.E.2d at 1210.

[50] *Id.* at 1018, 404 N.E.2d at 1210.

[51] *Id.* at 1019, 404 N.E.2d at 1211.

attempt to limit this holding to administrative warrants. Moreover, since most of the authorities cited by the Court in support of this holding involved criminal investigations,[52] the Court's holding on the incorporation issue presumably would apply to warrants used in criminal investigations. In its incorporation ruling, the Court again stressed the two policies of requiring specificity in order to limit the discretion of the executing officers and to inform the "person subject to the search and seizure what the officers are entitled to take."[53] This policy, especially the latter element, applies equally in criminal investigation. Although the United States Supreme Court has never faced this question, the *Accaputo* test was adopted by the United States Court of Appeals for the First Circuit in *United States v. Roche*.[54] The court of appeals stated that it was a matter of "settled law" that the document to be incorporated be physically attached and referred to by the warrant.[55]

In its discussion of the extrinsic document issue, the *Accaputo* Court stated that the power to seize, which did not appear in the *Accaputo* warrant, could never be incorporated from an extrinsic document.[56] In so doing, the Court distinguished previous Massachusetts cases in which extrinsic documents had been incorporated in order to cure defective warrants.[57] Two of the cases cited by the Court involved the incorporation of documents which were not physically attached to the warrant. In *Commonwealth v. Vitello*,[58] and in *Commonwealth v. Todisco*,[59] incorporation

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[52] The Supreme Judicial Court stated that "substantial authority" supported these requirements. *Id.* The following cases, cited by the *Accaputo* Court, accurately support the Court's holding: *In re* Lafayette Academy, Inc., 610 F.2d 1, 4 (1979); United States v. Klein, 565 F.2d 183, 186 n.3 (1st Cir. 1977); United States v. Johnson, 541 F.2d 1311, 1315-16 (8th Cir. 1976) (test met); United States v. Womack, 509 F.2d 368, 382 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975) (test met); Huffman v. United States, 470 F.2d 386, 393 n.7 (D.C. Cir. 1974) (test met) *rev'd on other grounds*, 502 F.2d 419 (D.C. Cir. 1974); United States v. Moore, 461 F.2d 1236, 1238 (D.C. Cir. 1972) (test met).

[53] 1980 Mass. Adv. Sh. at 1019, 404 N.E.2d at 1211.

[54] United States v. Roche, 614 F.2d 6, 8 (1st Cir. 1980).

[55] *Id.*

[56] 1980 Mass. Adv. Sh. at 1018, 404 N.E.2d at 1211. The Court stated that "[a]n extrinsic document simply cannot authorize a power not contained in the warrant itself." *Id.* Despite the inherent logic of the proposition, the Court cited no authority for it. Apparently, no court has ever been confronted with this narrow issue. Nevertheless, it would seem that the policy to reveal the limits of the search to the subject logically supports such a proposition. *See* 1980 Mass. Adv. Sh. at 1016, 1019, 404 N.E.2d at 1209, 1211.

[57] *See id.* at 1018, 404 N.E.2d at 1210-11 (discussing Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975); Commonwealth v. Todisco, 363 Mass. 445, 294 N.E.2d 860 (1973); Commonwealth v. Pope, 354 Mass. 625, 241 N.E.2d 848 (1968)).

[58] 367 Mass. 224, 271-74, 327 N.E.2d 819, 846-47 (1975).

[59] 363 Mass. 445, 448-49, 294 N.E.2d 860, 863-64 (1973). In *Todisco*, the application was attached to the warrant, but it was insufficient to cure the defect. The affidavit, which was not attached, was allowed to be incorporated to supply the cure. *See id.*

was allowed despite this fact, apparently because the searches in those cases were conducted by officers who had filed the extrinsic documents and were, therefore, presumed to have known the warrants' restrictions.[60] While such an exception to the *Accaputo* rule might satisfy the policy of circumscribing the discretion of the executing officer,[61] it does not meet the related aim of ensuring that the limits of the search are made known to the subject.[62]

Obviously, a strict application of the *Accaputo* rule would have required a different result in both *Vitello* and *Todisco*. In *Vitello*, the termination date of a warrant authorizing a wiretap was inadvertently omitted.[63] The *Accaputo* Court distinguished *Vitello* on the ground that the inadvertent omission from a *wiretap* order did not prejudice the defendant's constitutional rights.[64] This is a sensible distinction; since the warrant will not be presented to the subject of a wiretap order, the policy of informing him of the scope of the search — here the scope of the wiretap order — does not apply. As long as the executing officer knows and follows the limits of the order, this exception to the *Accaputo* rule is appropriate. *Todisco*, however, involved the physical search of the defendant's apartment.[65] Here again, there is a basis for distinguishing the decision from *Accaputo* on the ground that the defendant in *Todisco* was not present at the time of the search.[66] Thus, he would not have benefited from a warrant which accurately defined its limits. Such an exception is less justified than in the wiretap setting, where the subject of the search will never be presented with the warrant prior to the search and seizure. A warrant for a physical search of private quarters ordinarily should be drawn with the expectation that it will be presented to the subject at the time of the search in order to satisfy the policy to reveal the limits of the search to the subject. Under the narrowest reading of *Accaputo*, when the subject is present at the time of the search, a warrant to which a necessary extrinsic document is not attached may not be cured by the incorporation of the extrinsic document, unless the *Accaputo* test is met. It remains for future cases to resolve whether *Accaputo* will have broader applications. There is, however, no reason to limit the incorporation of that case to administrative searches.

In an extensively regulated society, administrative inspections are an important element in enforcing legislatively determined policy decisions. *Accaputo* presents the Supreme Judicial Court's initial application of the past

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[60] Commonwealth v. Vitello, 367 Mass. at 272, 327 N.E.2d at 846-47; Commonwealth v. Todisco, 363 Mass. at 449, 294 N.E.2d at 864.

[61] Marshall v. Barlow's Inc., 436 U.S. at 323; Camara v. Municipal Court, 387 U.S. 523, 532 (1967); 1980 Mass. Adv. Sh. at 1017-18, 1019, 404 N.E.2d at 1210, 1211.

[62] Marshall v. Barlow's Inc., 436 U.S. at 323; United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970); 1980 Mass. Adv. Sh. at 1016, 1019, 404 N.E.2d at 1209, 1211.

[63] 367 Mass. at 272, 327 N.E.2d at 847.

[64] *See* 1980 Mass. Adv. Sh. at 1010, 404 N.E.2d at 1211 n.16.

[65] 363 Mass. at 447, 294 N.E.2d at 862.

[66] *Id.*

decade's fourth amendment developments in this area. The decision accurately reflects the current state of the law relating to probable cause for issuing an administrative search warrant and to the scope of searches permitted by such devices. It also sets forth stringent requirements regarding the incorporation of extrinsic documents to cure a defective warrant. It is unclear how broad an application that requirement will receive, but it should extend beyond the narrow sphere of administrative searches to cover searches conducted in criminal investigations.

**§ 4.10. Right to a Speedy Trial.*** The sixth amendment to the United States Constitution provides a criminal defendant in federal court the right to a speedy trial.[1] This amendment applies to criminal defendants in state courts through the fourteenth amendment.[2] In addition, article XI of the Massachusetts Bill of Rights guarantees a criminal defendant's right to a speedy trial.[3] Nevertheless, neither the federal nor state Constitutions define "speedy trial." During the *Survey* year, the Supreme Judicial Court was provided with two opportunities, in *Commonwealth v. Look*[4] and in *Commonwealth v. Rodriguez*,[5] to determine whether a defendant's right to a speedy trial has been violated. In doing so, the Court applied a four factor test first enunciated by the United States Supreme Court in *Barker v. Wingo*[6] to ascertain whether a trial is "speedy."[7]

In *Commonwealth v. Look*, the defendant was arrested on January 28, 1974, for the murder of his wife and was indicted on May 29, 1974, for second degree murder.[8] On March 17, 1975, a superior court judge granted the defendant's pretrial motion to suppress statements made by the defendant during interrogation on the night of the murder.[9] In response, on March 26, 1975, the commonwealth filed an interlocutory appeal to the Supreme Judicial Court seeking a reversal of the order to suppress.[10] The application for appeal was dismissed on November 22, 1975.[11] The commonwealth did

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§ 4.10 [1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...." U.S. Const. Amend. VI.

[2] *See* Kopfer v. North Carolina, 386 U.S. 213, 222-23 (1976).

[3] Mass. Const. Part I, Article XI: "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws . . . He ought to obtain right and justice freely . . . promptly, and without delay; conformably to the laws."

[4] 1980 Mass. Adv. Sh. 537, 402 N.E.2d 470 (1980).

[5] 1980 Mass. Adv. Sh. 1223, 405 N.E.2d 124 (1980).

[6] 407 U.S. 514 (1972).

[7] Commonwealth v. Rodriguez, 1980 Mass. Adv. Sh. at 1230, 402 N.E.2d at 128; Commonwealth v. Look, 1980 Mass. Adv. Sh. at 540, 402 N.E.2d at 475.

[8] 1980 Mass. Adv. Sh. at 537-39, 402 N.E.2d at 473-74.

[9] *Id.* at 539, 402 N.E.2d at 474.

[10] *Id.*

[11] *Id.*

nothing further on the case for almost two years until November 2, 1977.[12] On that date, it moved to vacate the dismissal of the appeal.[13] The Court denied this motion twenty days later.[14] On March 27, 1978, the commonwealth requested a trial assignment in superior court.[15] Nine days later, Look moved to dismiss for lack of a speedy trial.[16] Thus, Look first asserted his right to a speedy trial more than four years after his indictment. He was not incarcerated, however, during this period.[17] The superior court judge denied the motion and the trial commenced on October 19, 1978.[18] A jury convicted Look of second degree murder.[19] He appealed the conviction to the Supreme Judicial Court claiming, *inter alia*, that his right to a speedy trial had been violated.[20] The Court examined four factors which must be considered to decide whether a defendant's right to a speedy trial has been violated: (1) the length of the delay, (2) the reasons for the delay by the prosecution, (3) whether and when defendant asserted his right, and (4) whether any prejudice to the defendant resulted from the delay.[21]

With regard to the first factor, the length of delay, the Supreme Judicial Court held that a period of four years and five months between indictment and trial is sufficient to require further inquiry into a defendant's claim of a violation.[22] The Court cited delays in other cases which, by comparison, suggested that the delay in this case warranted further scrutiny.[23] The Court stated that, unless the commonwealth could explain why the delay was so long, this factor supported a finding for the defendant.[24]

Accordingly, the Court next examined the second factor in its test, the reasons for the prosecutor's delay. Because the commonwealth offered no explanation, the Court attributed the delay to negligence on the part of the prosecution.[25] Although the Court acknowledged the difference between in-

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 537, 402 N.E.2d at 473.
[20] *Id.*
[21] *Id.* at 540, 402 N.E.2d at 475.
[22] *Id.* at 541, 402 N.E.2d at 475.
[23] *Id. See, e.g.*, Commonwealth v. Beckett, 373 Mass. 329, 366 N.E.2d 1252 (1977) (fifty-five month delay); Commonwealth v. Boyd, 367 Mass. 169, 326 N.E.2d 320 (1975) (fourteen month delay); Commonwealth v. Horne, 326 Mass. 738, 291 N.E.2d 629 (1973) (forty-eight month delay).
[24] 1980 Mass. Adv. Sh. at 541, 402 N.E.2d at 475.
[25] *Id.* at 542, 402 N.E.2d at 476.

tentional delay designed to frustrate the defendant's case and negligent delay, it nevertheless found that the needless delay also would strongly support the defendant's claim of a violation of his right to a speedy trial.[26]

Despite the Court's finding that the first two factors favored the defendant, it attributed primary importance to the third factor of the test, Look's failure to assert his right to a speedy trial at some earlier stage of the proceedings.[27] The Court held that it is the defendant's responsibility to assert his right in a timely manner.[28] The Court characterized Look's failure to act as "a gamble" that the commonwealth would not prosecute or that the commonwealth would "forg[et] about him."[29] Moreover, because Look's first motion to suppress was granted on March 17, 1975, and affirmed on November 22, 1975, Look had almost two years to move to dismiss for lack of a speedy trial.[30] Thus, the Court concluded that this third factor did not bolster defendant's case since the right to a speedy trial cannot be kept in reserve in case one's belief that prosecution will not occur proves to be erroneous.[31]

In addressing the fourth factor of the prejudice to the defendant's case caused by the delay, the Court heard three claims by Look. Look asserted that the delay resulted in, first, the unavailability of one defense witness, second, the failure of memory of all witnesses, and third, Look's anxiety during the four years before trial.[32] He claimed that each of these three events prejudiced his case. The Court noted that the speedy trial right is designed to afford a defendant the opportunity to present witnesses on his behalf.[33] The Court acknowledged that the testimony of Look's presently unavailable witness would have been relevant at trial.[34] Nevertheless, the Court found that, at trial, Look produced other witnesses who offered substantially the same testimony as the missing witness would have offered if present.[35] Because Look did not adequately demonstrate that the unavailable witness would have offered anything that had not been provided by testifying witnesses, the Court concluded that he was not prejudiced by the absence of the witness.[36] Furthermore, an examination of the trial

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[26] *Id.*

[27] *Id.* at 543, 402 N.E.2d at 476-77.

[28] *Id.* at 543, 402 N.E.2d at 476.

[29] *Id.* at 543, 402 N.E.2d at 476-77.

[30] *Id.* at 543, 402 N.E.2d at 477.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 544, 402 N.E.2d at 477.

[34] *Id.* at 544-45, 402 N.E.2d at 477. The witness would have testified as to the tranquility of the marital relationship. *Id.*

[35] *Id.* at 545, 402 N.E.2d at 478.

[36] *Id.*

transcript did not convince the Court that the witnesses who did testify demonstrated a significant failure of memory as a result of the delay.[37] Finally, the Court dismissed Look's third claim of prejudice concerning his anxiety.[38] The Court emphasized that Look was not incarcerated pending trial and had failed to demonstrate his alleged anxiety sooner during the four year waiting period.[39] In sum, Look's failure to assert his speedy trial right and his failure to demonstrate that the delay prejudiced his case undercut his claim that his right to a speedy trial was denied.[40] Thus, the fact that the delay was quite long and unexplained was not sufficient to dismiss the charges against Look without a showing of timely assertion of the right and of prejudice caused by the delay.[41]

Just three months after the *Look* decision, the Supreme Judicial Court found that a sixteen-month delay between indictment and trial was sufficient to constitute a denial of a defendant's right to a speedy trial. In *Commonwealth v. Rodriguez*,[42] the defendant, Ronaldo Rodriguez, was arrested on February 28, 1978, while possessing a sawed-off shotgun.[43] He was taken into custody and indicted on May 1, 1978, for unlawfully carrying a dangerous weapon on his person.[44] On June 7, 1978, a superior court judge allowed several motions by the defendant and granted him leave to file several more.[45] On June 7, 1978, the case was continued to June 12 and later continued for four more days.[46] Nevertheless, on the scheduled trial date of June 12, the defendant moved for a speedy trial.[47] Thus, unlike the defendant in *Look*, Rodriguez first asserted his right to a speedy trial just forty-three days after indictment.

On the trial date of June 16, 1978, the prosecution sought to amend the indictment to the more serious charge of unlawful possession of a sawed-off shotgun as opposed to the earlier indictment of the unlawful carrying on one's person of a dangerous weapon.[48] The prosecution's motion, however,

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[37] *Id.*

[38] *Id.* at 546, 402 N.E.2d at 478.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 1980 Mass. Adv. Sh. 1223, 405 N.E.2d at 124.

[43] *Id.* at 1223-24, 405 N.E.2d at 125.

[44] *Id.* at 1224, 405 N.E.2d at 125.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* The crime of carrying a dangerous firearm under chapter 269, section 10(a) is punishable by imprisonment of not less than two and one-half years in a state prison, while the crime of possession of a sawed-off shotgun under chapter 269, section 10(c) is punishable by life imprisonment.

was denied.[49] The prosecutor then made an endorsement of *nolle prosequi*[50] on the indictment of carrying a dangerous weapon.[51] The prosecution believed that the facts considered by the grand jury, which had returned an indictment for the unlawful carrying of a firearm, warranted further consideration regarding a possible indictment of the more serious crime of possession.[52] In response to the prosecution's endorsement of *nolle prosequi*, the grand jury indicted Rodriguez on September 7, 1978, charging him with unlawful possession of a sawed-off shotgun.[53] At this time, the defendant was serving a prison sentence in a New York jail on other charges.[54] The defendant filed a motion for speedy trial on the new indictment on April 17, 1979.[55] Four months later, on August 14, 1979, the defendant moved to dismiss the charges against him for the denial of his right to a speedy trial.[56] In support of this motion to dismiss, defendant filed two affidavits with the superior court on September 11, 1979.[57] The commonwealth filed no opposing affidavits.[58] As a result, the defendant's motion to dismiss was granted after a hearing held on September 11.[59]

The superior court judge found that the delay from the time of the initial indictment on May 1, 1978, to the hearing date of September 11, 1979, was caused by the mistake in the first indictment and the commonwealth's subsequent failure to correct the grand jury's mistake until June 16, 1978.[60] In addition, the judge found that the prosecution's endorsement of *nolle prosequi* and its petition for the second indictment were intended to circumvent the superior court's denial of the motion to amend the first indictment.[61] As a result of the delay, the imprisoned defendant was ineligible for both parole and other prison activities at the New York state prison and was thereby prejudiced.[62] The judge found that the defendant also had been prejudiced by the lapsing of the memories of many of defendant's

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[49] 1980 Mass. Adv. Sh. at 1224, 405 N.E.2d at 125.

