Chapter 10: Constitutional Law

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PART II
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CHAPTER 10
Constitutional Law
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§10.1. Constitutional issues: Policy of avoidance. When judges are called upon to exercise their undoubted power to inquire into the validity of acts of other departments of the Government, their instinctive reaction is, or should be, one of self-restraint. If it is possible, cases should be decided without going into questions of constitutionality. If constitutional adjudication is unavoidable, every effort should be made to avoid the conclusion that a law is invalid.¹ On five occasions during the 1961 Survey year the Supreme Judicial Court felt called upon to apply this salutary principle.

In Golden, Petitioner,² the question sought to be raised was one of the validity of the statute³ providing that one acquitted of murder or manslaughter by reason of insanity shall be committed to an institution for life, but may be discharged therefrom by the Governor and Council. A person so committed applied to a Probate Court for discharge under the statute,⁴ which provides that one who has been adjudicated mentally ill may apply for adjudication of his recovery and competence. The contention was made that, since the commitment was not one upon conviction for a crime, Section 101 would be unconstitutional because, unless a judicial remedy is available for discharge of a com-

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§10.1. ¹ The classic statement of this phase of judicial policy is found in the concurring opinion of Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346, 56 Sup. Ct. 466, 492, 80 L. Ed. 688, 710 (1936).
³ G.L., c. 123, §101.
⁴ Id. §94A.

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mitted person who is mentally competent, deprivation of his liberty would be at the uncontrolled discretion of the executive.

The Supreme Judicial Court rejected the contention. Pointing out that Section 94A, under which the petition was brought, was inapplicable because it covers only an adjudication of mental illness as of the time of its making, whereas the adjudication of the petitioner's insanity was as of the time of the homicide, the Court refused to conclude that the petitioner was left without judicial machinery to adjudicate his present mental competence and to order his discharge. Avoiding the doubtful constitutional status of Section 101 if it were construed as giving the Governor and Council exclusive jurisdiction to discharge a person in the petitioner's position, the Court said that some judicial relief is available. It suggested, without deciding, that an application under G.L., c. 123, §91, might lie. Even if it will not, and if no other statutory judicial relief is found, the petitioner may avail himself of the writ of habeas corpus.

A more subtle but equally inexplicit technique was used to erase a suggestion of constitutional infirmity in the horse and dog racing statute.5 Bay State Racing Assn. v. State Racing Commission6 was the outgrowth of competition between two race track operators for harness horse racing licenses. The statute7 provides that such licenses may be granted for no more than an aggregate of 90 days in any year. In 1959 the Bay State Association was licensed for 67 days, and its competitor, Eastern Racing Association, was licensed for 23 days. In 1960, Bay State's license was cut down to 57 days, and for 1961 it received a license of similar duration, although in each of the two latter years it had requested 67 days. For 1961 Eastern's license was enlarged to 33 days. The case arose in the form of a petition by Bay State under the Administrative Procedure Act8 to review the commission's denial of ten extra days to Bay State, and also its grant of ten extra days to Eastern.

The statute, after authorizing the commission to issue licenses,9 recites, rather inartistically, that the commission shall have “full discretion” to refuse to grant a license to any applicant.10 This seemingly posed substantial questions as to reviewability of the commission's acts. Could they be reviewed for error of law11 or lack of support by substantial evidence12 if there is no tangible legal standard to which the commission must adhere? This question, which was in substance presented by the demurrer to the petition, carried one of deeper implication. If there is no legal standard for the guidance of the commission in performing its licensing function, is there not a possible unconstitutional delegation of legislative authority to the commission?

5 Id., c. 128A.
7 G.L., c. 128A, §3(j).
8 Id., c. 30A, §14.
9 Id., c. 128A, §3.
10 Id. §11.
11 Id., c. 30A, §14(8)(c).
12 Id. §14(8)(c).
The Court was unwilling to read the statute as giving the commission "an arbitrary and uncontrolled discretion," and it chose instead to read into it a requirement that the commission "apply general standards of public interest, convenience, and necessity, similar to those which have been sometimes implied in the regulation of public utilities." This is reminiscent of the technique offered by Mr. Justice Cardozo of looking at a regulatory statute as a whole and gathering from it a legislative purpose to create a general pattern within which the subordinate agency is to operate. Although this method of saving statutes from the tag of invalid delegation was advocated in a dissenting opinion, the principle which it expressed seems now to have general acceptance.

