Chapter 10: Criminal Law, Procedure and Administration

Sanford J. Fox
§10.1. Crime in Massachusetts. Both the substantive criminal law and the complex expensive machinery for its administration have as one of their primary goals the suppression of crime. Increases or decreases in crime over a period of time, therefore, provide some indications of the efficacy of law and administration.¹

The most reliable sources of information concerning the incidence of major crime in the Commonwealth are the Uniform Crime Reports published annually by the Federal Bureau of Investigation.² Seven types of offenses are encompassed by the reports: murder and non-negligent manslaughter,³ forcible rape,⁴ robbery,⁵ aggravated assault,⁶ burglary,⁷ larceny of over fifty dollars⁸ and auto theft.⁹

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The author wishes to acknowledge the assistance of Ralph C. Good and John M. Silvaggi of the Board of Student Editors of the ANNUAL SURVEY.

§10.1. ¹ Of course, the incidence of crime can be traced to more than the operation of the criminal law. Religious and ethical training play a role in preventing crime. Similarly, economic forces as well as weaknesses in the law may precipitate crime. Nonetheless, society does look to the law for the preservation of peace and order.

² Information concerning other crimes is not available. The annual reports of the Commissioner of Correction include statistics for arrests and prosecutions of other crimes. E.g., 1957 Statistical Reports of the Commissioner of Correction, Pub. Doc. No. 115, at pp. 51-53, 80-81. But since there is no fixed relation between the amount of crime committed and the number of arrests or prosecutions these reports do not shed any light upon the incidence of crime. The FBI publication describes the number of offenses known to the police. Considering the nature of these offenses, defined in notes 3-9 infra, it may be assumed that these represent a high proportion of the offenses actually committed. A bill, H. 286, was introduced in 1959 that would establish a Bureau of Criminal Statistics in the Department of the Attorney General. Enactment of such a law would help provide invaluable information to all concerned with the problem of crime.

³ This includes all criminal homicides except those caused by negligence. “Man-slaughter by negligence includes any death which the police investigation establishes was primarily attributable to gross negligence on the part of some individual other than the victim.” FBI, 1958 Uniform Crime Reports 17.

⁴ Includes forcible rape, assault to rape and attempted rape. Ibid. Prior to 1958 this category included statutory offenses where the victim was under the age of consent. Id. at 2.

⁵ “Includes stealing or taking anything of value from the person by force or
In the calendar year 1958 there were 37,484 major offenses committed in Massachusetts, compared to 34,920 in 1957. The annual total for each offense is shown in Table I.

**Table I**

<table>
<thead>
<tr>
<th>Murder and Non-negligent Manslaughter</th>
<th>Aggravated Assault</th>
<th>Burglary</th>
<th>Larceny over $50</th>
<th>Auto Theft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder and Non-negligent Manslaughter</td>
<td>62</td>
<td>950</td>
<td>753</td>
<td>13,594</td>
</tr>
<tr>
<td>Robbery</td>
<td>753</td>
<td>13,594</td>
<td>8,790</td>
<td>10,771</td>
</tr>
<tr>
<td>1957</td>
<td>69</td>
<td>1,037</td>
<td>775</td>
<td>15,498</td>
</tr>
<tr>
<td>1958</td>
<td>1,037</td>
<td>775</td>
<td>9,091</td>
<td>11,014</td>
</tr>
</tbody>
</table>

Relating this increase in the number of offenses to the increase in the population reveals that the total number of major offenses committed per one hundred thousand of population went from 723.4 in 1957 to 771.0 in 1958, an increase in the rate of 6.6 percent. The highest increase in rate was shown for burglaries (up 13.2 percent over the 1957 rate), while the lowest increase was recorded for auto thefts (up only 1.5 percent). Table II on the following page shows the change in rate for all offenses.

For all major crimes the increase in rate for Massachusetts is slightly lower than the increase in rate for the country as a whole (6.6 percent compared to 7.4 percent). The Massachusetts increase is more than 2 percent less than that shown for all of New England (8.8 percent).