[50] An endorsement of *nolle prosequi* is defined as "[a] formal entry of record by the prosecuting attorney by which he declares unwillingness to prosecute a case or his intention not to prosecute the case further." BALLENTINE'S LAW DICTIONARY 853 (3d ed. 1969).

[51] 1980 Mass. Adv. Sh. at 1224, 405 N.E.2d at 125.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1224-25 n.3, 405 N.E.2d at 125 n.3.

[56] *Id.* at 1226, 405 N.E.2d at 126.

[57] *Id.*

[58] *Id.* at 1226, 405 N.E.2d at 127.

[59] *Id.* at 1226, 405 N.E.2d at 126.

[60] *Id.* at 1226-27, 405 N.E.2d at 126.

[61] *Id.*

[62] *Id.* at 1227, 405 N.E.2d at 127.

witnesses.[63] Finally, the superior court judge rejected the prosecutor's explanation of the delay — their inability to find the defendant between October 1978 and April 1979.[64] The judge found that the commonwealth should have surmised that the defendant was in the custody of the New York State authorities when those authorities arrested Rodriguez at the *nolle prosequi* hearing on June 16, 1978.[65]

The commonwealth subsequently appealed the superior court judge's findings to the Supreme Judicial Court.[66] The Court reiterated the four factors employed in *Look* to determine whether the defendant's right to a speedy trial was violated.[67] With regard to the first factor, the length of delay, the Court held that, for the purposes of this case, the delay would be measured from the date of Rodriguez's arrest on February 28, 1978, to the date of dismissal of September 11, 1979.[68] The Court thus considered the two indictments as one prosecution which constituted the delay.[69] The delay of eighteen months, as the Court observed, was not great in comparison to much longer delays tolerated by the Court in earlier decisions.[70] Consequently, it found that the delay in this case did not in itself constitute a violation of the speedy trial right.[71] Whether Rodriguez could succeed in establishing a violation of this right would, therefore, depend on the other three factors.

The next factor considered by the Court was the prosecution's reason for delay. The Court compared the conduct of the prosecutor in this case with the conduct of the prosecutor in the 1967 case of *Commonwealth v. Thomas*.[72] In *Thomas*, the prosecution's request for a thirty-day continuance was denied by a district court judge.[73] In response to the denial, the prosecution refused to prosecute and filed a *nolle prosequi*.[74] The commonwealth then presented the case to a grand jury which returned an indictment for the crime of breaking and entering.[75] The case then was assigned to the superior court.[76] Thus, by filing the *nolle prosequi* and obtaining reassignment, the prosecutor was able to obtain the thirty-day delay despite

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1223, 405 N.E.2d at 125.
[67] *Id.* at 1232, 405 N.E.2d at 128. See text and note at note 21 *supra*.
[68] *Id.* at 1231, 405 N.E.2d at 129.
[69] *Id.*
[70] *Id.* at 1231-32, 405 N.E.2d at 129. See note 20 *supra*.
[71] *Id.* at 1231, 405 N.E.2d at 129.
[72] 353 Mass. 429, 233 N.E.2d 25 (1967).
[73] *Id.* at 430, 233 N.E.2d at 26.
[74] *Id.*
[75] *Id.*
[76] *Id.*

the district court judge's refusal to grant the continuance. On appeal, the Supreme Judicial Court in *Thomas* chided the prosecution for its attempt to skirt the district court and held that the delay caused by such an attempt was a violation of the defendant's right to a speedy trial.[77] Accordingly, the case was dismissed.[78] As in *Thomas*, the *Rodriguez* Court concluded that the prosecutor's conduct supported a finding of a violation of the defendant's right to a speedy trial.[79]

Having analyzed the first two factors with differing results, the Court then examined whether the defendant had asserted his speedy trial right in a timely fashion. After reviewing the trial judge's findings, the Court concluded that the defendant seasonably and persistently asserted this right throughout the case.[80] The Court held that the defendant's efforts to assert this right in the face of the prosecution's delay strongly militated in favor of finding that he was deprived of his right to a speedy trial.[81]

Finally, the Court addressed the fourth factor, whether the delay in any way prejudiced the defendant. It first examined the trial judge's finding that the passage of time probably had impaired the memories of defendant's witnesses.[82] The Court found the trial judge's finding to be unjustified and contradictory to many past decisions of the Court including the *Look* case.[83] Nevertheless, the Court approved the trial judge's findings that the defendant had been prejudiced by the delay since the pending trial interfered with his parole eligibility and his opportunity to participate in programs at his place of detention in New York.[84] The Court found that this prejudice was further substantiated by two of defendant's affidavits.[85] Because the prosecution offered no opposing affidavits, the trial judge was justified in relying solely on defendant's affidavits in making his findings.[86] Thus, although the length of the delay was in no way remarkable, the Court found a violation of the defendant's speedy trial right based on the prosecutor's reason for the delay, the defendant's timely assertion of his right, and the prejudice he sustained from the delay.[87]

In both *Look* and *Rodriguez*, the Supreme Judicial Court employed the four-factor test to determine whether the defendant's right to a speedy trial

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[77] *Id.* at 432, 233 N.E.2d at 27.
[78] *Id.*
[79] 1980 Mass. Adv. Sh. at 1232, 405 N.E.2d at 129.
[80] *Id.*
[81] *Id.* at 1233, 405 N.E.2d at 130.
[82] *Id.* at 1229, 405 N.E.2d at 128.
[83] *Id.*
[84] *Id.* at 1233-34, 405 N.E.2d at 130.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1234, 405 N.E.2d at 130-31.

had been violated. This test was first articulated by the United States Supreme Court in *Barker v. Wingo*.[88] In *Barker*, however, that Court first rejected other approaches before adapting this particular test. One suggested approach was the so-called "demand-waiver doctrine."[89] This rule provides that a defendant waives any consideration of his speedy trial right for any period prior to which he has not demanded a speedy trial.[90] Unless the defendant actively asserts his right to a speedy trial, his right to a speedy trial will not be considered.[91] Thus, in order for the defendant to perfect his claim, he might be compelled to make a demand before trial and an additional motion for dismissal at trial.[92] The Supreme Court rejected this approach characterizing the demand-waiver rule as inconsistent with the Court's pronouncements on waiver of constitutional rights.[93] The Court held that there is a strong presumption against the waiver by silence of fundamental rights.[94] The Court also perceived this rule as placing the defendant's counsel in an awkward position. Unless counsel demands a trial early and often in the proceedings, he may frustrate his client's right.[95] Conversely, if counsel tolerates some delay for whatever reason, including to prepare his own case better, he runs the risk of waiting too long and losing his client's right.[96] Furthermore, since under the demand-waiver rule no time runs until the demand is made, the government will have a reasonable time *after* the demand has been made in which to prepare its case.[97] The result is that the defendant may have to wait an unreasonable length of time before his trial commences.[98]

Although the *Barker* Court rejected the demand-waiver rule, it maintained that a defendant has some responsibility to assert a speedy trial claim.[99] Moreover, the Court stated that the assertion or failure to assert this right is one factor for determining whether the right has been violated.[100] In adopting its four-factor test, the Court found this particular criterion not to be determinative but, rather, closely related to the other factors of the test.[101]

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[88] 407 U.S. 514 (1972).
[89] *Id.* at 523-24.
[90] *Id.*
[91] *Id.*
[92] Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1602 (1965).
[93] 407 U.S. at 525.
[94] *Id.*
[95] *Id.* at 527.
[96] *Id.*
[97] *Id.* at 527-28.
[98] *Id.* at 528.
[99] *Id.* at 529.
[100] *Id.* at 528.
[101] *Id.* at 531-32.

The Court continued to state, however, that the defendant's assertion of his speedy trial right would be entitled to strong weight in determining whether there was a deprivation of that right.[102]

Although citing the *Barker* test as its basis for the resolution of both *Look*[103] and *Rodriguez*,[104] the Supreme Judicial Court has relied, *sub silentio*, upon the demand-waiver rule instead. In both *Look* and *Rodriguez*, strong, if not controlling weight was given to whether the defendants had asserted their right to a speedy trial in a timely manner. For example, the Court in *Look* described the defendant's failure to assert his right as "a gamble" that the prosecution would be discontinued.[105] While it is true that Look made no attempt to invoke this right for over four years, there is nothing in the record to warrant the Court's speculation that Look took a "gamble." Similarly, the *Rodriguez* Court attributed great significance to the defendant's seasonable and persistent assertion of his speedy trial right, citing *Barker* for the importance of the defendant's timely assertion of his rights.[106] In effect, the Court disregarded the factor of the length of the delay in both cases. In its place, the Court effectively fashioned a new factor: the reason for defendant's failure to assert his rights earlier. Considering the inordinate delay in *Look*, it seems incongruous to place greater emphasis on the defendant's failure to assert his rights than on the prosecution's negligent failure to prosecute for over four years.

The Court also has misapplied the four-factor approach in *Look* by wedding the factors of the timely assertion of the speedy trial right and the prejudice to the defendant caused by the delay. The fourth factor, the prejudice to the defendant caused by the delay, was comprised of several elements including the anxiety and concern to the defendant during the delay.[107] The *Look* Court stated that the defendant's failure to assert his speedy trial right at an earlier time precluded any claim that the delay had caused him *undue* anxiety.[108] In this respect, the Court also noted that Look was not incarcerated while awaiting trial.[109] In effect, the Court made the factor of anxiety, and the prejudice caused by such anxiety, dependent upon a defendant's timely assertion of his speedy trial right. The Court found it difficult to conceive that Look had experienced any anxiety given that he

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[102] 1980 Mass. Adv. Sh. at 537, 402 N.E.2d at 470.

[103] 1980 Mass. Adv. Sh. at 1230, 405 N.E.2d at 128.

[104] 1980 Mass. Adv. Sh. at 543, 402 N.E.2d at 476-77.

[105] Another possible explanation for Look's failure to assert his rights is that he was represented by incompetent counsel. *See* Barker v. Wingo, 407 U.S. 514, 536 (1972).

[106] 1980 Mass. Adv. Sh. at 1233, 405 N.E.2d at 130.

[107] Barker v. Wingo, 407 U.S. at 532.

[108] 1980 Mass. Adv. Sh. at 546, 402 N.E.2d at 478.

[109] *Id.*

did not assert his right for four years and that he was not incarcerated.[110] In *Barker*, however, the Supreme Court noted that even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and is still living under a cloud of anxiety, suspicion, and often hostility.[111] Indeed, in speedy trial cases, a measurement of anxiety is an extremely questionable undertaking at best.[112] It is probably better left as a question of fact for the trial court. Moreover, the United States Supreme Court in *Barker* envisioned a test comprised of "related factors [which] must be considered together with such other circumstances as may be relevant."[113] The Court did not state, however, that any one factor should be *dependent* on any other. In contrast, the *Look* Court precluded a finding of substantial and prejudicial anxiety because the defendant failed to make a timely assertion of his speedy trial right. It therefore made one factor dependent upon another and misapplied the test.[114]

Despite its skewed use of the four-factor test, the Court indicated in *Look* that the speedy trial right may be enforced in subsequent cases through the new Massachusetts Rules of Criminal Procedure.[115] Specifically, Rule 36, entitled "Case Management," provides standards for a speedy trial including time limits between indictment and trial.[116] If a defendant is not brought to trial within these time limits, he is entitled, upon motion, to a dismissal of the charges.[117] Rule 36, however, also provides certain exceptions to the general time limits. For example, delays resulting from other proceedings concerning the defendant, such as hearings on pretrial motions or interlocutory appeals, are excluded in computing the time within which the trial must commence.[118] Further, a delay resulting from a continuance granted by a court is excluded from the calculation of the required time period provided the judge sets forth his reasons for the continuance.[119]

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[110] *Id.*

[111] 407 U.S. at 533.

[112] Note, *Right to a Speedy Trial*, 86 HARV. L. REV. 164, 170 (1972).

[113] 407 U.S. at 533.

[114] This is not to suggest that the weight to be placed on the anxiety factor may not be reduced by the length of time a defendant waits to assert his right. A court must balance, however, the weight to be given each factor as opposed to making one factor dependent upon another.

[115] 1980 Mass. Adv. Sh. at 541 n.2, 402 N.E.2d at 476 n.2. *See* MASS. R. CRIM. P. 36. See also, Mills, *Criminal Law and Procedure*, 1977 ANN. SURV. MASS. LAW § 14.6, at 297.

[116] From July 1, 1979 to July 1, 1980, a defendant must be tried within twenty-four months after the defendant's return day — the day on which a defendant is ordered by summons to first appear or does first appear to answer the charges. From July 1, 1980 to July 1, 1981, the defendant must be tried within eighteen months after the return day. Finally, after July 1, 1981, a defendant must be tried within one year after the return day. Mass. R. Crim. P. Rule 36(b)(1).

[117] *Id.* at (b)(1)(D).

[118] *Id.* at (b)(2)(A)(iv)-(v).

[119] *Id.* at (b)(2)(F).

In addition to providing for specific time periods for bringing a defendant to trial, the Rules specify other special circumstances which warrant dismissal. A defendant may be entitled to a dismissal of the charges if the prosecutor's conduct is unreasonably lacking in diligence or has caused prejudice to the defendant.[120] This provision is particularly relevant to the *Look* decision. In *Look*, the defendant had to establish that the prosecution had no reasonable explanation for the delay.[121] The Court noted that this burden was onerous since a defendant is not privy to the administrative decisions of the district attorney's office.[122] Nevertheless, the Court quite properly stated that the new Rules mitigate this burden to some degree by shifting it to the commonwealth if a defendant has not been brought to trial within certain time periods.[123] Thus, a delay as existed in *Look* should become quite uncommon for two reasons. First, the prosecution is obligated to try a defendant within a certain time period and, second, a defendant may move for dismissal due to prejudicial delay even before this time period expires.

A final special provision of the new Rules which bears directly on *Rodriguez* is a provision which concerns persons detained outside the commonwealth. Under this provision, the commonwealth must not delay in notifying a defendant who is detained outside the commonwealth of charges against him and must promptly seek to obtain his presence for trial.[124] Should the prosecution fail to do so, the charges against the defendant must be dismissed.[125] In *Rodriguez*, the prosecution failed to notify the defendant incarcerated in a New York State prison of the charges against him for seven months.[126] Under the new Rule, Rodriguez would have been able to argue that this delay was unreasonable and, therefore, greatly increase the chance that his charges be dismissed.

In conclusion, although the Supreme Judicial Court was compelled to employ the four-factor test articulated in *Barker*, the Court nevertheless has misapplied the test. The Court has placed so much weight on the factor of a defendant's assertion of his speedy trial right that the Court's test approaches the demand-waiver rule. Despite the Court's questionable interpretation of the *Barker* test, the new Rules of Criminal Procedure may provide additional protection to a defendant's right to a speedy trial. In accordance with the new Rules, the prosecution generally will be obligated to try a criminal defendant within twelve months. The adoption of these Rules may obviate "speedy trials" of four years.

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[120] *Id.* at (c).

[121] 1980 Mass. Adv. Sh. at 541, 402 N.E.2d at 476.

[122] *Id.* at 541 n.2, 402 N.E.2d at 476 n.2.

[123] *Id.*

[124] MASS. R. CRIM. P. 36(d)(3).

[125] *Id.*

[126] 1980 Mass. Adv. Sh. at 1227, 405 N.E.2d at 127.

**§ 4.11. Double Jeopardy — Two-Tier Court System.*** Under the reorganized court system in effect in Massachusetts since January 1, 1979, a criminal defendant who is brought to trial in a district court[1] may elect to have either a jury trial or a bench trial.[2] If a defendant elects a jury trial and is convicted, he may appeal directly to the appeals court.[3] If a defendant elects a bench trial, however, his only recourse from a conviction is a trial de novo,[4] again at the district court level.[5] During the *Survey* year, in *Lydon v. Commonwealth*,[6] the Supreme Judicial Court upheld the two-tier trial de novo system against a challenge brought under the fifth amendment.[7] Specifically, the challenge asserted that when a defendant has been convicted on insufficient evidence at a bench trial, reprosecuting him in a trial de novo would violate his right to be protected from double jeopardy.[8]

The defendants in *Lydon v. Commonwealth* were brought to trial for possession of burglarious instruments[9] in the Municipal Court of the City of Boston.[10] Under the Massachusetts court system, the defendants had the

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§ 4.11. [1] The district courts, and the Municipal Court of the City of Boston, have original jurisdiction, concurrent with the superior courts, over violations of local ordinances, "all misdemeanors, except libels, all felonies punishable by imprisonment in the state prisons for not more than five years," and several listed felonies punishable by imprisonment for more than five years. G.L. c. 218, § 26.

[2] G.L. c. 218, § 26A.

[3] G.L. c. 218, § 27A(g).

[4] G.L. c. 218, § 26A. The statute reads as follows:

> Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

*Id.*

[5] G.L. c. 218, § 27A.

[6] 1980 Mass. Adv. Sh. 1915, 409 N.E.2d 745.

[7] *Id.* at 1918-19, 409 N.E.2d at 748.

[8] *Id.* In two companion opinions decided the same day, Gibson v. Commonwealth, 1980 Mass. Adv. Sh. 1933, 409 N.E.2d 741, and A Juvenile v. Commonwealth, 1980 Mass. Adv. Sh. 1939, 409 N.E.2d 755, the Court upheld the two-tier system that was in effect before January 1, 1979. The distinguishing feature of the old system was that a defendant could not elect a jury trial in the first instance. Instead, a defendant was tried originally in a bench trial from which the only recourse was a new trial. G.L. c. 278, § 18, as amended through Acts of 1974, c. 167. Since these two opinions incorporated much of the *Lydon* opinion in reaching the same result, they will not be discussed separately in this chapter.

[9] Lydon v. Commonwealth, Reservation and Report of Questions Arising in the Plaintiff's Petition for Relief under G.L. c. 211, § 3, at 1.

[10] 1980 Mass. Adv. Sh. at 1916, 409 N.E.2d at 746-47. The two-tier system applies equally to the Boston Municipal Court and the District Courts of Massachusetts. G.L. c. 218, § 26A.

right to a jury trial, but they elected instead to proceed to a bench trial.[11] The defendants were convicted at their bench trial, and subsequently they petitioned for a trial de novo by jury.[12] Before the second trial commenced, however, the defendants filed a motion with the jury trial judge to have the charges against them dismissed.[13] The defendants asserted that the prosecution's evidence at the bench trial had been insufficient to warrant their convictions.[14] They argued that to require them to submit to a new trial would violate the double jeopardy clause of the fifth amendment, because the evidence at the first trial had been insufficient to support convictions.[15] The defendants' motion was denied by the trial judge, and the defendants immediately petitioned the single justice session of the Supreme Judicial Court for relief under that Court's superintendence power.[16] The single justice stayed the second trial and, solely "for the purpose of reporting clearly framed questions to the full bench [of the Supreme Judicial Court],"[17] accepted the defendants' contention that the evidence presented at the bench trial did not warrant the convictions.[18]

On the basis of this assumption, the single justice reported two questions for consideration by the full bench.[19] First, the Court was presented with the question whether, when the evidence at the bench trial is insufficient to warrant convictions, the defendants would be placed in double jeopardy by requiring that they submit to a new trial.[20] The second question was whether, assuming the defendants would be placed in double jeopardy, the trial court judge may pass on the sufficiency of the evidence that was presented at the first trial.[21] The Court answered the first inquiry in the negative[22] and held, therefore, that the judge at the second trial would never have occasion to adjudicate the sufficiency of the evidence presented at the first trial.[23]

The first question decided by the full bench of the Supreme Judicial Court was "whether a defendant would be denied his right not to be placed in double jeopardy if he were required to go through a jury trial when the

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[11] *Id.*

[12] *Id.* at 1916, 409 N.E.2d at 747.

[13] *Id.*

[14] *Id.* The defendants also had asserted this at the conclusion of the bench trial. *Id.*

[15] See text and notes at notes 33-36 *infra*.

[16] *Id.* The superintendence power of the Supreme Judicial Court, conferred by G.L. c. 211, § 3, is the power to correct and to prevent errors and abuses in the courts of inferior jurisdiction by issuing any necessary writs, processes, and directives.

[17] *Id.* at 1918 n.6, 409 N.E.2d at 748 n.6.

[18] *Id.* at 1916, 409 N.E.2d at 747.

[19] *Id.*

[20] *Id.* at 1916-17 n.3, 409 N.E.2d at 747 n.3.

[21] *Id.*

[22] *Id.* at 1926, 409 N.E.2d at 752.

[23] *Id.*

evidence at the bench trial was inadequate to support his conviction."[24] On this issue, the defendants relied primarily on *Burks v. United States*,[25] a United States Supreme Court decision that substantially broadened the availability of a fifth amendment double jeopardy claim to a criminal defendant. Prior to *Burks*, when a defendant successfully had appealed a conviction to a reviewing court, the double jeopardy clause did not limit the state's ability to reprosecute.[26] *Burks* narrowed this rule to provide that reprosecution was not permissible in cases where the appellate reversal was grounded on the insufficiency of the evidence to support the verdict.[27]

The *Burks* Court thus distinguished between an appellate reversal because of trial error and a reversal because of insufficient evidence.[28] The Court stated that reprosecution after an appellate reversal because of trial error was permissible, since the reversal "implies nothing with respect to the guilt or innocence of the defendant."[29] In contrast, when a conviction is reversed for lack of sufficient evidence, the prosecution has been given one fair chance to offer whatever proof it could assemble and has failed, as a matter of law, to prove the defendant's guilt.[30] The Court found no valid distinction, for fifth amendment purposes, between an appellate determination that there was insufficient evidence for a reasonable jury to convict the

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[24] *Id.* at 1916-17, 409 N.E.2d at 747. The claim that the evidence was insufficient to convict the defendants was accepted by the single justice as a premise on which to hypothesize this question. *Id.* at 1918 n.6, 409 N.E.2d at 748 n.6.

[25] 437 U.S. 1 (1978). On the day it was decided, the *Burks* decision was held applicable to the states through the fourteenth amendment in *Greene v. Massey*, 437 U.S. 19, 24 (1978).

[26] *See, e.g.*, Forman v. United States, 361 U.S. 416 (1960) (The Court stated: "[i]t is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal." *Id.* at 425 (citing United States v. Ball, 163 U.S. 662, 672 (1896)).) Yates v. United States, 354 U.S. 298 (1957) (The Court remanded to the district court, holding that a new trial was justified "even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked in the alternative for a new trial as well as for acquittal." *Id.* at 328).

The *Burks* Court examined prior decisions on whether a case that is reversed on appeal may be remanded for a new trial. The Court concluded that the cases were fraught with ambiguities, but that "at least one principal emerged: A defendant who *requests* a new trial as one avenue of relief may be required to stand trial again, even where his conviction was reversed due to a failure of proof at the first trial." 437 U.S. at 10.

[27] 437 U.S. at 18. The petitioner in *Burks* was tried on bank robbery charges in a United States District Court, and was convicted despite his assertion of insanity. *Id.* at 2-3. Burks successfully appealed to the Court of Appeals, which found that the prosecution had failed to present sufficient evidence to rebut his claim of insanity. *Id.* at 3. The case reached the Supreme Court on Burks' assertion that the Appeals Court's remand for a possible reprosecution placed him in double jeopardy. *Id.* at 5. The Supreme Court agreed that a new trial would violate the fifth amendment, and hence directed a judgment of acquittal. *Id.* at 18.

[28] *Id.* at 15-16.

[29] *Id.* at 15.

[30] *Id.* at 16.

defendant and a jury acquittal in the first instance.[31] Since reprosecution would be impermissible in the latter situation, the *Burks* Court held that reprosecution also must be barred in the former.[32]

The defendants in *Lydon* argued that the principles underlying *Burks* applied equally to their own situation.[33] The rule in *Burks*, they argued, should bar their retrial.[34] They asserted that the prosecutor should not be provided a second opportunity to prove the defendants guilty after his initial failure during a full and fair first trial.[35] This rule should apply, they asserted, regardless of whether there has been an appellate decision on the sufficiency of the evidence presented at the bench trial.[36] The Supreme Judicial Court, however, interpreted *Burks* more restrictively and ultimately distinguished it from the situation in *Lydon*.[37] According to the *Lydon* Court, the Supreme Court's holding in *Burks* was limited to situations where a " *'reviewing court has found the evidence legally insufficient.'* "[38] The *Lydon* Court held that, absent such an appellate decision, the double jeopardy clause is not implicated.[39] Because there was no provision in the Massachusetts system for an appellate court to determine the sufficiency of the evidence presented at the bench trial, the *Lydon* Court found that the Supreme Court's interpretation of the double jeopardy clause did not bar a trial de novo.[40]

In addition to finding *Burks* inapplicable, the *Lydon* Court ultimately decided that the two-tier system was "not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect."[41] First, the defendants' assertion that the commonwealth had no legitimate state interest in reprosecuting them was rejected because, the

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[31] *Id.*

[32] *Id.*

[33] Brief for Defendants-Appellants at 12.

[34] *Id.* at 14-15.

[35] *Id.* at 9-10.

[36] *Id.* at 13-15. The Appellants cited Ludwig v. Massachusetts, 427 U.S. 618 (1976), a pre-*Burks* challenge to the Massachusetts two-tier system, in support of their contention that: "the answer to the question of how double jeopardy applies to a de novo defendant is found by analyzing how double jeopardy applies to a defendant who successfully challenges his conviction in an appellate court." *Id.* at 631-32.

[37] 1980 Mass. Adv. Sh. at 1919-20, 409 N.E.2d at 748-49.

[38] *Id.* at 1919-20, 409 N.E.2d at 749 (quoting Burks v. U.S., 437 U.S. 1, 18 (1978)) (emphasis added by the Supreme Judicial Court).

[39] *Id.* at 1919-20, 409 N.E.2d at 749.

[40] *Id.* at 1919, 409 N.E.2d at 748-49. The Court also found that, since the double jeopardy clause was not violated by a second trial unless a defendant could obtain appellate review of the sufficiency of the evidence at the first trial, the double jeopardy protection did not give a defendant the right to such appellate review. *Id.* at 1920, 409 N.E.2d at 749.

[41] *Id.* at 1925, 409 N.E.2d at 751 (citation omitted).

Court found, the commonwealth was not seeking to reprosecute.[42] Rather, the commonwealth merely provided defendants with an option: allow the convictions to stand or submit to a trial de novo.[43] Second, the Court stressed that under the existing system, the defendants had elected voluntarily to proceed to the bench trial from which their only recourse would be a trial de novo.[44] Had they not done so, "no question of double jeopardy would have arisen."[45] The notion of waiver of the constitutional protection was, therefore, a factor in the Court's decision. Finally, the Court found that a criminal defendant actually may benefit from the two-tier system by virtue of having "two opportunities to avoid conviction and secure an acquittal."[46]

Having upheld the two-tier system, the *Lydon* Court then examined the second question reported to it by the single justice. The second question was, assuming the existence of a valid double jeopardy claim, whether "a jury-trial judge could or should reconsider the question of the sufficiency of the evidence which a bench-trial judge had decided adversely to a defendant."[47] The defendants had contended that, because a second trial is prohibited if the initial conviction is based on insufficient evidence, a decision must be made on the sufficiency of the evidence before the defendants could be subject to a second trial.[48] They argued that in order to decide whether the defendants' double jeopardy assertion was valid, the de novo court would be required to review the sufficiency of the evidence presented at the first trial. Such a review was required, the defendants argued, even though there was no statutory authority for a de novo court to review evidence presented at a bench trial.[49] Although the Court accepted the contention that the trial de novo judge was required to consider the assertion of a violation of the double jeopardy clause, it found that the judge would have to reject such an assertion.[50] This finding was an obvious result, given the Court's decision that there is no valid double jeopardy claim in the absence

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[42] *Id.* at 1921, 409 N.E.2d at 749.

[43] *Id.* at 1921, 409 N.E.2d at 749-50.

[44] *Id.* at 1923, 409 N.E.2d at 750-51. In Gibson v. Commonwealth, 1980 Mass. Adv. Sh. 1933, 409 N.E.2d 741, and in A Juvenile v. Commonwealth, 1980 Mass. Adv. Sh. 1939, 409 N.E.2d 755, the companion cases to *Lydon*, the Court upheld the two-tier system in effect in Massachusetts before January 1, 1979. Under the old system, a defendant had no choice but to submit to a bench trial from which his only recourse was a trial de novo. G.L. c. 278, § 18, as amended through Acts of 1974, c. 167. See note 7 *supra*. The Court's decisions in these two cases indicate that the lack of voluntariness does not warrant a holding different from that in *Lydon*.

[45] 1980 Mass. Adv. Sh. at 1923, 409 N.E.2d at 751.

[46] *Id.* at 1924, 409 N.E.2d at 751 (citation omitted). Some ancillary benefits of a prior bench trial include: "a means of discovery and recordation of the prosecution's testimony [, and] . . . a less expensive and less time consuming process." *Id.*

[47] *Id.* at 1917, 409 N.E.2d at 747.

[48] Brief for Defendants-Appellants, at 18-22.

[49] *Id.* at 19.

[50] 1980 Mass. Adv. Sh. at 1926, 409 N.E.2d at 752.

of an appellate reversal. Because such an assertion would be rejected, moreover, the trial de novo judge would never reach the issue of the sufficiency of the evidence.[51]

Justice Liacos, in a separate opinion joined by Justice Abrams, concurred in the majority's finding that the de novo court was the proper forum for the defendants to raise their double jeopardy claim[52] but dissented on the issue of the validity of such a claim.[53] Justice Liacos contended that the absence of an appellate decision on the sufficiency of the evidence was irrelevant and that a retrial of defendants convicted on insufficient evidence would violate the fifth amendment proscriptions.[54] He concluded that the majority's interpretation of *Burks* "fixed upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause."[55] Rather than reading *Burks* to require an appellate reversal as a condition precedent to a valid double jeopardy claim, Justice Liacos interpreted it as requiring only a failure of proof at the first trial.[56] This conclusion resulted from *Burks*' focus on the "nature of the error committed at the first trial, not on acquittal or conviction."[57] In the case at bar, Justice Liacos concluded that the defendants' retrial would be barred by the single justice's assumption that the evidence at the bench trial was insufficient to support their conviction.[58]

The separate opinion also rejected the majority's reliance on the defendants' election as a form of waiver.[59] Justice Liacos contended that a waiver is only valid if the defendant knows that the effect of his decision is to waive constitutional rights.[60] He found no evidence that the defendants knew they were giving up their constitutional right not to be reprosecuted after a conviction based on insufficient evidence.[61] The defendants indisputably would have retained such a right had they elected a jury trial in the first instance.[62] Because there was no evidence that the *Lydon* defendants had decided on a bench trial with such knowledge,[63] and because there was no assurance that future defendants would make such a decision with such knowledge,[64] Justice Liacos refused to find a waiver.[65]

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[51] *Id.*

[52] *Id.* at 1931, 409 N.E.2d at 754.

[53] *Id.* at 1927, 409 N.E.2d at 752.

[54] *Id.* at 1928, 409 N.E.2d at 753.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1929-30, 409 N.E.2d at 754.

[60] *Id.* at 1930, 409 N.E.2d at 754.

[61] *Id.*

[62] Had the defendants elected a jury trial in the first instance, they would have retained the right to have an appellate court decide the sufficiency with the evidence, and, by exercising such right, they could have avoided reprosecution.

[63] 1980 Mass. Adv. Sh. at 1930, 409 N.E.2d at 754.

[64] *Id.*

[65] *Id.*

The *Lydon* Court's attempt to distinguish *Burks* on the basis of the lack of an appellate review finds no support in the principles underlying *Burks*. The risks that justify extending the double jeopardy protection to cover situations involving a failure of proof do not differ depending upon whether there has been an appellate reversal. The *Burks* Court recognized that a retrial after a conviction based on inadequate proof raises double jeopardy implications as severe as those raised by a retrial after an acquittal.[66] Although *Burks* did involve an appellate determination that evidence was insufficient, its holding was not expressly limited to such situations. Nor is such a limitation justified, since, regardless of whether there has been an appellate determination, a second trial will provide the prosecution with a second opportunity to obtain a valid conviction after having failed in its first attempt. This is precisely the evil against which the double jeopardy clause is directed.[67] Moreover, a failure of proof in a first trial carries with it a very definite implication of innocence.[68]

In *Lydon*, defendants convicted on evidence that was conceded to have been insufficient were seeking the acquittal that, by law, should have resulted from the first trial. At the same time, they were seeking to avoid giving the prosecutor the opportunity to supply additional evidence. By denying them that right, the Court rejected the principles underlying *Burks* in favor of an arbitrary precondition designed to keep the court system intact. The United States Supreme Court, however, already had denied the validity of the precondition that a defendant must obtain an appellate reversal in *Ludwig v. Massachusetts*,[69] a pre-*Burks* challenge to the Massachusetts de novo system. In that case, the Court stated: "A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of a trial record and gains a reversal of his conviction and a remand of his case for a new trial."[70] Indeed, Justice Liacos recognized the arbitrariness of the precondition adopted by the majority and instead focused on the nature of the error at the trial court. His interpretation of *Burks* elevates the substantive policies

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[66] 437 U.S. at 10-11.

[67] The United States Supreme Court has described the evil against which the double jeopardy clause is directed as follows:

> The constitutional prohibition against double jeopardy rests on the belief that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

[68] See text and note at note 29 *supra*.

[69] 427 U.S. 618 (1976).