Due to changes in the FBI's method of computing population, these comparisons cannot be carried back further than to 1957. A different approach is to use annual surveys of the population of Massachusetts.
ence in the crime rate from only one year to the next cannot provide
the basis for identifying a trend. The dangers of generalization from
such a narrow base of comparison are illustrated by the crime data
for the first nine months of 1959 relating to cities in the Common-
wealth having populations of over one hundred thousand.\textsuperscript{14} Comparison of these figures with those for the first nine months of 1958
for these cities indicates that, on the whole, the number of crimes is
decreasing (14,631 for the first three quarters of 1958, 13,464 for the
same period in 1959). The number of murders and non-negligent
manslaughters has decreased (27 to 26); forcible rapes have increased
(73 to 80); robberies have decreased (486 to 409); aggravated assaults
have increased (437 to 582); burglaries have decreased (5005 to 4916);
larcenies over fifty dollars have decreased (3378 to 2848); and auto
thefts have decreased (5225 to 4603).

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
 & Murder and Non-negligent Manslaughter & Robbery & Aggravated Assault & Burglary & Larceny over $50 & Auto Theft \\
\hline
1957 & 1.3 & 19.7 & 15.6 & 281.6 & 182.1 & 223.1 \\
1958 & 1.4 & 21.3 & 15.9 & 318.8 & 187.0 & 226.5 \\
\hline
\end{tabular}
\caption{Number of Major Offenses per One Hundred Thousand of Population: 1957 and 1958}
\end{table}

Whether this downward trend will persist for the Commonwealth
as a whole and through the last quarter of 1959 will not be known
until the next annual report is issued in the fall of 1960. The 1957,
1958 and incomplete 1959 data are presented here primarily to provide
a basis for determining true crime trends in future Annual Surveys
and to depict our present state.

A. Legislation

\textbf{§10.2. Income taxes.} Several new crimes have been created as part
of the income tax enforcement system. Since 1955 a taxpayer who
files a fraudulent return has been subject to criminal penalties.\textsuperscript{1} The

\textsuperscript{14} FBI, Uniform Crime Reporting, Release of Preliminary Data for the United
States, January-September 1959. This report includes the city of Lynn. The coun-
terpart Preliminary Data report for January-September 1958 did not include Lynn.
The comparisons in the text, therefore, are made only for the seven cities appearing
in both reports: Boston, Cambridge, Fall River, New Bedford, Somerville, Springfield
and Worcester. Since both reports consist of only one page, no additional
 citations are made for the figures in the text.

\textsuperscript{15} Compiled from FBI, 1958 Uniform Crime Reports 64-65.

Mass. Law §16.6 at 176.
same criminal penalties have now been extended to whoever willfully assists in the filing or preparation of a fraudulent return, provided its fraudulent nature is known to him. A failure to pay over to the Commissioner any money received from another person for the purpose of discharging that other person's tax liability is also now subject to the same criminal penalties. No particular knowledge, purpose or intent is needed — the crime is in the fact of failure to pay.  

New crimes have also been created as part of the scheme to collect income taxes through a system of withholding. A penalty of a $1000 fine or imprisonment for one year is applicable to an employer who willfully fails to furnish his employee with a statement concerning the amount of taxes that have been deducted and withheld from wages. Similarly, an employee who willfully fails to furnish his employer with a withholding exemption and deduction certificate, or who furnishes a false or fraudulent certificate, is punishable by a $500 fine or imprisonment for one year.  

Upon a failure to comply with certain of the withholding provisions an employer is required to deposit withheld taxes in a separate bank account. Failure to meet the deposit requirements subjects the employer to a fine of not less than $100 nor more than $5000 or by imprisonment for not more than one year. Certain defenses to this prosecution are set forth in the statute. The employer must prove that (1) there was a reasonable doubt as to whether a tax was required to be withheld, or (2) there was a reasonable doubt as to who was required to withhold the tax, or (3) the failure to comply with the deposit requirements was due to circumstances beyond the control of the employer. A lack of funds with which to make the deposit, however, does not bring the defaulting employer within the terms of this last defense.  