[70] *Id.* at 631-32.

of the fifth amendment above the specific procedural differences between *Burks* and *Lydon*. Since there is no valid reason for the fifth amendment protection not to attach until after an appellate reversal, Justice Liacos' interpretation is more consistent with the constitutional proscription.

In conclusion, the Supreme Judicial Court acted in *Lydon* to uphold the current Massachusetts two-tier court system against a double jeopardy challenge. The *Burks* Court's expansion of the availability of a double jeopardy claim to a defendant convicted on insufficient evidence was deemed not to have implicitly invalidated the two-tier system. The *Lydon* Court imposed a precondition on the attachment of the substantive protections of *Burks*: an appellate judge must have decided that the evidence presented at the first trial was insufficient. Since the Massachusetts court system does not provide a defendant convicted at a bench trial with the opportunity to seek such an appellate determination, the constitutionality of its trial de novo system was upheld. This result does not accord with the principles set forth in *Burks*, and creates a situation where the availability of the constitutional protection is dependent on the will of the legislature. The risks that the double jeopardy clause was designed to avert are no less substantial in the situation of the two-tier court system than in the situation considered in *Burks*, and there is thus no valid justification for the divergent result.

**§ 4.12. The Fifth Amendment Requirement of Testimonial Communication.*** The fifth amendment privilege against self-incrimination does not protect an accused from being compelled to engage in any activity that would produce self-incriminating evidence.[1] Rather, the fifth amendment protects an accused only from being compelled to make incriminating testimonial communications.[2] During the *Survey* year, in *Commonwealth v. Hughes*,[3] the Massachusetts Supreme Judicial Court delineated the scope of activities that are sufficiently testimonial to evoke the protections of the fifth amendment. The *Hughes* Court held that an accused could not be compelled to produce the revolver allegedly used in an assault. By producing the gun, the accused would admit possession of the gun. This admission is protected by the privilege against self-incrimination.[4] In reaching this result, the Court relied on principles set forth by the United States Supreme Court in *Fisher v. United States*.[5]

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§ 4.12 [1] Fisher v. United States, 425 U.S. 391, 408 (1976); Holt v. United States, 218 U.S. 245, 252-53 (1910); 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton rev. ed. 1961).

[2] 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton rev. ed. 1961).

[3] 1980 Mass. Adv. Sh. 1161, 404 N.E.2d 1239.

[4] *Id.* at 1173, 404 N.E.2d at 1246.

[5] 425 U.S. 391 (1976).

In *Fisher*, two taxpayers who were under criminal investigation obtained work papers prepared by their accountants and transferred them to their attorneys.[6] The attorneys challenged summonses served on them to produce the papers, relying on their clients' privilege against self-incrimination.[7] The Court agreed that the clients' privilege was the relevant issue,[8] but on the facts of the case, the Court held that the production of the papers could be compelled.[9]

In deciding whether the summonses violated the fifth amendment, the *Fisher* Court focused exclusively on the communicative aspects of the act of producing the documents.[10] The Court stated that "[t]he act of producing evidence in response to a subpoena ... has communicative aspects of its own...."[11] Thus, the Court recognized that all acts of production have a communicative character. The act of producing the papers in *Fisher* was found to be tantamount to an admission by the defendants that the papers had existed and that the defendants had possessed and controlled them.[12] Once the Court discerned the substance of the implicit communications, it analyzed these communications to determine whether they were sufficiently "testimonial" to be protected by the fifth amendment.[13]

The *Fisher* Court focused on the factual issues involved in the case in deciding whether the implicit communications were testimonial. The Court found that the existence and location of the work papers were not "in issue"[14] but were a "foregone conclusion."[15] Moreover, attesting to the papers' existence and location was deemed to provide little or no additional evidence for the prosecution.[16] Consequently, the *Fisher* Court held that the implicit communications were not testimonial and, hence, not privileged.[17]

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[6] *Id.* at 394.

[7] *Id.* at 395.

[8] *Id.* at 404-05.

[9] *Id.* at 410-12.

[10] *Id.* at 410. The contents of the papers did not come within the ambit of the fifth amendment because the privilege extends only to protect against one's own compelled testimony and the accountant's workpapers "were not prepared by the taxpayer and they contain no testimonial declarations by him." *Id.* at 409.

[11] *Id.* at 410.

[12] *Id.*

[13] *Id.* at 408. The Court commented: "It is clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence, but applies only when the accused is compelled to make a *testimonial* communciation that is incriminating." *Id.* (emphasis original).

[14] *Id.* at 412.

[15] *Id.* at 411.

[16] *Id.*

[17] *Id.* The *Fisher* Court analogized the case before it with a hypothetical case of an accused who is compelled to submit a handwriting examplar, thereby implying only that he has the

Thus, the *Fisher* Court establisherd the principle that the fifth amendment privilege does not protect an accused from being compelled to make an implicit communication that is tantamount to a foregone conclusion, because the communication is not testimonial.

The Supreme Judicial Court applied the *Fisher* principle in *Commonwealth v. Hughes*,[18] a criminal case in which the defendant was charged with assault with a deadly weapon, specifically, a revolver.[19] Prior to Hughes' indictment, the police had searched his car pursuant to a lawful warrant, but they were unable to find the pistol.[20] Six months after the indictment was entered, the commonwealth filed a "Motion to Order Defendant to Produce Weapon," describing with particularity a gun that was registered in the accused's name which was of the same caliber as the gun allegedly used in the shooting incident.[21] The motion was granted after a hearing, but Hughes failed to comply with the subsequent court order.[22] Hughes was adjudged in contempt and sentenced to incarceration by the superior court, but his sentence was stayed pending direct appellate review by the Supreme Judicial Court.[23]

The Supreme Judicial Court vacated the judgment of contempt,[24] basing its decision on its interpretation of the "converse inference from *Fisher*,"[25] namely that "assertions implied from the production of things (whether or not documents) are within the Fifth Amendment ... when they are non-trivial and incriminating."[26] To justify drawing this inference, the Court cited several cases where communications implied by the act of production were deemed privileged.[27] The *Hughes* Court applied this principle to the facts and concluded that the act of producing the revolver would have sufficient incriminating and communicative implications to warrant the defend-

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ability to write and that the examplar is his. *Id.* Since these facts generally would not be subject to dispute, the defendant's fifth amendment privilege would not be violated because "nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege." *Id.* See note 45 *infra*.

[18] 1980 Mass. Adv. Sh. 1161, 404 N.E.2d 1239.

[19] *Id.* at 1161, 404 N.E.2d at 1240.

[20] *Id.* at 1162, 404 N.E.2d at 1240.

[21] *Id.*

[22] *Id.* at 1162-63, 404 N.E.2d at 1240-41.

[23] *Id.* at 1163, 404 N.E.2d at 1241.

[24] *Id.* at 1173, 404 N.E.2d at 1246.

[25] *Id.* at 1168, 404 N.E.2d at 1243.

[26] *Id.*

[27] *Id.* at 1168-69, 404 N.E.2d at 1243-44. The Court cited: United States v. Plesons, 560 F.2d 890, 893 (8th Cir. 1977) (production of patient records by doctor would implicitly authenticate them); United States v. Campos-Serrano, 430 F.2d 173, 176-77 (7th Cir. 1970) (production of forged alien registration card by defendant would be tantamount to a waiver of his fifth

ant's invoking of the fifth amendment.[28] In reaching this result, the Court reasoned that the act of producing the revolver was equivalent to making an implicit statement about the existence, location, control, and authenticity of the gun.[29] The futility of the search warrant demonstrated to the Court that the commonwealth did not know the whereabouts of the revolver.[30] Because of the commonwealth's lack of solid information, the Court determined that the implicit assertions of possession and control would not "amount to a 'foregone conclusion' conveying merely trivial new knowledge."[31] Rather, the implicit admissions would add significantly to the prosecution's case,[32] thus satisfying the nontrivial element of the test. The Court also found that the implicit communications would be incriminating.[33] Thus, the Court concluded that Hughes could not be compelled to produce the revolver.[34]

The prosecutor in *Hughes* argued by analogy to *Fisher* that, since it could prove the defendant's possession of the gun "beyond a reasonable doubt" by independently obtained evidence,[35] the "production of the weapon would add nothing to what is already known" and hence should not be privileged.[36] In emphatically rejecting the prosecutor's argument,[37] the Supreme Judicial Court seemed to adopt the position that the degree to

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amendment privilege because "the only effective evidence defendant could produce in rebuttal would be for him to testify." *Id.* [this case preceded *Fisher*]); *In re* Grand Jury Subpoena Duces Tecum, 466 F. Supp. 325, 327 (S.D.N.Y. 1979) (defendant's production of financial records would implicitly assert existence and possession); *In re* Bernstein, 425 F. Supp. 37, 39 (S.D. Fla. 1977) (defendant's production of incriminating tape recordings would implicitly authenticate them); State v. Alexander, 281 N.W.2d 349, 352 (Minn. 1979) (production of allegedly obscene films by defendants would implicitly assert their control over, possession of, and responsibility for the films); State v. Dennis, 16 Wash. App. 417, 423-24, 558 P.2d 297, 301 (1976) (production of cocaine implicitly acknowledged guilty knowledge of possession).

[28] 1980 Mass. Adv. Sh. at 1169-71, 1173, 404 N.E.2d at 1244-45, 1246.

[29] *Id.* at 1169-70, 404 N.E.2d at 1244.

[30] *Id.* at 1170, 404 N.E.2d at 1244. The Court commented that "the Commonwealth is seeking to be relieved of its ignorance or uncertainty by trying to get itself informed of knowledge the defendant possesses." *Id.* (citation omitted).

[31] *Id.*

[32] *Id.* at 1170-71, 404 N.E.2d at 1244-45.

[33] *Id.* at 1171, 404 N.E.2d at 1245. In deciding that the production of the pistol would incriminate the defendant independently, the Court reiterated the generally recognized proposition that "the constitutional privilege 'does not merely encompass evidence which may lead to a criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution....' " *Id.* (citation omitted).

[34] *Id.* at 1171, 1173, 404 N.E.2d at 1245, 1246.

[35] Brief for the Commonwealth, Appellee at 8-9.

[36] *Id.* at 9.

[37] 1980 Mass. Adv. Sh. at 1171-72, 404 N.E.2d at 1245.

which the implicit communications would enhance "other persuasive evidence obtained without the defendant's help"[38] was irrelevant to the disposition of the case.[39] The opinion is inconsistent, however, because the Court ultimately did dispose of the case by evaluating the degree to which the implicit communications would enhance the prosecutor's independently obtained evidenced. The prosecutor's lack of solid evidence of the weapon's whereabouts was conclusive.[40]

The Supreme Judicial Court's opinion in *Hughes* renders the scope of the fifth amendment privilege uncertain. Although the ambiguities in *Fisher* and its progeny have contributed to the uncertainty, the *Hughes* opinion further confounds the issues because it inconsistently discusses the manner in which significance is to be determined and because it shifts its focus from "testimonial" to "nontrivial." As a result, the role of incriminating evidence independently obtained by the prosecutor remains unresolved. Furthermore, the concept of "nontriviality" intimates that the scope of the privilege is a question of degree, yet the Court offers no justification for this approach and provides no guidelines or characteristics that would enhance the predictive value of its analysis.

In *Fisher*, the United States Supreme Court based its holding that the act of producing the work papers was not testimonial on three findings. The *Fisher* Court found that the substance of the implicit communications was not in issue,[41] that it was a foregone conclusion,[42] and that it added "little or nothing to the sum total of the Government's information...."[43] Although some courts that have interpreted *Fisher*, including the *Hughes* Court, have treated this third element as justification for examining the prosecutor's independently obtained evidence,[44] the *Fisher* Court itself did not examine such evidence. The statement in *Fisher*, therefore, appears to mean nothing more than the recognition that the government would gain no benefit from the implicit communications, since the existence and location of the work papers had not been disputable issues in the case.[45] Although

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[38] *Id.* at 1171, 404 N.E.2d at 1245.

[39] *Id.*

[40] See text and notes at notes 30-32 *supra*.

[41] 425 U.S. at 412.

[42] *Id.* at 411.

[43] *Id.*

[44] *See, e.g., In re* Katz, 623 F.2d 122, 126 (2d Cir. 1980); *In re* Grand Jury Subpoena Duces Tecum, 466 F. Supp. 325, 327 (S.D.N.Y. 1979); and State v. Alexander, 281 N.W.2d 349, 352 (Minn. 1979).

[45] Further supporting this interpretation of *Fisher* is the Court's statement that the papers were "the kind usually prepared by an accountant working on the tax returns of his client." 425 U.S. at 411. Thus, the Court implied that the existence of the privilege depends on whether the implicit communications relate to matters that would be undisputed, rather than whether

*Fisher* has been interpreted to have created a standard based solely on the existence of a disputable issue,[46] it also has been interpreted to have adopted a test based on the extent of incriminating evidence independently obtained by the prosecutor.[47] Under the former interpretation, a determination by the *Hughes* Court that the defendant's possession of the gun was at issue would have been dispositive. Because the defendant had purchased the gun more than two years before the crime, his possession of the weapon could be an issue. If the possession was an issue, the implicit admission of possession would be testimonial and, hence, within the fifth amendment protection. Instead, the opinion leaves open the possibility that an absence of the prosecutor's need for the implicit communication should result in a finding that the privilege is unavailable despite the Court's vigorous rejection of the prosecutor's similar argument. In fact, the *Hughes* opinion seems to require an analysis of the prosecutor's evidence to evaluate his need for the implicit communication, in order to decide whether the substance of the implicit communication amounts to a foregone conclusion. The *Fisher* Court did not intend this result,[48] yet the *Hughes* Court appears to have left open the possibility of such an analysis.

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the prosecutor has independent proof of the facts.

The Supreme Court also analogized the production of the accountant's work papers with the production of a handwriting examplar by a defendant.

> When an accused is required to submit a handwriting examplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But *in common experience*, the first would be *a near truism* and the latter *self-evident*.... [H]is Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege.... The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

*Id.* at 411-12 (emphasis added) (citations omitted). See note 17 *supra*.

[46] The Court of Appeals of Washington, in State v. Dennis, 16 Wash. App. 417, 423-24, 558 P.2d 297, 301 (1976), *cited in Hughes* at 1980 Mass. Adv. Sh. at 1168, 404 N.E.2d at 1244, adopted this interpretation of *Fisher*. The court emphasized the existence of a contestible issue about guilty knowledge of possession of cocaine. *Id.* By being compelled to produce the cocaine, rather than awaiting the inevitable execution of a search warrant, the defendant had "all but negated any possible defense of unwitting or unknowing possession." *Id.* at 424, 558 P.2d at 301. Although the court also discussed the defendant's having provided an "additional ingredient" to the prosecutor's case, *id.*, the court did not address the prosecutor's lack of information on the matter. Hence, the court's finding was predicated primarily on its finding that guilty knowledge was, or could be, placed in issue.

[47] Indeed, Justice Brennan, concurring in *Fisher*, apparently interpreted the majority as deciding testimoniality on the basis of the extent to which the prosecutor has independent proof. He stated the reason for his hesitancy to endorse the majority opinion: "I know of no Fifth Amendment principle which makes the testimonial nature of evidence, and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him." 425 U.S. at 429. See also note 44 *supra*.

[48] See text and notes at notes 41-45 *supra*.

Moreover, the *Hughes* Court's emphasis on significance rather than testimoniality renders ambiguous the standard to be applied. The concept of significance intimates that the scope of the privilege is a question of degree. This represents a departure from the approach taken by the Supreme Court in *Fisher* where the principle was established that any matter that is not a foregone conclusion is testimonial and thus privileged. The exact nature of the departure taken by the *Hughes* Court, however, is unclear. The *Hughes* Court, by adopting an analysis based on the significance of the implicit communications, may have been attempting to take into consideration the relative values of the evidence that would be obtained by the implicit communications and the evidence that would be lost by failure to comply with the order to produce. The Court's failure to explain its use of the term "nontrivial," however, renders the opinion ambiguous and its application unpredictable.

The *Hughes* Court's failure to clarify the role of independently obtained evidence and its focus on the "significance" of the implicit communication places the practitioner in an uncertain position. A prosecutor, in order to obtain a valid order to produce, first must discern the possible communicative implications of complying with the order, such as admitting possession, existence, control, or authenticity. The prosecutor then must prove that these matters are a foregone conclusion conveying merely trivial new knowledge. Triviality is apparently dependent on the conclusiveness of the prosecutor's independently obtained evidence, but probably also could be satisfied by a showing that the matter is not a disputable issue. A prosecutor, of course, also should assert that the matter is not incriminating, but such an argument must focus on the implicit communications themselves and not the evidence that is the object of the subpoena. A defendant's attorney, conversely, must prove that the implicit communications are not conclusively established and that they are significant, in addition to proving that the defendant would be incriminated thereby.