§10.3. Sexually dangerous persons. Early in the 1959 Survey year the Massachusetts statute dealing with sex offenders was replaced by one following a similar pattern in dealing with sexually dangerous persons. Many of the changes introduced by the new act represent distinct improvements in the method of dealing with a complex and difficult problem. A few, unfortunately, do not.  

It should be stressed at the outset that neither the new act nor its predecessor always require the commission of a crime for its provisions to go into effect. Three classes of persons are eligible for treatment as sexually dangerous persons: (1) those who are convicted of designated

3 Ibid.  
4 Id., c. 17, §11(c).  
5 Id. §11(d).  
6 Id. §7(a), (b).  
7 Id. §7(d).  
8 Id. §7(e).  

§10.3. 1 Acts of 1958, c. 646.
sex offenses;\(^2\) (2) those serving sentence in a jail, house of correction or prison\(^3\) (this class includes such diverse persons as those who have committed criminal homicide and those who have unreasonably believed they were not required to withhold an income tax\(^4\)); and (3) those in the custody of the Youth Service Board\(^5\) (this group includes delinquent and wayward children who may not have committed any offense at all\(^6\)).

To some extent these statutes are a departure from the idea that the compulsive force of the state is to be applied to an individual when he has done something proscribed and represent some acceptance of the idea that the use of this force is justified when an individual has become something proscribed.

A person must satisfy three definitional elements in order to be classed as sexually dangerous. These relate to past behavior, a present defect and a likelihood of future misbehavior.

**Past behavior.** The statutory definition of a sexually dangerous person mentions three items of past behavior.\(^7\) The first is "misconduct in sexual matters." There is no indication that this misconduct must amount to criminal misconduct. Nor is there anything to indicate how much or what kind of sexual deviation will amount to "misconduct." The former statute spoke of "a course of misconduct in sexual matters."\(^8\) Under the new act merely one instance of "misconduct" apparently is sufficient. The second and third items of past behavior are new to the statutory scheme. The second is "repetitive or compulsive behavior." The third is "violence or aggression by an adult against a victim under the age of sixteen years."

The second requirement seems to cancel the change wrought by dropping the course of misconduct requirement of the former act. That is, if there has been repetitive or compulsive behavior it is highly likely that there has been a course of misconduct in sexual matters. This would seem to be true unless the repetitive or compulsive behavior need not have been sexual behavior.

The third item of past behavior seems to exempt from the provisions of the act those whose sexual activity is not accompanied by violence or whose appetites, violent or not, do not extend to young children. If this were an exemption from criminality for sexual deviation that is nonviolent and does not involve children, it could be understood

\(^2\) Indecent assault or indecent assault and battery, indecent assault and battery on a child under the age of fourteen, rape, rape of a female child under sixteen, carnal knowledge and abuse of a female child under sixteen, assault with intent to commit rape, open and gross lewdness and lascivious behavior, unnatural and lascivious acts with another person or with a child under the age of sixteen, lewd, wanton and lascivious behavior or indecent exposure, or an attempt to commit any of these crimes. Id. §3.

\(^3\) Id. §6.

\(^4\) See the comment on this latter provision in §10.2 *supra*.

\(^5\) Acts of 1958, c. 646, §6

\(^6\) "Delinquent child" and "wayward child" are defined in G.L., c. 119, §52.

\(^7\) Acts of 1958, c. 646, §1.

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to represent a legislative judgment that consent and maturity are sufficient to govern relations between persons in this area, and that the community need not be concerned when these two factors are present. There is no such exemption or judgment in the act, however. Therefore, so long as such offenses as sodomy have no exception for consensual adult commission, it is not clear why those who peacefully engage in them are not treated as sexually dangerous persons. Inherent in the judgment that this kind of sexual behavior is criminal is the judgment that it poses a danger to the community. If there is not sufficient danger then the conduct ought not to be criminal in the first place.

Present defect. The new act repeats the requirement of the old act that the past behavior must indicate a general lack of power to control sexual impulses.