In summary, the Supreme Judicial Court recognized in *Hughes* that the act of producing evidence in response to a subpoena may be tantamount to an implicit assertion regarding the existence, location, authenticity, and control of the subpoenaed evidence. Where the implicit assertions relate to a matter that is not a foregone conclusion, where they add significantly to the prosecutor's case, and where they are incriminating, compulsory process issued against a criminal defendant is unenforceable because it would violate the fifth amendment. The test adopted in *Hughes*, however, is ambiguous. The manner in which a court will decide whether a matter is a foregone conclusion and whether a matter is significant remains uncertain. Although a shift in focus toward a determination of whether the asserted facts are or could be placed in issue, accompanied by an abandonment of

the concept of significance, would not change the result in *Hughes*, the advantages to the parties in terms of certainty and clarity would be substantial.

**§ 4.13. Indirect Interrogations and the Scope of *Miranda*.*** In two cases decided during the *Survey* year, the Supreme Judicial Court examined the restrictions on the custodial interrogation of suspects by police. The foundation of these restrictions lies in the United States Supreme Court decisions of *Miranda v. Arizona*[1] and *Michigan v. Mosley*.[2] In *Miranda v. Arizona*,[3] the Supreme Court held that certain procedural safeguards must be employed by law enforcement officers during a custodial interrogation of a suspect.[4] Before questioning begins, the suspect must be informed that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed.[5] Should the accused indicate that he wishes to consult with an attorney before speaking, the interrogation must cease immediately.[6] In *Michigan v. Mosley*,[7] however, the Court stated that *Miranda* did not create a permanent proscription of any further questioning once the suspect has invoked his right to remain silent.[8] Rather, the Court noted that the admissibility of statements obtained after the suspect has decided to remain silent depends on whether his " 'right to cut off questioning' was 'scrupulously honored.' "[9]

During the *Survey* year, in *Commonealth v. Brant*[10] and *Commonwealth v. Gallant*,[11] the Massachusetts Supreme Judicial Court considered whether the constitutional rights of two suspects were adequately protected by law enforcement officials conducting a custodial interrogation. In both cases, the Court ruled that the immediate resumption of an interrogation — under any form — after a suspect has invoked his right to remain silent, violates the accused's *Miranda* rights.[12]

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§ 4.13 [1] 384 U.S. 436 (1966).

[2] 423 U.S. 96 (1975).

[3] 384 U.S. 436.

[4] *Id.* at 444-45.

[5] *Id.*

[6] *Id.*

[7] 423 U.S. 96.

[8] *Id.* at 102-03.

[9] *Id.* at 104 (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

[10] 1980 Mass. Adv. Sh. 1473, 406 N.E.2d 1021.

[11] 1980 Mass. Adv. Sh. 2031, 410 N.E.2d 704.

[12] 1980 Mass. Adv. Sh. at 1480-82, 406 N.E.2d at 1026-27; 1980 Mass. Adv. Sh. at 2034, 410 N.E.2d at 706-07.

The defendant in *Brant* was arrested, along with a man named Kampen, by Brevard County Police in Titusville, Florida, on February 4, 1978.[13] On February 13, 1978, while the two suspects awaited arraignment on certain Florida charges, Assistant District Attorney Tiernan of Norfolk County, Massachusetts contacted Deputy Sheriff Hudepohl of Florida.[14] Tiernan requested the Deputy Sheriff to interview the suspects regarding an armed robbery of a grocery store in Norwood, Massachusetts.[15] Hudepohl consequently interrogated Kampen about the Norwood incident.[16] Kampen knowingly and willingly waived both his right to remain silent and his right to the presence of an attorney during questioning.[17] He then gave Hudepohl an inculpatory statement regarding the Norwood robbery.[18]

Upon learning of the incriminating statement Kampen had made, Assistant District Attorney Tiernan, accompanied by two Massachusetts police officers, traveled to Florida to interrogate Brant.[19] Before questioning began, Sheriff Hudepohl asked Brant if he was willing to proceed without an attorney being present to represent him.[20] Brant replied that he was not, and refused to answer any further questions in the absence of his counsel.[21] At this point, one of the Massachusetts authorities informed Brant that Kampen already had made a statement to the police.[22] Brant immediately asked to speak with Kampen privately, and was granted his request.[23] Fourteen minutes later, Brant declared that he had changed his mind and wished to make a statement regarding the Norwood robbery.[24] The statement Brant made was a virtual confession to the Massachusetts charges.[25] Both Kampen and Brant then agreed to return to Massachusetts to face the armed robbery charges.[26]

At trial, Brant was convicted of armed robbery and sentenced to a term of eighteen to thirty years in prison.[27] Brant appealed from the conviction, claiming as error the denial of his motion to suppress the inculpatory state-

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[13] 1980 Mass. Adv. Sh. at 1474, 406 N.E.2d at 1023.
[14] *Id.* at 1475, 406 N.E.2d at 1023.
[15] *Id.*
[16] *Id.*, 406 N.E.2d at 1023-24.
[17] *Id.* at 1476, 406 N.E.2d at 1024.
[18] *Id.* at 1475, 406 N.E.2d at 1024.
[19] *Id.* at 1476, 406 N.E.2d at 1024.
[20] *Id.* at 1476-77, 406 N.E.2d at 1024.
[21] *Id.* at 1477, 406 N.E.2d at 1024.
[22] *Id.*
[23] *Id.*
[24] *Id.*, 406 N.E.2d at 1024-25.
[25] *Id.* at 1478, 406 N.E.2d at 1025.
[26] *Id.*
[27] *Id.* at 1473, 406 N.E.2d at 1022-23.

ment he had made in Florida.[28] The Appeals Court affirmed the conviction.[29] On appeal, the Supreme Judicial Court reversed the conviction.[30] The Court held that by informing Brant of Kampen's incriminating statement, the Massachusetts official had interrogated Brant.[31] Furthermore, because the interrogation was resumed immediately after Brant had invoked his right to remain silent, the Court found that the suspect's constitutional rights had been violated.[32]

In finding that the conduct of the law enforcement officials following Brant's assertion of his right to remain silent constituted an interrogation, the Court relied on the recent Supreme Court decision of *Rhode Island v. Innis*.[33] In *Innis*, the Supreme Court held that the term "interrogation" refers not only to express questioning, but also to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[34] Noting that, in ruling on the defendant's request to suppress his confession, the motion judge had found that the officials informed Brant of Kampen's statement in order to elicit an incriminating response from him, the Court ruled the practice was one which the officials should have known was reasonably likely to have that effect.[35] The Court concluded that this type of "compelling influence" wielded by the authorities constituted an interrogation in violation of the defendant's right to remain silent.[36]

The Court next considered the prosecution's contention that although a second interrogation may have taken place, it nevertheless yielded admissible evidence.[37] The commonwealth relied on the United States Supreme Court's decision in *Michigan v. Mosley*,[38] where evidence obtained in an interrogation which followed the accused's invocation of his right to remain silent was held to be admissible against the defendant.[39] Nevertheless, the Supreme Judicial Court distinguished the *Mosley* case from *Brant* on several grounds. The Court observed that when the defendant in *Mosley* asserted his *Miranda* rights, the police immediately ceased the interrogation.[40] Questioning was resumed only after the passage of a "significant

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[28] *Id.* at 1473-74, 406 N.E.2d at 1023.
[29] *Id.* at 1473-74, 406 N.E.2d at 1023.
[30] *Id.* at 1484, 406 N.E.2d at 1028.
[31] *Id.* at 1480, 406 N.E.2d at 1026.
[32] *Id.* at 1481-82, 406 N.E.2d at 1027.
[33] 446 U.S. 291 (1980).
[34] *Id.* at 301.
[35] 1980 Mass. Adv. Sh. at 1480, 406 N.E.2d at 1026.
[36] *Id.*
[37] *Id.*
[38] 423 U.S. 96 (1975).
[39] *Id.* at 107; 1980 Mass. Adv. Sh. at 1480, 406 N.E.2d at 1026.
[40] 1980 Mass. Adv. Sh. at 1481, 406 N.E.2d at 1027.

period of time."[41] In addition, the Court noted, the subsequent interrogation was accompanied by a fresh set of *Miranda* warnings, and restricted to a crime which was not the subject of the earlier interrogation.[42] In *Brant*, however, the interrogation did not cease when the defendant asserted his rights.[43] Quite to the contrary, the statements made by the authorities were intended to overcome the defendant's resistance to interrogation.[44] The respite of fourteen minutes, allowing Brant to confer with Kampen, also was designed to elicit an incriminating response.[45] Thus, a suspect who asserted his right to have an attorney present during his interrogation instead was "subtly turned" towards making an inculpatory statement.[46] Such conduct on the part of the authorities, the Court held, violated the accused's undisputed right to remain silent, and therefore the inculpatory statement was excluded from evidence.[47]

In *Commonwealth v. Gallant*,[48] the Court was faced with a similar question of whether a suspect's right to terminate questioning was scrupulously honored.[49] The defendant in *Gallant* was arrested in connection with incidents related to the robbery of a variety store in Amesbury.[50] After the Amesbury police informed Gallant of his *Miranda* rights, he replied that he did not wish to make a statement.[51] Approximately one minute after the defendant invoked his right to remain silent, the chief of police handed him a statement made by Gallant's brother which implicated both Gallant and his brother in the variety store crimes.[52] After advising the defendant of his rights once again, the chief asked Gallant if his brother's statement was true.[53] Gallant replied that it was, and made an oral statement of his version of what happened.[54]

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[41] *Id.* In *Mosley*, more than two hours elapsed before the interrogation was resumed. 423 U.S. at 4.

[42] 1980 Mass. Adv. Sh. at 1481, 406 N.E.2d at 1027.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1481-82, 406 N.E.2d at 1027.

[46] *Id.* at 1483, 406 N.E.2d at 1028.

[47] *Id.* The prosecution also contended that the defendant had voluntarily waived his Miranda rights in order to face the Massachusetts charges out of a fear that he would be subject to homosexual attacks in Florida state prisons. The Court ruled, however, that the burden was on the Commonwealth to establish that the defendant knowingly and intelligently waived his privilege against self-incrimination, and that the Commonwealth had failed to do so. *Id.*, 406 N.E.2d at 1027-28.

[48] 1980 Mass. Adv. Sh. 2031, 410 N.E.2d 704.

[49] *Id.* at 2034, 410 N.E.2d at 706.

[50] *Id.* at 2032, 410 N.E.2d at 706.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

Gallant consequently was indicted on charges which included robbery, assault, and battery.[55] At a pretrial hearing, the defendant filed a motion to suppress the inculpatory statements made by him to the Amesbury police.[56] Concluding that Gallant's right to cut off questioning was not scrupulously honored, the motion judge allowed the motion to suppress the defendant's incriminating statements.[57] On appeal,[58] the Supreme Judicial Court affirmed the motion judge's ruling, citing its decision in *Commonwealth v. Brant* as controlling.[59]

In its decision, the Court noted that the statement of Gallant's brother was revealed to Gallant for the "obvious purpose of eliciting a response."[60] Under *Brant*, such conduct constitutes an interrogation.[61] Turning to the circumstances under which the interrogation was resumed, the Court found that a one-minute interval was an "insufficient passage of time between events to constitute a scrupulous observance of the defendant's right to cut off questioning."[62] Consequently, the Court ruled, the incriminating statements Gallant made as a result of the unconstitutional interrogation were properly suppressed.[63]

The foundation of the *Brant* and *Gallant* decisions rests in notions of protecting a suspect's fifth amendment rights. In *Miranda*, the Supreme Court concluded that without proper safeguards, the process of a custodial interrogation contains "inherently compelling pressures" which serve to undermine the individual's will to resist and "compel him to speak where he

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[55] *Id.* at 2031, 410 N.E.2d at 705. Specifically, Gallant was charged with robbery, assault with intent to murder, assault and battery by means of a dangerous weapon, and assault and battery. *Id.*

[56] *Id.* at 2032, 410 N.E.2d at 705.

[57] *Id.* at 2033, 410 N.E.2d at 706.

[58] The motion judge granted the Commonwealth's application for leave to appeal interlocutory orders suppressing certain evidence to the Supreme Judicial Court. *Id.* at 2031, 410 N.E.2d at 705. *See also* MASS. R. CRIM. P. 15(b)(2).

[59] 1980 Mass. Adv. Sh. at 2031, 2033, 410 N.E.2d at 705, 706.

[60] *Id.* at 2034, 410 N.E.2d at 707.

[61] 1980 Mass. Adv. Sh. at 1480, 406 N.E.2d at 1026.

[62] 1980 Mass. Adv. Sh. at 2034, 410 N.E.2d at 707.

[63] *Id.* at 2038, 410 N.E.2d at 708. Gallant's alleged accomplice in the variety store crimes, a man named Searles, had moved that an inculpatory statement he had made be suppressed also. *Id.* at 2032, 410 N.E.2d at 706. The Amesbury chief of police had interrogated Searles concerning the robbery. *Id.* at 2033, 410 N.E.2d at 706. Although the interrogation complied with the Miranda procedures, Searles claimed as error the revelation by the chief of Gallant's inculpatory statement. *Id.* at 2035, 410 N.E.2d at 706. The motion judge ruled that since Searles' admissions were obtained as a consequence of his having been shown admissions illegally obtained from Gallant, Searles' statement should be suppressed as well. *Id.* at 2033, 410 N.E.2d at 707. The Supreme Judicial Court reversed the ruling, holding that the wrongful method of obtaining Gallant's statement in no way tainted the procedures followed in questioning Searles. *Id.* at 2037, 410 N.E.2d at 707.

would not otherwise do so freely."[64] In order to ensure that the individual has a full opportunity to exercise his right against self-incrimination, the Court held that the suspect must be adequately informed of his rights, "*and the exercise of those rights must be fully honored.*"[65] The Court stressed that it was psychological, as well as physical coercion, which the decision was directed against, noting that " 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' "[66]

The Supreme Judicial Court's decision that an interrogation had been conducted in both *Brant* and *Gallant* mirrors the United States Supreme Court's commitment to uphold the rights of the accused. In *Rhode Island v. Innis*, the Supreme Court stated that when it appears that the authorities should have known that their conduct was reasonably likely to elicit an incriminating response from the suspect, such conduct constitutes an interrogation.[67] *Brant* and *Gallant* rest on the sensible proposition that just as direct interrogation must cease once an accused asserts his *Miranda* rights, so too must other, more subtle forms of eliciting a response come to a halt. In *Brant*, the Supreme Judicial Court found that the officials "hoped and expected" that informing Brant of Kampen's confession would provoke an incriminating response.[68] Similarly, the Court in *Gallant* found that Gallant's brother's statement was shown to the defendant for the "obvious purpose" of eliciting a response.[69] The infringement of a suspect's right to remain silent is in no way less offensive simply because the coercion exerted is of a clever, subtle nature.[70]

Just as the definition of "interrogation" applied by the Supreme Judicial Court is in keeping with the policies of *Miranda*, so too does the Court's discussion of when and how an interrogation may be resumed reflect a concern for protecting the rights of the accused. Echoing the words of the Supreme Court in *Michigan v. Mosley*,[71] the Court spoke of the need for an immediate halt to questioning upon a suspect's assertion of his right to remain silent.[72] Only after the passage of a significant period of time, as well

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[64] 384 U.S. at 467.

[65] *Id.* (emphasis added).

[66] *Id.* at 448 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

[67] 446 U.S. at 301.

[68] 1980 Mass. Adv. Sh. 1480, 406 N.E.2d at 1026.

[69] 1980 Mass. Adv. Sh. at 2034, 410 N.E.2d at 707.

[70] While courts may have been tardy in recognizing that methods other than direct questioning can be an effective means of eliciting a response from a suspect, other elements of society have long recognized such approaches. It was in the sixteenth century that Hamlet declared, "The play's the thing, wherein I'll catch the conscience of the King." W. SHAKESPEARE, HAMLET, Act II, Scene II. No matter what method of "questioning" is used in a custodial interrogation, the suspect's constitutional rights are due proper respect.

[71] 423 U.S. 96 (1975).

[72] 1980 Mass. Adv. Sh. at 1481, 406 N.E.2d at 1026-27.

as the provision of a fresh set of *Miranda* warnings, may questioning be resumed.[73] In addition, the interrogation must be concerned with a crime not the subject of the first interrogation.[74] None of these conditions were met in the *Brant* or *Gallant* cases. Instead, some form of interrogation resumed almost immediately after the suspects had invoked their right to remain silent.[75] In both cases, the second interrogations concerned the subject of the original interrogation, and only in *Gallant* was the interrogation preceded by a fresh set of *Miranda* warnings.[76] Such activity cannot be characterized as conduct which scrupulously honors the defendant's right to cut off questioning.[77]

In summary, *Brant* and *Kampen* do not mark an expansion of the *Miranda* doctrine by the Supreme Judicial Court. Rather, the decisions were necessary in order to properly implement the policies enunciated in *Miranda*. If authorities are allowed to engage in subtle forms of coercion and disregard a suspect's attempts to halt an interrogation, as in *Brant* and *Gallant*, then the *Miranda* warnings become nothing but an empty reminder of individual rights once held to be inviolable.