Future misbehavior. The last requirement for classification as a sexually dangerous person is a prognosis of attacking or otherwise inflicting injury "on the objects of his uncontrolled or uncontrollable desires." 9 This requirement replaces one that there be a likelihood of attack or infliction of injury, degradation, pain or other evil on prospective victims.10

It has already been pointed out that a determination of sexual dangerousness may be made concerning persons convicted of sex offenses, those incarcerated for any offense, and juveniles in the custody of the Youth Service Board. The statute provides two adjudicating procedures, one for the first category and another for the second and third.

a. Persons convicted of sex offenses. If it appears to a District Court judge that a person charged with commission of one of the listed sex offenses11 is guilty and appears to be a sexually dangerous person then the case must be sent to the Superior Court.12 Once a conviction has been had in the Superior Court the new act continues the provisions giving the Superior Court authority to commit the offender to a "treatment center" for no more than sixty days before the court imposes sentence.13 The commitment is for psychiatric examination, diagnosis and recommendation as to disposition.14

The actual declaration of status as a sexually dangerous person takes place only after an adversary proceeding in the Superior Court based

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11 See note 2 supra.
12 Acts of 1958, c. 646, §3.
13 Id. §4. At several points the new statute refers to the treatment center or a branch thereof, e.g., id. §5. These branches are authorized in Section 2. However, Acts of 1959, c. 615, amends Section 2 so as to remove the authorization for branches. It seems, therefore, that all other references to branches of the treatment center in the new sexually dangerous persons law are impliedly repealed. Legislation making the repeal explicit would be desirable.
14 This provision drops reference to "special treatment" during this initial commitment as it was found in Acts of 1954, c. 686, §1, as amended by Acts of 1957, c. 772, §2.
upon a psychiatric report from the center that the offender is sexually dangerous. This differs markedly from the former act which provided for imposition of a traditional sentence and commitment to the treatment center as a matter of course following a psychiatric report placing the offender within the statute.\textsuperscript{15} In the hearing the offender is entitled to compulsory attendance of witnesses in his behalf and to have the court appoint counsel for him if that is necessary to protect his rights. No mention is made of who pays counsel, or if he is to be paid at all. The psychiatric report is admissible in evidence, although there is no requirement that it be introduced or that the judge's finding be based upon it. This leaves unanswered the vital question of the offender's right to a copy of this all-important document.

If the offender is found by the court to be sexually dangerous it may, in lieu of a traditional sentence, commit the offender to the treatment center for an indeterminate life sentence.\textsuperscript{16} This was authorized in the former act.\textsuperscript{17} A significant change, however, is found in the grant of discretion to the court to place the offender on probation. One effect of this grant would seem to be an implied repeal of the mandatory five-year prison term for adult offenders twice convicted of forcible rape of a child under the age of sixteen or of unnatural and lascivious acts with a child under the age of sixteen.\textsuperscript{18} It must be remembered, however, that the authority to grant probation is conditioned upon a finding of sexual dangerousness. Thus there is the anomalous situation whereby a person convicted of either of these two offenses a second time must go to prison for at least five years if he is not sexually dangerous but may be given supervised liberty if he is sexually dangerous.

b. Persons serving a sentence or in the custody of the Youth Service Board. If it appears to the custodian of such a person that he is sexually dangerous the custodian may initiate an investigation culminating in a Superior Court commitment hearing if there is a corroborating psychiatric finding of sexual dangerousness.\textsuperscript{19} In the absence of such a finding the person must be returned to his prior status even before the case reaches the Superior Court hearing. The hearing is conducted in the manner provided for in the case of convicted sex of-

\textsuperscript{15} Under the old law, however, the offender could obtain a hearing on the report by appealing to the Superior Court. Acts of 1954, c. 686, §1, as amended by Acts of 1957, c. 772, §3.

\textsuperscript{16} Acts of 1958, c. 646, §5.

\textsuperscript{17} Acts of 1954, c. 686, §1, as amended by Acts of 1957, c. 772, §6.