**§ 4.14. Investigation of Potential Jurors — Interviewing of Neighbors.*** During the *Survey* year, the Supreme Judicial Court directly addressed, for the first time, the pre-empanelment investigation of prospective jurors. In *Commonwealth v. Allen*,[1] Allen and his codefendants[2] were indicted for conspiracy to commit arson and conspiracy to defraud an insurer.[3] Prior to trial in the Superior Court for Suffolk County,[4] the trial judge ordered the issuance of summonses for two special venires of 100 persons each.[5] Empanelment of the jury began six weeks later.[6] The voir dire consisted of

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[73] *Id.*

[74] *Id.*

[75] *Id.* at 1481-82, 406 N.E.2d at 1027; 1980 Mass. Adv. Sh. at 2034, 410 N.E.2d at 706.

[76] 1980 Mass. Adv. Sh. at 1427, 406 N.E.2d at 1024; 1980 Mass. Adv. Sh. at 2032, 410 N.E.2d at 706.

[77] 1980 Mass. Adv. Sh. at 1479, 406 N.E.2d at 1025; 1980 Mass. Adv. Sh. at 2034, 410 N.E.2d at 706.

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§ 4.14 [1] 1980 Mass. Adv. Sh. 175, 400 N.E.2d at 229.

[2] On October 13, 1977, four men were indicted. *Id.* at 175, 400 N.E.2d at 231. Only three, however, stood trial together; one of the original co-indictees appeared only as a witness and later pleaded guilty in accordance with a plea bargaining arrangement. *Id.* at 175-76, 400 N.E.2d at 231. Subsequent references to the "defendants" are to the three men who were tried together.

[3] Commonwealth v. Allen, 1979 Mass. Adv. Sh. 1819, 1819-20, 392 N.E.2d 1027, 1028-29 (This case is where the Supreme Judicial Court first considered the *Allen* case in ruling on a stay of execution.). *See* Commonwealth v. Allen, 1980 Mass. Adv. Sh. at 175, 400 N.E.2d at 231.

[4] Commonwealth v. Allen, 1979 Mass. Adv. Sh. at 1820, 392 N.E.2d at 1029.

[5] 1980 Mass. Adv. Sh. at 178, 400 N.E.2d at 232.

[6] *Id.*

questions specified by chapter 234, section 28[7] and of additional questions relating to various matters including the jurors' attitudes about arson and insurance companies and the jurors' exposure to media coverage of arson charges.[8] Twenty-two jurors had been questioned and three had been seated when counsel for the commonwealth informed the trial judge during a lobby conference that investigators for the defendants had been interviewing neighbors of the prospective jurors.[9]

In response to questions by the judge, defense counsel admitted that investigators were observing the type of neighborhood in which a juror lived and that the investigators were interviewing neighbors.[10] The judge expressed concern that a juror might be inhibited if that juror became aware that he was being investigated by the defendants.[11] On two occasions, the judge stated, however, that he would not act until he knew all the facts.[12] Defense counsel then informed the judge of actions taken to end any investigation.[13] After further discussions, defense counsel requested the judge to rule on the record in regard to the investigation of potential jurors.[14] The

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[7] *Id.* at 178, 400 N.E.2d at 232. G.L. c. 234, § 28 provides:

> Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead.
>
> For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.

[8] 1980 Mass. Adv. Sh. at 178, 400 N.E.2d at 232-33.

[9] *Id.* at 178-79, 400 N.E.2d at 233.

[10] *Id.* at 179-80, 400 N.E.2d at 233. Although, at first, defense counsel admitted that investigators were interviewing neighbors, *id.* at 179, 400 N.E.2d at 233, during the same conference, counsel expressed ignorance as to whether such interviews had been conducted, *id.* at 179-80, 400 N.E.2d at 233. Nevertheless, the Supreme Judicial Court subsequently stated that later in the day defense counsel "repeated that the neighbor interviews had been conducted without the express direction of counsel...." *Id.* at 182, 400 N.E.2d at 234.

[11] *Id.* at 180, 400 N.E.2d at 233.

[12] *Id.* at 180, 181, 400 N.E.2d at 233, 234.

[13] *Id.* at 181, 400 N.E.2d at 234.

[14] *Id.* at 182, 400 N.E.2d at 235.

judge declined to issue any order and observed that he was only inquiring into the integrity of the jury.[15]

Before a full jury had been empanelled, the first venire was exhausted.[16] The judge asked all seated jurors if they were aware of any investigation in their neighborhood.[17] None responded affirmatively.[18] Defense counsel represented that no juror from the second venire had been investigated and asserted that investigation of potential jurors had been stopped in response to the court's actions.[19] The judge then stated that he had issued no order preventing any investigation.[20] After empanelment concluded, the defense moved for a mistrial on the grounds that the judge had interfered with the selection of the jury by inhibiting the investigation of potential jurors.[21] The judge denied the motion,[22] and all three defendants subsequently were convicted.[23] The defendants appealed to the Appeals Court and the Supreme Judicial Court removed the case on its own initiative.[24]

On appeal, the defendants contended that the judge's statements during the empanelment were, in effect, a ruling which forbade using investigators in neighborhoods of the jurors, or at least prohibited interviewing any neighbors.[25] The Supreme Judicial Court disagreed.[26] The Court first distinguished the case at bar from the situation where an attorney is threatened with a summary contempt citation.[27] The Court stated that, in the instant case, there is at most "a possible inference that the judge may have considered the possibility of a plenary hearing on the question of contempt at the end of the trial."[28] The Court noted that the statements of the judge in no way prevented the defendants from investigating the jury and that defense counsel were left to make their own decision.[29] Thus, any

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[15] *Id.*

[16] *Id.* at 183, 400 N.E.2d at 235.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 183-84, 400 N.E.2d at 235.

[20] *Id.*

[21] *Id.* at 184, 400 N.E.2d at 235.

[22] *Id.*

[23] *Id.* at 176, 400 N.E.2d at 231.

[24] *Id. See* G.L. c. 211A, § 10(A). Other appellate proceedings of this case involved stays of execution pending appeal. *See* Commonwealth v. Allen, 1979 Mass. Ad. Sh. 1819, 392 N.E.2d 1027; Commonwealth v. Allen, 1979 Mass. App. Ct. Adv. Sh. 147, 385 N.E.2d 532.

[25] 1980 Mass. Adv. Sh. at 184, 400 N.E.2d at 236.

[26] *Id.* at 185, 400 N.E.2d at 236.

[27] *Id.* at 184-85, 400 N.E.2d at 236. The defendants had cited Sussman v. Commonwealth, 1978 Mass. Adv. Sh. 754, 374 N.E.2d 1195, where the Court held that an attorney must be adequately warned before a judge may impose a summary contempt citation for pursuing a certain line of questioning on cross examination.

[28] 1980 Mass. Adv. Sh. at 184-85, 400 N.E.2d at 236.

[29] *Id.* at 185, 400 N.E.2d at 236.

discontinuation of investigation was defense counsel's own voluntary decision which could not be challenged on appeal.[30] Therefore, the Court held that the trial judge's denial of the motion for mistrial was proper.[31]

Because it concluded that the defendants had been free to investigate prospective jurors, the Court refrained from considering whether a prohibition of investigation would have deprived the defendants of their rights to effective counsel and an impartial jury.[32] Nevertheless, the Court observed that it had never directly addressed the topic of investigation of prospective jurors and then "proceed[ed] to do so by way of dictum for guidance of the Bar."[33]

In its discussion, the Court stressed the importance of both peremptory challenges and challenges for cause.[34] The Court commented that the availability of both challenges implies the right of reasonable investigation in order to exercise these challenges intelligently.[35] Although prior decisions of the Court had allowed direct contact with prospective jurors and their families,[36] the Court observed that such contact is now prohibited by statute and by rule of the Supreme Judicial Court.[37] The Court further noted that

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[30] *Id.* at 185-86, 400 N.E.2d at 236.

[31] *Id.* at 186, 400 N.E.2d at 236.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 186-87, 400 N.E.2d at 237.

[35] *Id.* at 187, 400 N.E.2d at 237.

[36] *See id.* at 187 & n.5, 400 N.E.2d at 237 & n.5. Among such cases are Commonwealth v. Smith, 350 Mass. 600, 601-03, 215 N.E.2d 897, 900-01 (1966); Commonwealth v. Sherman, 294 Mass. 379, 384-86, 2 N.E.2d 477, 481 (1936); Commonwealth v. DiStasio, 294 Mass. 273, 281-82, 1 N.E.2d 189, 194-95 (1936); Commonwealth v. Cero, 264 Mass. 264, 274-76, 162 N.E. 349, 353-54 (1928).

[37] 1980 Mass. Adv. Sh. at 187, 400 N.E.2d at 237. The Court cited G.L. c. 234, §§ 24, 24A; S.J.C. Rules 3:22, DR 7-108(A), (F), and 3:22A, PF 10, DF 11. G.L. c. 234, § 24, provides for serving jury summonses personally or by leaving written notice at the venireman's residence. G.L. c. 234, § 24A, provides for the alternative summoning method of service by mail. Both sections provide that after service has been effected, "no person shall, except as otherwise provided by law, question any [person summoned for jury duty] for the purpose of obtaining information as to his background in connection with his jury duty."

S.J.C. Rule 3:22, DR 7-108, provides, in part:

> (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
>
> ....
>
> (F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

S.J.C. Rule 3:22A provides, in part:

> PF 10. Relations with Jury.
>
> It is unprofessional conduct for the prosecutor to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The prosecutor should avoid the reality or appearance of any such im-

investigation of potential jurors is limited by the nature of an efficient judicial system, by the trial judge's protection against abuses, by other statutes, and by the right of privacy of the potential jurors.[38] In addition, the Court suggested that current statutes be amended to provide for a detailed questionnaire to be sent to potential jurors.[39] In the Court's view, allowing counsel access to the results of such questionnaires might obviate the need for further investigation and would be particularly valuable to litigants of limited means.[40]

With the exception of statutes and court rules prohibiting direct contact with potential jurors and their families,[41] the Court found no rule prohibiting interviewing other persons.[42] Nevertheless, the Court emphasized that investigators must not "by design or effect, influence, solicit, intimidate or propagandize either the persons interviewed or, indirectly, the prospective juror."[43] In order to minimize the chance of any improper influence, the Court presented three guidelines.

> First, the investigators should be persons who are not closely related or associated with a litigant or his family. Second, the investigators should, where possible, avail themselves of sources of information

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proper communications.

A juror improperly approached by counsel or any other person should communicate the circumstances to the judge promptly. A prosecutor or a defense lawyer receiving such a report should refer the juror to the judge forthwith.

DF 11 provides similarly for defense counsel.

[38] 1980 Mass. Adv. Sh. at 187-88, 400 N.E.2d at 237.

[39] *Id.* at 188, 400 N.E.2d at 237-38.

G.L. c. 234A, § 18, provides that, in Middlesex County, counsel may have access to substantial information about jurors contained in a questionnaire. G.L. c. 234A, § 18, provides, in part:

> Enclosed with the summons shall be a juror questionnaire. The information elicited by the questionnaire shall be such information as is ordinarily raised in voir dire examinations of jurors, including the juror's name, sex, age, residence, marital status, number and ages of children, educational level, occupation, employment address, spouse's occupation, spouse's employment address, previous service as a juror, present or past involvement as a party to civil or criminal litigation, spouse's present or past involvement as a party to civil or criminal litigation, relation to a police or law enforcement officer, spouse's relation to a police or law enforcement officer, and such other information as the jury commissioner deems appropriate.... Unless the court orders otherwise, the clerk of court or an assistant clerk shall provide copies of the appropriate completed questionnaires to the trial judge and counsel for use during voir dire. Except for disclosures made during voir dire or unless the court orders otherwise, the information inserted by prospective jurors in the questionnaires shall be held confidential by the court, the clerk or assistant clerk, the parties, trial counsel, and their authorized agents. Upon completion of voir dire, the parties and their counsel shall return all copies of the completed questionnaires to the clerk or the assistant clerk....

[40] 1980 Mass. Adv. Sh. at 188-89, 400 N.E.2d at 237-38.

[41] See note 37 *supra*.

[42] 1980 Mass. Adv. Sh. at 189, 400 N.E.2d at 238.

[43] *Id.*

> other than third-party interviews, if such sources are likely to provide the desired data. Third, ideally investigators would be employed on a mutual or cooperative basis between parties, with the resulting information available to both sides.[44]

Although the Court avoided discussing the access of one party to the results of an investigation sponsored by another,[45] the Court commented that if an investigation is not undertaken by all the parties to a case, the investigators should not reveal for whom they are working.[46]

After delineating these precautions, the Court considered two limitations on all pre-empanelment investigations that also could prevent undue influence of prospective jurors. First, the Court noted the power of the trial judge to issue orders in regard to an investigation.[47] In addition to imposing sanctions for any impropriety in an investigation,[48] a trial judge may attempt to forestall any impropriety by requiring any party undertaking an investigation to submit to the court the names of the investigators, the information sought, the procedures to be followed and the questions to be asked.[49] Second, the Court observed that the nature of an efficient trial system may serve to limit investigations of potential jurors.[50] Such investigations may have to be restricted where an available venire is unexpectedly exhausted and a special venire or even talesmen must be summoned.[51]

Although the Court discussed the limitations on pre-empanelment investigations and suggested precautions to prevent abuse of those investigations, the Court did not develop two of the issues raised by its opinion. The Court did not fully consider to what extent, if any, the results of an investigation undertaken by one party should be available to another party. It also left unresolved how a juror's right to privacy might affect the parties' right to pre-empanelment investigations. Nevertheless, the Court did supply some indication of its leanings on each issue.

The first issue not fully explored by the Court is the availability to one party of the results of an investigation sponsored by another party. Although the Court noted that in the ideal situation an investigation would be undertaken on a mutual or cooperative basis,[52] this observation was

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[44] *Id.* at 189-90, 400 N.E.2d at 238-39 (footnotes omitted).

[45] *Id.* at 190 n.12, 400 N.E.2d at 239 n.12. See text at notes 52-75 *infra*.

[46] *Id.* at 190, 400 N.E.2d at 239.

[47] *Id.*

[48] *Id.* As possible sanctions, the Court suggested G.L. c. 234, §§ 32, 33 (providing for setting aside a verdict and awarding a new trial); G.L. c. 268, §§ 13, 13B (providing for fines and prison sentences for corruption or intimidation of jurors, among others); and contempt or ethical sanctions. 1980 Mass. Adv. Sh. at 190 n.13, 400 N.E.2d at 239 n.13.

[49] 1980 Mass. Adv. Sh. at 190, 400 N.E.2d at 239.

[50] *Id.*

[51] *Id.* at 190-91, 400 N.E.2d at 239. *See* G.L. c. 234, §§ 12, 27, 42 (providing for a court's power to summon special venires and talesmen).

[52] 1980 Mass. Adv. Sh. at 190, 400 N.E.2d at 239.

made with regard to the goal of avoiding improper influence.[53] The Court also stated, however, that in an investigation sponsored by fewer than all parties, this objective would be advanced if the investigator did not reveal who his sponsor was.[54] In a footnote, the Court declined to consider whether the results of a juror investigation are subject to discovery.[55] Nevertheless, the Court referred to an earlier case[56] in which it stated its belief that the results of an investigation of potential jurors conducted by the police should be equally available to the prosecution and the defendant.[57] The Court's rationale for this view was that it would be improper for the police to be available to only the prosecution for investigation of potential jurors.[58] Thus, the Court implied that it might require that results of such investigations be equally available to all parties.

Although some case law from other jurisdictions supports equal access to police investigation of potential jurors,[59] most jurisdictions have rejected such equal access.[60] Courts accepting the doctrine of equal access have relied on the concept of fundamental fairness.[61] These courts reason that it would not be fair to allow the government to use the police and its other resources to investigate potential jurors while denying the results of any investigation to the defendant.[62] In the case of *People v. Aldridge*,[63] for instance, the Michigan Court of Appeals relied on both the trend toward more liberal discovery and the concept of fundamental fairness to support equal access.[64] The court stated that disclosure of investigatory information will aid in a trial's search for truth.[65]

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[53] *See id.* at 189, 400 N.E.2d at 238.

[54] *Id.* at 190, 400 N.E.2d at 239.

[55] *Id.* at 190 n.12, 400 N.E.2d at 239 n.12.

[56] *Id.* (citing Commonwealth v. Smith, 350 Mass. 600, 215 N.E.2d 897 (1966)).

[57] Commonwealth v. Smith, 350 Mass. 600, 603, 215 N.E.2d 897, 901 (1966). This statement is dictum as the Court found that the defendant did not show prejudice in failing to receive information, did not move to dismiss the jury, and did not challenge for cause a juror testifying to knowledge of the investigation. *Id.* at 602, 215 N.E.2d at 900.

[58] *Id.* at 604, 215 N.E.2d at 901.

[59] *See, e.g.*, Losavio v. Mayber, 178 Colo. 184, 190, 496 P.2d 1032, 1035 (1972); People v. Aldridge, 47 Mich. App. 639, 650, 209 N.W.2d 796, 801-02 (1973).