\textsuperscript{18} These offenses were created by Sections 2 and 4 of Chapter 763 of the Acts of 1955. This statute also created the crime of assaulting a female child under the age of sixteen with intent to commit rape. Id. §3. Section 1 was an amendment to the parole laws, G.L., c. 276, §87, as amended by Acts of 1941, c. 264, §2, purporting to remove these three new offenses from eligibility for parole until after five years of imprisonment had been served. This amendment, however, does not refer to the offense created by Section 3; the cross reference is to Section 24A of G.L., c. 265 (dealing with venue for the trial of certain offenses), instead of to Section 24B (the new offense created by Acts of 1955, c. 763, §3). This defect appears not to have been noticed in the discussion of the 1955 act in 1955 Ann. Surv. Mass. Law §12.21.

\textsuperscript{19} Acts of 1958, c. 646, §6.
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fenders. That this does not, however, include appointment of counsel is indicated by the provision that relatives or friends be informed if the person charged "is incapable of conducting his contest to the report" and that a guardian ad litem may be appointed to protect his interests. Another difference is that the court has authority to commit a sexually dangerous person from this group to a mental institution, an alternative not available when the sexually dangerous person has merely committed a sex offense. Otherwise, the consequences of being sexually dangerous are the same for both groups.

Release from commitment as a sexually dangerous person. The most important change in the new act relates to a provision for parole from the treatment center. The use of supervised liberty appears to be a wise addition to a flexible and individualized program. There are, however, potential dangers to be noted. The supervision of liberty may last for the rest of the person's natural life. It is questionable, however, that sexual dangerousness persists this long. A provision requiring complete liberty at the age of sixty-five would be a proper addition to the statutory plan. The act also provides that the parole permit becomes automatically void upon the violation of any law of the Commonwealth. If all of the laws of the Commonwealth were conceived and drawn in such a way that there could be some assurance that those who violate them represent some degree of menace to the general security then this voiding provision would be proper. It is perfectly clear, however, that this is not the case and that many criminal acts bear no relation at all to the safety of the Commonwealth. For example, why should a person be subject to additional treatment as a sexually dangerous person for having committed the crime of pulling up a wild azalea?

§10.4. Eavesdropping. Significant legislative changes in the crime of eavesdropping have been made during the 1959 Survey year. The new legislation affects both the elements of the offense and the means of obtaining immunity from the statute for law enforcement officers.

The former statute proscribed secretly overhearing conversations within a building with the aid of mechanical devices or a telephone wire tap, provided this was done with an intent to procure official information or to injure someone. The 1959 version of eavesdropping modifies each of these elements. There must now be secret overhearing without the consent of one of the parties to the conversation. "Within a building" has been replaced by "at any place," so that the crime may be committed anywhere. The proscribed method of eavesdropping is described as "using any electronic recording device, or a

20 Ibid.
21 Id. §9.
22 Ibid.
23 It is a crime to pull up any more of a wild azalea than is necessary to procure the flower. G.L., c. 266, §116A.

§10.4. 1 Acts of 1959, c. 449.
wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement or by tapping any wire.” 3 This description would presumably include the mechanical devices mentioned in the superseded statute.

The most significant change in the elements of the offense, however, is the elimination of the requirement of intent. No state of mind is mentioned in the new statute. Its impact, therefore, is immensely broader than that of its predecessor. By operation of this statute all persons are criminals who secretly overhear conversations of others regardless of the purpose of the overhearing, or even if it is done with no particular purpose — merely from curiosity. Judicial interpretation may lessen the seeming harshness of the act. If “secretly” is taken to include a malicious element then an intent to injure may be imported back into the statute. Or, merely overhearing without some electronic or mechanical aid may be held to fall outside the statutory proscription. Unless some such restrictions are operative it seems that many, many persons are criminals who present no serious threat to the well-being of the community and as to whom the criminal stigma would be wholly unjustified.

Both the present and the earlier statutes contain exceptions whereby eavesdropping is permitted under certain conditions. Under the earlier act immunity could be conferred by the written permission of the Attorney General or the district attorney “for the district.” 4 Currently, immunity from criminality is dispensed by “any justice of the Supreme Judicial Court or Superior Court.” The earlier act contained no legislative policy as to when the permission was to be granted. Discretion was completely uncontrolled and unguided. The present law, on the other hand, makes permission to eavesdrop turn on a judicial finding that there are reasonable grounds to believe that evidence of crime may be obtained by eavesdropping. The Supreme Judicial Court has advised that this judicial participation in the law enforcement process is constitutionally proper. 5 This control on discretion is partly diluted, however, by the provision that the person to be overheard and the line to be tapped need not be known in order for the judicial permission to issue.

The new statute contains a curious provision that a decision granting exemption from the proscription is not subject to review. The whole purpose of official eavesdropping would be defeated if the application were made in an adversary proceeding. If these are ex parte proceedings, as they must be, then who is there to seek review if the moving party (the law enforcement official) obtains the relief for which he prays? By implication, this provision denying review when exemption is granted may authorize review when it is denied. A more clear and direct statement of such an authorization would be desirable.

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Section 2 of the new statute is directed against those who, for the purpose of eavesdropping, permit or acquiesce in the installation of an eavesdropping device. This is not punishable, however, when authorized under the provisions discussed above. A problem arises from the fact that there is nothing in these provisions authorizing this kind of activity. Those who actually do the eavesdropping may be authorized; but nothing is said of those, such as superintendents or landowners, who must permit or acquiesce in installation of equipment. Perhaps the statute is to be read as meaning that permission for one is permission for all. Here too, a clear and direct statement of policy would be desirable.

§10.5. Support of needy disabled children. The Uniform Desertion and Non-Support Act provides that “any . . . father who unreasonably neglects or refuses to provide for the support and maintenance of . . . his minor child . . . and any mother who . . . willfully neglects or refuses to provide for the support and maintenance of her child under the age of sixteen” are subject to criminal penalties.\(^1\) The duty imposed under this act has been supplemented and expanded by a criminal statute enacted during the 1959 Survey year.\(^2\) The new act applies the duty of support without regard to the age of the child, provided he is needy and disabled. In such a case the parent must not “unreasonably neglect or refuse to provide for the support and maintenance” of the child. The penalty is a maximum of two years of imprisonment or a $500 fine, or both.

§10.6. Corrupt payments in labor relations. Early in the 1959 Survey year a criminal statute was enacted proscribing certain improper payments.\(^1\) The scheme of the statute is to make two separate prohibitions. The first makes it illegal for designated employer personnel to pay, deliver, or agree to pay or deliver money or any other thing of value to an employee or group of employees.\(^2\) The second imposes criminality on the employee or labor union official who solicits or accepts the forbidden payment. In both cases the solicitation, payment, delivery or agreement must be for the purpose of influencing employees in exercising their rights to organize or to select a representative or for the purpose of hindering the existence or functioning of a labor organization.

An imbalance in liability is apparent in the situation where a payment is made to a labor union official. If the illegal statutory purpose is present the activity of the official is always criminal. This is the effect of the second prohibition. But the employer-party to such a payment is criminally liable only if the union official is an employee; the management liability is limited to situations in which the corrupt arrangement is made with employees.

§10.5. 1 G.L., c. 271J, §1.  

§10.6. 1 Acts of 1958, c. 678.  
2 The act contains certain exceptions to permit such things as payment of wages to employees or of withheld union dues to the labor organization.
§10.7

B. DECISIONS

§10.7. Proceedings against delinquents. Violations of the criminal law by children between the ages of seven and seventeen are prosecuted in special juvenile hearings, unless the offense is first-degree murder. The Superior Court has jurisdiction to conduct a regular criminal trial for this offense. The court conducting the juvenile hearing may terminate the proceeding and order the child to be tried in the traditional criminal manner, provided the child is between the ages of fourteen and seventeen and the court determines that the child's welfare and the public interest require such a trial. By implication, children under the age of fourteen must remain before the juvenile court.