[60] *See, e.g.*, United States v. Falange, 426 F.2d 930, 932-33 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); Martin v. United States, 266 F.2d 97, 99 (5th Cir. 1959); United States v. Costello, 255 F.2d 876, 883-84 (2d Cir), *cert. denied*, 357 U.S. 937 (1958); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); People v. Quicke, 71 Cal.2d 502, 523, 455 P.2d 787, 799, 78 Cal. Rptr. 683, 695 (1969); Monahan v. State, 294 So.2d 401, 402 (Fla. App. 1974); Robertson v. State, 262 So.2d 692, 692-93 (Fla. App. 1972); Commonwealth v. Foster, 219 Pa. Super. 127, 133, 280 A.2d 602, 604-05 (1971).

[61] *See, e.g.*, Losavio v. Mayber, 178 Colo. 184, 188, 190, 496 P.2d 1032, 1034, 1035 (1972); People v. Aldridge, 47 Mich. App. 639, 649, 209 N.W.2d 796, 801 (1973).

[62] See note 61 *supra*.

[63] 47 Mich. App. 639, 209 N.W.2d 796 (1973).

[64] *Id.* at 649, 209 N.W.2d at 801.

[65] *Id.*

In a subsequent case, *People v. McIntosh*,[66] the Supreme Court of Michigan disagreed with the *Aldridge* court. It held that defendants should not have equal access because they had no constitutional or statutory right to investigatory information.[67] The *McIntosh* court stated that if policy considerations supported equal access, then the situation should be addressed by a court rule.[68] The reasoning of the *McIntosh* court is similar to that employed by other courts. Some courts have noted the absence of a rule or precedent permitting equal access as a sufficient reason for denying such access.[69] Many courts have held that the denial of equal access does not result in a prejudiced jury, and therefore that a defendant may not complain.[70] One court characterized the use of peremptory challenges as a "rejective, rather than a selective, process."[71] Thus, this court noted, the result of the prosecution's exclusive possession and use of investigatory information could have been only the striking of jurors unduly biased in favor of the defendant.[72]

The argument that the absence of equal access does not result in a prejudiced jury is a refutation of the fundamental fairness argument. The due process clause requires only those procedures essential to a fair system of justice[73] or "implicit in the concept of ordered liberty."[74] Because equal access to investigatory information is not such a procedure, there is no constitutional requirement for it. Equal access must be supported by statute or rule of court as it has no constitutional basis. Although criminal discovery has become more liberal, it is still of limited scope not covering investigatory information.[75]

The second observation not fully developed by the *Allen* Court was that the right to acquire information to exercise juror challenges is limited

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[66] 400 Mich. 1, 252 N.W.2d 779 (1977).

[67] *Id.* at 8, 252 N.W.2d at 782.

[68] *Id.* at 8-9, 252 N.W.2d at 782.

[69] *See, e.g.*, Martin v. United States, 266 F.2d 97, 99 (5th Cir. 1959); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); People v. Quicke, 71 Cal.2d, 502, 523, 455 P.2d 787, 799, 78 Cal. Rptr. 683, 695 (1969); Monahan v. State, 294 So.2d 401, 402 (Fla. App. 1974); Robertson v. State, 262 So.2d 692, 692-93 (Fla. App. 1972); Commonwealth v. Foster, 219 Pa. Super. 127, 133, 280 A.2d 602, 605 (1971).

[70] *See, e.g.*, United States v. Falange, 426 F.2d 930, 932-33 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); United States v. Costello, 255 F.2d 876, 884 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951).

[71] United States v. Costello, 255 F.2d 876, 884 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958), *quoted in* United States v. Falange, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970).

[72] *Id.*, *quoted in* United States v. Falange, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970).

[73] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[74] *Id.*, *quoted in* Rochin v. California, 342 U.S. 165, 169 (1952).

[75] *See* Commonwealth v. Foster, 219 Pa. Super. 127, 133, 280 A.2d 602, 605 (1971).

"ultimately by the jurors' right to privacy."[76] The Court, however, made no attempt to define what it meant by a juror's right to privacy. It did, however, cite a Utah case, *Salt Lake City v. Piepenburg*,[77] in this regard. In *Piepenburg*, the defendant was charged with exhibiting an obscene film in violation of a city ordinance.[78] The majority and concurring opinions did not consider prosecutorial misconduct in acquiring juror information, but a dissenting opinion examined it in great detail.[79] The primary concern of the dissent was that jurors had become aware of the involvement of the Mormon Church in supplying information on their backgrounds.[80] The *Piepenburg* dissent reasoned that this knowledge, combined with the knowledge that the Mormon Church had taken a strong anti-pornography stand, constituted an outside influence on the jurors.[81] The dissent found that jurors, as a result of this influence, felt as if they were expected to render a certain verdict.[82] Accordingly, the dissent concluded that the jury was neither impartial nor independent.[83]

In addition to citing *Piepenburg*, the *Allen* Court also cited *United States v. Barnes*.[84] That case involved a trial in New York City of defendants charged with narcotics violations.[85] The *Barnes* court considered the history of violence in the area, as well as pretrial publicity of violence allegedly committed by the defendants.[86] The court held that, under these circumstances, the trial judge did not err in refusing to release the names or addresses of any of the jurors where adequate voir dire had taken place.[87] The court concluded that by maintaining the anonymity of the jurors, the jurors would be relieved of any fear of retaliation.[88]

Although arguably concerned with a juror's right of privacy, both the *Piepenburg* dissent and the *Barnes* decision focused on maintaining the integrity of the jury. These two issues are distinct. Courts considering pre-empanelment investigation have concentrated on protecting jurors from any improper influence. Indeed, such maintenance of the jury's integrity is

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[76] 1980 Mass. Adv. Sh. at 188, 400 N.E.2d at 237.

[77] 571 P.2d 1299 (Utah 1977), *cited in* 1980 Mass. Adv. Sh. at 191 n.15, 400 N.E.2d at 239 n.15.

[78] 571 P.2d at 1299.

[79] *Id.* at 1309-13 (dissenting opinion).

[80] *Id.* at 1310.

[81] *Id.* at 1311.

[82] *Id.*

[83] *Id.*

[84] 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980), *cited in* 1980 Mass. Adv. Sh. at 191 n.15, 400 N.E.2d at 239 n.15.

[85] 604 F.2d at 130.

[86] *Id.* at 141.

[87] *Id.*

[88] *Id.*

[89] 1980 Mass. Adv. Sh. at 189, 400 N.E.2d at 238.

the thrust of the Supreme Judicial Court's decision in *Allen*. The goal sought to be achieved is ensuring that jurors consider only evidence relevant to the merits of the case in their deliberations. The question of juror privacy is, however, another matter. Juror privacy protects the individual's interest in freedom from unwarranted intrusions into his or her private life. Thus, it is difficult to see how a juror would have a less or a greater right to privacy than any other citizen. A person's zone of privacy should extend as far whether it is juxtaposed with a defendant's right to know or any other possibly conflicting right. Any concern that a juror might be influenced or intimidated is not really a concern with jurors' right to privacy, but a concern for maintaining the integrity of the jury.

The Supreme Judicial Court in *Allen*, although limiting its holding to affirming the trial judge's conduct and rulings, specified three precautions for investigation of potential jurors in order to safeguard a jury's impartiality. First, an investigator should not be closely associated with any party.[89] Second, interviews of third parties should be avoided where the desired information may be obtained from other sources.[90] Third, investigators should not convey to an interviewee that the investigation is being sponsored by fewer than all the litigants.[91] This third precaution may be fulfilled either by not disclosing who is sponsoring the investigation or by having the investigation sponsored by all parties in a case.[92] The Court noted that whether its precautions are heeded, counsel must take the responsibility to protect against abuses in the investigation of potential jurors.[93] Apparently the Court believed that counsel should tell an investigator precisely what is to be done during the investigation. Decisions concerning the scope or methods of an investigation should be those of counsel, as it is he who must answer to the court for any abuses. In its decision, the Supreme Judicial Court left open the question of whether parties should be granted equal access to the results of an investigation undertaken by another party. In addition, the Court failed to explore how the jurors' right to privacy affects the defendant's right to conduct pre-empanelment investigations. Although it failed to discuss adequately these two questions, the Supreme Judicial Court in *Allen* did give guidance to the trial bar regarding investigation of potential jurors.

**§ 4.15. Underrepresentation of Young Persons on Jury Lists.*** During the *Survey* year, the Supreme Judicial Court considered whether a criminal defendant could challenge the composition of jury lists on the basis of

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[90] *Id.* at 189-90, 400 N.E.2d at 238.

[91] *Id.* at 190, 400 N.E.2d at 239.

[92] *Id.*

[93] *Id.* at 190, 191 n.15, 400 N.E.2d at 239 & n.15.

underrepresentation of persons between the ages of eighteen and thirty-four.[1] The Court rejected a defendant's right to such a challenge by holding that the group of those persons was not "identifiable" or "distinctive" for constitutional purposes.[2] Nevertheless, the Court recommended that changes be made in the jury selection process.[3] In *Commonwealth v. Bastarache*, the defendant was convicted of manslaughter in superior court.[4] In a pretrial motion to that court, the defendant unsuccessfully challenged the underrepresentation of eighteen to thirty-four year olds on the jury lists from which his grand and petit juries were drawn.[5] The challenges were based on state statutes and the federal constitution.[6] On appeal, the Appeals Court reversed the defendant's conviction on several grounds. One of these grounds was that the jury lists that were employed to derive the defendant's grand and petit juries were composed in an unconstitutional manner.[7] The commonwealth appealed the Appeals Court's reversal to the Supreme Judicial Court.[8] Although that Court affirmed the reversal of the conviction,[9] it rejected the defendant's challenges to the composition of the jury lists.[10] In his appeal to the Supreme Judicial Court, the defendant attacked the jury lists on the basis of state statutes, the United States Constitution, and the state constitution.[11]

Before considering the defendant's contentions, the Court summarized the facts surrounding the challenge of the jury lists and the statutory procedure used to generate the jury lists.[12] It cited 1970 United States census figures which indicated that about 36% of the population of Franklin County eligible for jury duty were persons between eighteen and thirty-four, inclusive.[13] During the times relevant to the case, this age group represented only about 18.5% of the persons on the jury lists.[14] The trial

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§ 4.15 [1] Commonwealth v. Bastarache, 1980 Mass. Adv. Sh. 2465, 414 N.E.2d 984.

[2] *Id.* at 2478, 414 N.E.2d at 993.

[3] *Id.* at 2480-82, 414 N.E.2d at 995.

[4] *Id.* at 2465, 414 N.E.2d at 987.

[5] *Id.* at 2466, 414 N.E.2d at 987.

[6] *Id.*

[7] *Id.* Among the other reasons relied on by the Appeals Court in reversing the conviction was admission of irrelevant evidence and incorrect instructions to the jury. Commonwealth v. Bastarache, 1980 Mass. App. Ct. Adv. Sh. 1729, 1739-43, 409 N.E.2d 796, 803-05.

[8] 1980 Mass. Adv. Sh. at 2466, 414 N.E.2d at 987.

[9] The Court held that the trial judge's instructions to the jury on involuntary manslaughter, wanton and reckless action, and flight as admission of guilt were erroneous. *Id.* at 2482-85, 414 N.E.2d at 996-97.

[10] *Id.* at 2478, 414 N.E.2d at 993.

[11] *Id.* at 2466-67, 414 N.E.2d at 987.

[12] *Id.* at 2467-71, 414 N.E.2d at 988-90. This description does not apply to Middlesex County, whose procedures are prescribed by G.L. c. 234A. *See id.* at 2467 n.2, 414 N.E.2d at 988 n.2.

[13] 1980 Mass. Adv. Sh. at 2467, 414 N.E.2d at 988.

[14] *Id.*

judge found that under the key man system the persons selecting the potential jurors had not discriminated consciously against any age group, including the eighteen-to-thirty-four-year-old group.[15] The judge also found that any failures to adhere to statutory requirements were minimal, unintentional and inadvertent, and that there was no evidence that jurors were not selected at random.[16] The judge further found that those under the age of thirty-five were reasonably represented in the jury pools and that the grand and petit juries were drawn from a jury pool representative of a fair cross section of the community.[17] In addition, the judge found that the eighteen to thirty-four age group possessed no inherent characteristics distinguishing it from other age groups.[18] Finally, the trial judge found that the differences in representation of younger persons between those in jury pools and those eligible to serve on juries resulted from random influences and the statutes that control jury selection.[19]

Noting that a trial court's findings of fact are binding to the extent that they are supported by the evidence,[20] the Supreme Judicial Court accepted the trial judge's finding that the eighteen-to-thirty-four age group had no inherent or common characteristics distinguishing it from other age groups.[21] The Court observed, however, that younger people often would bring different values to jury service and would react differently than would older people.[22] Thus, while denying the existence of distinctive characteristics between younger and older age groups, the Court did acknowledge differences between the groups. Nevertheless, the Court emphasized that, in this case, there was no evidence of intentional bias against younger people in selecting potential jurors.[23]

Having summarized the trial judge's findings, the Court proceeded to describe the statutory procedure for compiling municipal jury lists.[24] The Court noted that, in general, anyone qualified, though not necessarily registered, to vote for state legislators is liable to serve as a juror.[25] Persons having custody of and being responsible for the daily supervision of a child under fifteen years of age, and persons at least seventy years old, may elect to be exempt from jury service.[26] In addition, certain public officials and court, law enforcement, fire, religious, academic and medical personnel are

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[15] *Id.*
[16] *Id.* at 2468, 414 N.E.2d at 988.
[17] *Id.* at 2467, 414 N.E.2d at 988.
[18] *Id.* at 2468, 414 N.E.2d at 988.
[19] *Id.*
[20] *Id.* (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).
[21] *Id.* at 2468, 414 N.E.2d at 988.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 2468-71, 414 N.E.2d at 988-90.
[25] *Id.* at 2468-69, 414 N.E.2d at 988. *See* G.L. c. 234, § 1.
[26] 1980 Mass. Adv. Sh. at 2469, 414 N.E.2d at 989. *See* G.L. c. 234, § 1.

exempted.[27] Those who actually serve on a jury are exempted for a period of two or three years.[28]

The method of choosing jurors by community representatives is known as the "key man" system.[29] Under this sysem, in each town a list of potential jurors is prepared by the board of selectmen.[30] The selectmen are directed to choose those residents who are statutorily qualified, not exempt, and "of good moral character, of sound judgment and free from all legal exceptions, ... as they think qualified to serve as jurors."[31] The names of the jurors are then written on separate "ballots" and placed in a box.[32] To fill a venire, jurors' ballots are drawn at random from the box.[33]

As one of several arguments, the defendant advanced a statutory argument that the impartial and random procedures prescribed by statute for the drawing of jurors' names[34] implied similar requirements in the initial compilation of municipal jury lists.[35] The Court rejected this argument.[36] Although noting that selectmen may not engage in arbitrary, capricious or unconstitutional action, the Court held that there was no statutory requirement that selectmen use a random selection process or any process that results in jury lists with a proportionate distribution of age groups.[37]

After rejecting the defendant's statutory argument, the Court then addressed the defendant's federal constitutional challenges. The Court first observed that such challenges to underrepresentation of younger age groups "have been uniformly unsuccessful" in the Supreme Judicial Court.[38] The defendant's challenges based on the United States Constitution arose from two amendments. On the basis of the sixth amendment, the defendant attacked the composition of the lists that generated the petit jury that convicted him.[39] In contrast, because the fourteenth amendment does not re-

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[27] *See* G.L. c. 234, § 1.

[28] 1980 Mass. Adv. Sh. at 2470, 414 N.E.2d at 989. *See* G.L. c. 234, § 2. Only in Nantucket and Dukes counties are jurors obligated to serve two years after service. G.L. c. 234, § 2.

[29] 1980 Mass. Adv. Sh. at 2470, 414 N.E.2d at 989.

[30] *Id. See* G.L. c. 234, § 4. In cities, either the board of election commissioners or the board or registrars of voters prepares the lists. G.L. c. 234, § 4.

[31] 1980 Mass. Adv. Sh. at 2470, 414 N.E.2d at 989; G.L. c. 234, § 4.

[32] 1980 Mass. Adv. Sh. at 2470-71, 414 N.E.2d at 989.

[33] *Id.* at 2471, 414 N.E.2d at 989-90; G.L. c. 234, § 19.

[34] The defendant referred to procedures prescribed for drawing a venire from the "ballots," G.L. c. 234, § 19, and for drawing jurors from the venire at empanelment, G.L. c. 234, § 25. 1980 Mass. Adv. Sh. at 2471, 414 N.E.2d at 990.

[35] *Id.*

[36] *Id.* at 2472, 414 N.E.2d at 990.

[37] *Id.*

[38] *Id. See* Commonwealth v. Peters, 372 Mass. 319, 321-22, 361 N.E.2d 1277, 1279 (1977); Commonwealth v. Lussier, 364 Mass. 414, 423-24, 305 N.E.2d 499, 505 (1973); Commonwealth v. Therrien, 359 Mass. 500, 507, 269 N.E.2d 687, 692 (1971); Commonwealth v. Slaney, 350 Mass. 400, 402, 215 N.E.2d 177, 179 (1966).