In *Metcalf v. Commonwealth*, the Supreme Judicial Court decided two questions of first impression in Massachusetts which arose under this system of adjudicating juvenile offenses. Reginald Metcalf was indicted for first-degree murder, being fourteen years old at the time the indictment was returned. He had been thirteen years old at the time of the killing which was the subject of the indictment. In the Superior Court, Metcalf pleaded guilty to second-degree murder and was thereupon sentenced to life imprisonment. He appealed to the Supreme Judicial Court, claiming (1) that the Superior Court lost jurisdiction over him when it had been determined that he had not committed first-degree murder, the court's acceptance of his plea being such a determination, and (2) that he should have been remanded to the juvenile court which would have to treat him as a delinquent child under the age of fourteen since it is age at the time of the commission of the offense which determines whether there is discretion in the juvenile court to order him tried in a criminal proceeding. The Commonwealth contended that once the jurisdiction of the Superior Court attached, it was not defeated by the plea to second-degree murder and that discretion would exist in the juvenile court to send Metcalf to the Superior Court since it is age at the time of the indictment that establishes this discretion.

The Supreme Judicial Court decided both questions in Metcalf's favor. Other states that have passed on similar questions arising under their own juvenile offender laws have been divided on the answers reached.

The continuation or loss of jurisdiction by the Superior Court is highly important since upon it turns the question of whether that court or the juvenile court passes sentence. The latter court does not possess the authority to order imprisonment and it is, therefore, more

1 G.L., c. 119, §§52, 54.
2 The Boston Juvenile Court or a District Court, except the Municipal Court of Boston.
3 G.L., c. 119, §61.
5 See 338 Mass. at 653 n.1, 656, 156 N.E.2d at 651 n.1, 654.
in keeping with the legislative scheme of withholding harsh punishments from children to hold as the Supreme Judicial Court did on the first question. A second reason supporting the decision divesting the Superior Court of sentencing jurisdiction relates to the experience of the juvenile courts in dealing with youthful offenders. It is patently best, both for the child and for the public, that advantage be taken of this experience as frequently as is consistent with legislative requirements.

It may be suggested, however, that this question never should have been permitted to arise. The first-degree murder exception to the youthful offender statute is largely without merit. Underlying the exception is an assumption that children who commit first-degree murder are different in some meaningful aspect from those who commit second-degree murder or manslaughter. The distinctions among these grades of criminal homicide, however, are highly technical, turning on the existence of such mystical elements as deliberate and premeditated malice aforethought. Legislative reconsideration might indicate that the public interest would be advanced by including all delinquent offenders in the statutory scheme.

As to the second question presented in the Metcalf case, the wisdom of the Supreme Judicial Court's decision is not so clear. The opinion relies heavily upon the language of G.L., c. 119, §61, "If it be alleged . . . that a child between fourteen and seventeen years of age has committed [Court's emphasis] an offense against a law of the commonwealth," as indicating that the age at the time of the offense is crucial. As a strict matter of the contextual meaning of the words, the Court's reading is not the only reasonable interpretation. The Court reads the statute as meaning "a child between fourteen and seventeen who has committed an offense while between fourteen and seventeen." It would also be reasonable to read it as describing a child fourteen to seventeen years old who has committed an offense at any time. It appears, therefore, that the Court was not foreclosed from finding that juvenile court discretion exists regardless of when the offense was committed. The Court's decision, in effect, announces an additional condition for the exercise of juvenile court discretion to order a fourteen-to seventeen-year-old child tried as an adult. The condition is that the offense must have been committed after the age of fourteen has been reached. Justification for thus limiting the juvenile court's discretion seems to be lacking. The same considerations, e.g., a need for the regimented life of a prison, that would persuade the juvenile court to order an adult trial for an offense committed at the age of fifteen may be present when the offense was committed at the age of thirteen.

§10.8. Rape: Fraud. General Laws, c. 265, §22 provides that "Whoever ravishes and carnally knows a female by force and against her will shall be punished by imprisonment in the state prison for

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http://lawdigitalcommons.bc.edu/asml/vol1959/iss1/14
life or for any term of years.” It has been held that “against her will” means “without her consent” so that it is a violation of the statute to have relations with a woman who is so drunk as to be unconscious and thereby incapable of consenting. In Commonwealth v. Goldenberg the Supreme Judicial Court reviewed another conviction for rape where the use of force was not an element.

The defendant, a physiotherapist, had been treating a pregnant nineteen-year-old girl in an attempt to produce a miscarriage. In the course of his treatment he induced her to consent to the intercourse with him by telling her that it was a part of the treatment and that “it would help in some way.” The Court reversed the conviction for rape under these circumstances.

This was the first time the question of fraudulently induced consent has been considered in a Massachusetts rape case. In other states in which the problem has arisen the effect of the fraud on the liability for rape depends upon what the fraud relates to. If there is fraud or deception as to the act itself (fraud in the factum), as where the woman is induced to believe that she will be treated with surgical instruments, the consent is not effective and the liability is upheld. But if the fraud relates to some other matter and the woman is aware that she is consenting to an act of intercourse (fraud in the inducement) then the consent will be a bar to liability.

The decision in the Goldenberg case is based upon the refusal to accept fraud as a substitute for force. The opinion makes no reference to the fact that this case involves fraud in the inducement and not fraud in the factum. Whether this case is authority for an outright rejection of fraud or merely follows the distinction made outside Massachusetts cannot be known until a case involving fraud in the factum comes before the Court.

§10.9. Statute of limitations. The statute of limitations for criminal actions serves both individual and community purposes. For the individual it provides assurance that experiences in the distant past will not be made the basis of accusations which neither memory nor evidence can satisfactorily refute. For the community the time limitation forms a part of the procedural structure designed to promote fair trials and to mitigate the risk of convicting innocent persons. That statutes limiting prosecutions in criminal cases are viewed solely as benefits conferred on the criminal class, however, is indicated from the common structure of the statutes which vary the period of limitations according to the seriousness of the crime. Further evidence of the same limited view is found in the provision that the statute is


3 Pomeroy v. State, 94 Ind. 96 (1883).


§10.9. 1 See, e.g., G.L., c. 277, §63.
tolled during the time when the person charged makes it especially
difficult for enforcement officials to find him. Under the Massachusetts
statute the defendant must reside "usually and publicly" within the
Commonwealth in order for the statute to continue running.\footnote{2}
Unfortunately, the Supreme Judicial Court during the 1959 Survey year
has also neglected the fact that the statute of limitations is an integral
part of criminal procedure designed to insure a maximum of fairness
and general security.

In \textit{Couture v. Commonwealth}\footnote{3} the Court interpreted the tolling
provision of the Massachusetts statute. The defendant was tried for
offenses committed in September, 1942, on an indictment returned
in December, 1951. One week after the offenses were committed the
defendant was taken at night from his home in Taunton, Massa-
chusetts, by police from Providence, Rhode Island. They had no
warrant for his arrest and took him to the Taunton police station.
Later that night he was taken from the police station to Rhode Island
where he was tried and imprisoned "during the greater part''\footnote{4}
of the
time between 1942 and 1951. The offenses for which Couture was
tried in 1951 would be barred from prosecution unless the statute was
tolled during his Rhode Island incarceration. The Supreme Judicial
Court decided that the statute was tolled in spite of the circumstances
of Couture's removal from the Commonwealth.

The opinion does not expressly say so, but there is little doubt that
it was wrong to arrest Couture without a warrant and to permit him
to be taken out of the Commonwealth other than by the means
provided by law. Both Massachusetts and Rhode Island have adopted
the Uniform Criminal Extradition Act.\footnote{5} In view of this it would seem
that a minimum obligation of the government to the citizen is to pro-
tect him from illegal seizure and see to it that his most basic legal
rights are not denied him. In the \textit{Couture} case the Court had an
opportunity to recognize this obligation and to motivate the police
to do likewise by denying to the government the fruits of its own
failure to protect the defendant. By deciding that the statute was
tolled the Court condones the procedure to which Couture was
subjected. The Court noted that there was not sufficient participation
by the Commonwealth to raise this question of fairness.\footnote{6} It is sug-
gested, however, that there was sufficient neglect of the Common-
wealth's duty to require a ruling on the fairness of the whole course
of events.

\footnote{2} Ibid.
\footnote{4} 338 Mass. at 32, 153 N.E.2d at 627.