[39] 1980 Mass. Adv. Sh. at 2474, 414 N.E.2d at 991.

quire a state to obtain a grand jury indictment prior to pursuing criminal charges,[40] the defendant could not base his challenge of the grand jury lists on sixth amendment grounds, but had to rely solely on the equal protection clause of the fourteenth amendment.[41]

Evaluating the defendant's grand jury equal protection claim first,[42] the Court used the test stated in the Supreme Court case of *Castaneda v. Partida*.[43] That case enumerated three elements which the criminal defendant must satisfy in order to show that the jury selection procedure employed resulted in substantial underrepresentation of an identifiable group to which he belongs.[44] First, the criminal defendant must establish that his group "is a recognizable, distinct class, singled out for different treatment under the law, as written or as applied."[45] Second, the defendant must prove a disproportionate underrepresentation of the group over a significant period of time.[46] Third, the presumption of discrimination raised by the statistics must be supported by a selection process that is susceptible of abuse or not neutral.[47] Once a defendant has established his prima facie case, the state then bears the burden to rebut by dispelling the inference of intentional discrimination.[48]

Before considering whether the defendant had satisfied the *Castaneda* requirements, the Court examined the test to be employed to determine the validity of the defendant's sixth amendment claim that the source of his petit jury was not fairly representative of the community. With regard to this claim, the *Bastarache* Court looked to the criteria articulated by the Supreme Court in *Duren v. Missouri*.[49] The *Duren* test requires that the defendant show three elements for a prima facie case: (1) that the allegedly excluded group is a "distinctive" group in the community, (2) that the group's representation in venires is not fair and reasonable in relation to the group's number in the community, and (3) that the underrepresentation of the group is due to systematic exclusion of it in the jury selection process.[50] In order to rebut such a prima facie case, the state must show adequate justification for any disproportionate representation.[51] This justification may be in the form of a showing that those aspects of the selection process

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[40] *See* Hurtado v. California, 110 U.S. 516, 538 (1884).
[41] 1980 Mass. Adv. Sh. at 2467, 2474, 414 N.E.2d at 987-88, 991.
[42] *Id.* at 2474, 414 N.E.2d at 991-92.
[43] 430 U.S. 482 (1977).
[44] *Id.* at 494.
[45] 1980 Mass. Adv. Sh. at 2474, 414 N.E.2d at 991 (quoting *Castaneda*, 430 U.S. at 494).
[46] *Id.* (citing *Castaneda*, 430 U.S. at 494).
[47] *Id.*
[48] *Id.* at 2474, 414 N.E.2d at 991-92 (citing *Castaneda*, 430 U.S. at 497-98).
[49] *Id.* at 2474, 414 N.E.2d at 992 (citing Duren v. Missouri, 439 U.S. 357 (1979)).
[50] *Id.* at 2474-75, 414 N.E.2d at 992 (citing *Duren*, 439 U.S. at 364).
[51] *Id.* at 2475, 414 N.E.2d at 992 (citing *Duren*, 439 U.S. at 367-68).

that result in disproportionate representation manifestly and primarily advance a significant interest.[52]

The Supreme Judicial Court in *Bastarache* compared the first criteria of the *Partida* and *Duren* tests — whether a group is identifiable for equal protection purposes, or is distinctive, for sixth amendment purposes.[53] The Court noted that the two criteria might produce different results.[54] Nevertheless, the Court concluded that classifications based on age alone were neither identifiable nor distinctive groups.[55] The Court stated that "virtually every Federal case" considering the issue was in agreement.[56] In addition, the Court cited the Supreme Court case of *Hamling v. United States*[57] as suggesting that age groups are not identifiable or distinctive groups.[58] Because the *Bastarache* Court concluded that age groups were not identifiable or distinctive for federal constitutional purposes, the Court held that the defendant's challenge to the validity of both the petit and grand jury lists under the United States Constitution failed.[59]

Because it concluded that the defendant had failed to establish the requisite first element of either test, the Supreme Judicial Court did not discuss the second and third elements of either the equal protection or sixth amendment tests in the context of the case at bar. Instead, the Supreme Judicial Court proceeded to consider the state's rebuttal. Under equal protection principles, the state may rebut a prima facie case by demonstrating the absence of intent to discriminate.[60] The Court stated that the actions of the local officials evidenced no intentional discrimination against young people.[61] In order to rebut a sixth amendment claim, the state may show that significant interests are being advanced.[62] In *Bastarache*, the Court postulated that the selectmen may have known that certain young people were away at school or military service or were employed elsewhere while maintaining residence with their parents.[63] The Court noted that it would be

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[52] *Id.* (citing *Duren*, 439 U.S. at 367-68).

[53] *Id.*

[54] *Id.* The Court observed that the equal protection clause has focused on groups historically discriminated against — on the basis of sex, race, color, religion, or natural origin — whereas the sixth amendment is based on the requirement that juries be selected from a source fairly representative of the community. *Id.*

[55] *Id.* at 2478, 414 N.E.2d at 993.

[56] *Id.* at 2476, 414 N.E.2d at 992. The Court listed the cases. *Id.* at 2476 n.10, 414 N.E.2d at 992 n.10.

[57] 418 U.S. 87 (1974).

[58] 1980 Mass. Adv. Sh. at 2477, 414 N.E.2d at 993 (citing *Hamling*, 418 U.S. at 135-38).

[59] *Id.* at 2478, 414 N.E.2d at 993.

[60] *Id.* at 2474, 414 N.E.2d at 991-92 (citing *Castaneda*, 430 U.S. at 497-98).

[61] *Id.* at 2478, 414 N.E.2d at 993.

[62] *Id.* at 2475, 414 N.E.2d at 992 (citing *Duren*, 439 U.S. at 367-68).

[63] *Id.* at 2478, 414 N.E.2d at 994.

proper for selectmen to consider these facts in order to create lists of those who would be able to serve as jurors.[64] Thus, in addition to dismissing the defendant's federal constitutional challenges on the basis that young persons were not an identifiable or distinctive group, the Court found that the state had rebutted both the equal protection and sixth amendment challenges.

The Court next turned its attention to the defendant's challenges based on the state constitution. The Court held that it need not consider this claim because the defendant had not raised it below.[65] Nevertheless, the Court stated that even if the challenge had been raised properly, it would have failed.[66] The Court underscored its special concern about discrimination against those groups enumerated in article 1 of the Declaration of Rights, as amended by article 106 — "sex, race, color, creed or national origin."[67] The Court observed that even unintentional discrimination against any of these groups would raise a constitutional issue.[68] In the instant case, however, the defendant claimed discrimination against young people, a group not described in article 1 of the Declaration of Rights.[69] In addition, it had been demonstrated that there was no intentional discrimination against people under age thirty-five.[70] The Court thus found that Bastarache had failed to show that he had been denied " 'the judgment of his peers.' "[71]

After rejecting all of the defendant's statutory and constitutional challenges, the Supreme Judicial Court proceeded to discuss its supervisory powers. Acknowledging its obligation to oversee the courts,[72] the Court stated that its power to review the administration of justice was broader than the mere enforcement of statutory and constitutional dictates.[73] The Court observed that the defendant's case demonstrated the "undesirable consequences" of the jury selection system employed.[74] Noting that this "key man" system is susceptible of abuse,[75] the Court stated that there were benefits in adopting a random jury selection process.[76] These benefits would

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[64] *Id.* at 2478-79, 414 N.E.2d at 994.
[65] *Id.* at 2479, 414 N.E.2d at 994.
[66] *Id.*
[67] *Id.* (quoting Mass. Const., Decl. of Rights, art. 106).
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 2480, 414 N.E.2d at 995. *See* G.L. c. 211, § 3.
[73] 1980 Mass. Adv. Sh. at 2480, 414 N.E.2d at 995.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 2481, 414 N.E.2d at 995.

include improving the appearance of fairness, increasing confidence in the jury system, and providing a more even distribution of service on juries.[77]

In order to gain the benefits of a random jury selection process, the Court asked the attorney general to devise procedures for such a process in cities and towns that were not yet using a random selection system.[78] The Court stated that the new procedure should be implemented as soon as is practicable or as warranted.[79] Further, the Court suggested that the legislature consider the expansion of the random selection procedures used in Middlesex County.[80] The Court emphasized the need for prompt consideration of the issue.[81] In order to ensure the reform of jury selection procedures, the Court commented that "[a]fter the passage of a reasonable time, judges of the Commonwealth should look with favor on proven claims that the jury lists from which grand and particularly petit jurors are derived were not compiled by a substantially random process, subject, of course, to appropriate statutory exemptions."[82] The Court concluded by explaining that it was still affirming the Appeals Court reversal of the conviction, on other grounds.[83]

Although the Supreme Judicial Court reversed the defendant's conviction on account of improper jury instructions, the significance of *Bastarache* lies in the Court's discussion of defense challenges to the jury selection process. To support its conclusion that the group of persons eighteen to thirty-four years of age is not an identifiable or distinctive group for federal constitutional purposes,[84] the Court relied on federal precedent as well as its own interpretation of the Supreme Court case of *Hamling v. United States*[85] to counter the reasoning of the Appeals Court. In addition, the Supreme Judicial Court criticized the Appeals Court's reliance on the First Circuit case of *United States v. Butera*.[86] In *Butera*, the First Circuit Court of Appeals found that young adults twenty-one to thirty-four years of age were a

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 2481-82, 414 N.E.2d at 995.

[83] *Id.* at 2482-85, 414 N.E.2d at 995-97. The Court affirmed the reversal because it ruled that the trial court erred on two counts: (1) by instructing the jury that wanton and reckless conduct by the defendant would warrant a finding of involuntary manslaughter where the Supreme Judicial Court found no evidence to support that instruction, *id.* at 2482, 414 N.E.2d at 996, and (2) by incorrectly instructing the jury on the law of self-defense, *id.* at 2482-83, 414 N.E.2d at 996. In addition, the Court noted that "[t]here was little evidence warranting an instruction that flight could be an 'admission of guilt.' " *Id.* at 2485, 414 N.E.2d at 997.

[84] *See id.* at 2478, 414 N.E.2d at 993.

[85] *See id.* at 2476-77, 414 N.E.2d at 992-93 (citing Hamling v. United States, 418 U.S. 87, 135-38 (1974)).

[86] 420 F.2d 564 (1st Cir. 1970), *cited in* Commonwealth v. Bastarache, 1980 Mass. App. Ct. Adv. Sh. 1729, 1737, 409 N.E.2d 796, 802.

group cognizable under the Constitution.[87] The Appeals Court adopted the reasoning of *Butera*, finding that young adults must be found a cognizable group lest discrimination against such a large class of persons would go uncorrected.[88] In addition, *Butera* stated that because the attitudes of younger and older adults appeared to be distinct, the government must supply some justification for excluding either class from jury pools.[89] Nevertheless, the *Butera* court denied the defendant relief because it found sufficient justification.[90] The Supreme Judicial Court noted, however, that *Butera* has been called a "judicial rarity"[91] and cited a dozen federal appellate and district court cases denying the constitutional cognizability of groups based on age.[92] Courts refusing to acknowledge young persons as a cognizable group have cited reasons including that young people are not distinct from the rest of society,[93] that there is no cohesiveness of attitudes among young people,[94] and that any demarcation of groups on the basis of age would be arbitrary.[95] Indeed, many cases have noted the singularity of *Butera*'s conclusion.[96]

In addition to relying on *Butera*, the Appeals Court also had justified its finding of cognizability based on its sense that recent Supreme Court cases have expanded the sixth amendment's fair cross section requirement.[97] In contrast, the Supreme Judicial Court cited *Hamling v. United States* as suggesting that age groups are not identifiable or distinctive.[98] The Supreme Judicial Court concluded that the Supreme Court's reluctance to find

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[87] *Id.* at 570. The Supreme Judicial Court noted that this finding of *Butera* was not essential to that decision because the *Butera* court found that the government had successfully rebutted the defendant's case. 1980 Mass. Adv. Sh. at 2476 n.10, 414 N.E.2d at 992 n.10. *See Butera*, 420 F.2d at 574.

[88] *Bastarache*, 1980 Mass. App. Ct. Adv. Sh. at 1736, 409 N.E.2d at 801 (quoting *Butera*, 420 F.2d at 570).

[89] *Butera*, 420 F.2d at 570.

[90] *Id.* at 573.

[91] 1980 Mass. Adv. Sh. at 2476 n.10, 414 N.E.2d at 992 n.10 (citing Foster v. Sparks, 506 F.2d 805, 824 (5th Cir. 1975)).

[92] *Id.* at 2476 n.10, 414 N.E.2d at 992 n.10.

[93] *E.g.*, United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976); United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); United States v. Kuhn, 441 F.2d 179, 181 (5th Cir. 1971).

[94] *E.g.*, United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976).

[95] *E.g.*, United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976); United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); Chase v. United States, 468 F.2d 141, 145 (7th Cir. 1972); United States v. DiTommaso, 405 F.2d 385, 391 (4th Cir.), *cert. denied*, 394 U.S. 934 (1968).

[96] *See, e.g.*, United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976); United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); United States v. Briggs, 366 F. Supp. 1356, 1362 (N.D. Fla. 1973).

[97] *Bastarache*, 1980 Mass. App. Ct. Adv. Sh. at 1738, 409 N.E.2d at 802.

[98] 1980 Mass. Adv. Sh. at 2477, 414 N.E.2d at 993 (citing *Hamling*).

groups based on age cognizable as well as the existence of a number of lower federal court cases rejecting claims of cognizability for such groups supported its denial of the defendant's challenges under the federal constitution.[99]

Although the Supreme Judicial Court rejected the defendant's challenges to the compilation of grand and petit jury lists, the Court did express concern regarding the operation of the jury selection system.[100] The Court noted that even though underrepresentation of young persons was not a ground for reversing a conviction, some of the consequences of such underrepresentation were "undesirable."[101] The Court pointed out the decreasing popularity of "key man" systems among the various states and the increased adoption of random jury selection procedures.[102] The Court noted that in 1968 Congress replaced the key man system in the federal courts with a random selection process.[103] Convinced of the preferability of random selection procedures, the Court requested the attorney general and the legislature to act to cause the speedy implementation of such procedures.[104] In order to ensure jury selection reform, the Court directed the lower courts, after a reasonable time, to entertain favorably claims showing that substantially random procedures were not used to compile jury lists.[105]

Interestingly, soon after the Supreme Judicial Court issued the *Bastarache* opinion, the Supreme Court of New Hampshire took action similar to that taken in *Bastarache*, but the New Hampshire court went one step further.[106] In *State v. Elbert*, the defendant's challenges included a claim that the selection of the grand jury that indicted him impermissibly excluded young people eighteen to thirty-four years old.[107] The New Hampshire court refused to recognize young people as a cognizable class, and held that the representation of young people was adequate for constitutional purposes.[108] In addition, the *Elbert* court concluded that selectmen did not intentionally exclude young persons.[109] Consequently, the court denied relief to the defendant.[110] Nevertheless, the court exercised its supervisory powers and went on to order that all future New Hampshire jury lists be

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[99] *Id.* at 2477-78, 414 N.E.2d at 993.

[100] *Id.* at 2480-81, 414 N.E.2d at 995.

[101] *Id.* at 2481, 414 N.E.2d at 995.

[102] *Id.* at 2480 & n.14, 414 N.E.2d at 995 & n.14.

[103] *Id.* at 2480, 414 N.E.2d at 995 (citing 28 U.S.C. § 1861 et seq. (1976)).

[104] *Id.* at 2481, 414 N.E.2d at 995.

[105] *Id.* at 2481-82, 414 N.E.2d at 995.

[106] *See* State v. Elbert, 121 N.H. _____, 424 A.2d 1147 (1981).

[107] *Id.* at _____, 424 A.2d at 1148.

[108] *Id.* at _____, 424 A.2d at 1149. People between the ages of eighteen and thirty-four represented 38.4% of the relevant general population, and only 11.4% of the jurors. *Id.*

[109] *Id.* at _____, 424 A.2d at 1150.

[110] *Id.*

chosen randomly under the direction of the clerks of court.[111] The court noted that this action would be superseded by orders or rules of the court or by a suitable statute.[112] Thus, another court, while denying relief to the complaining criminal defendant, has not only decided that jury selection procedures should be more random but has taken affirmative steps toward securing this end.

While the *Elbert* court fully exercised its supervisory powers, the *Bastarache* Court did not. The *Bastarache* Court did, however, leave the potential for future court action on several grounds. In its decision, the Court stressed the finding that there was no intentional discrimination against younger people,[113] implying that a state claim might succeed on a demonstration of such intentional discrimination.[114] Although of undetermined significance, the Court observed that in the case at bar, "there was no tension based on differences in age between defendant and victim."[115] Finally, the Court ordered the lower court to accept proven challenges that jury lists were not compiled by substantially random procedures.[116] The only provisos articulated by the Court were that such challenges could succeed only after lapse of a reasonable time and that the randomness of selection procedures may be affected by appropriate statutory exemptions.[117]

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[111] *Id.*
[112] *Id.*
[113] 1980 Mass. Adv. Sh., at 2467, 2468, 2479, 414 N.E.2d at 988, 994.
[114] *See id.* at 2479, 414 N.E.2d at 994.
[115] *Id.*
[116] *Id.* at 2481-82, 414 N.E.2d at 995.
[117] *Id.*