A more doubtful instance of interpolating language into a statute to offset constitutional vulnerability was *Demetropolos v. Commonwealth*. This was a suit to determine the validity of one of the obscene literature statutes. This provides, so far as pertinent to the case, that whoever sells a pamphlet, printed paper, or other thing which is obscene, indecent, or impure shall be punished. A companion statute provides that whoever sells a book, "knowing it to be obscene, indecent, or impure," shall be punished. The plaintiff had been charged, under the former statute, with sale of a magazine which, it was stipulated, was obscene, indecent, and impure within the meaning of the statute. There was, however, no showing that the accused had knowledge of the content of the magazine. The criminal case was continued, without findings, pending the outcome of the declaratory judgment proceeding.

The Court ruled that Section 28A was not in violation of either the state or the federal Constitution. It noted that the Supreme Court of the United States had invalidated a Los Angeles city ordinance punishing the offering for sale of obscene or indecent books, where the ordinance had been construed as not requiring knowledge on the part of the accused of the contents of the book. Such an ordinance was held to be an abridgment of freedom of the press in violation of the Fourteenth Amendment. The Supreme Judicial Court saved Section 28A from a similar defect by reading it "as if it contained the words 'knowing it to be obscene, indecent or impure.'"
While it is a "cardinal principle" that a court should resort to interpretation in order to avoid coming to grips with serious doubts as to constitutionality, it is of possibly equal importance that courts observe the distinction between interpretation and amendment. This distinction is, of course, easier to state than to define. It may be one thing to give a restrictive, even violently restrictive, meaning to a word that is actually in a statute in order to dissipate doubts that would arise if a more expansive meaning were given to the word, and something else again to read into a statute words which the legislature did not put there in order to avoid similar doubts. Whether the distinction is more than a verbal one, at least in many instances, is debatable. "Reading in" additional language, as in the Demetropoulos case, may fall into the category of interpretation on the score that the legislature clearly would have written the language into the statute had it adverted to the constitutional necessity of such language. There is, on the other hand, danger that courts which adopt the "reading in" technique may end with substituting for legislative language words that the judges would have written into the statute if they had been the legislators. The authorities on the point are not at all in harmony, and the reasons for the conflicting decisions are not too carefully spelled out.

Other instances of judicial restraint in meeting constitutional issues were Board of Health of Franklin v. Hass, where the Court held that the party seeking to raise the question of validity of a statute lacked standing to do so because of failure to exhaust administrative remedies, and Donahue v. Selectmen of Saugus, where the Court held that the question was prematurely raised, since the section of the statute involved in the litigation was separable from the section the validity of which was sought to be drawn into question.

§10.2. Self-incrimination: Test. The difficulty and perhaps the futility of devising verbal formulas to define constitutional doctrines was illustrated in Sandrelli v. Commonwealth. There the Supreme Judicial Court purported to set up a criterion for application of the constitutional provision that "No subject shall be . . . Compelled to accuse, or furnish evidence against himself." Sandrelli was called as a witness before a grand jury that was investigating the killing of one Joseph DeMarco, whose bullet-ridden body had been found in a dump. Sandrelli was asked a series of

24 See the concurring opinion of Mr. Justice Douglas, in United States v. Rumely, 345 U.S. at 48, 73 Sup. Ct. at 547, 97 L. Ed. at 776.
25 Cases pro and con are collected in Sutherland, Statutory Construction §4924 (Horack ed. 1943).
2 Mass. Const., Declaration of Rights, Art. XII.
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questions, most of which he refused to answer, although admonished by the court to do so, under claim of privilege against self-incrimination. He was thereupon ordered to show cause why he should not be adjudged in contempt.

At the contempt hearing Sandrelli attempted to prove, through testimony of the district attorney and his assistant, and by a tape recording of a radio broadcast by the former, that the officials had made public statements in which they proposed to prove that Sandrelli was in the company of the deceased the night before, or the early morning of the day on which the body was discovered, and also that Sandrelli was the owner, in fact, though not of record, of the restaurant in question. He also offered newspaper reports of similar tenor, records of the local licensing board with respect to ownership of the restaurant, and his own probation record. All the evidence was excluded, and Sandrelli was found guilty of contempt and sentenced to imprisonment. The decision noted was on writ of error to review the conviction.

At the contempt trial, Sandrelli asked for a ruling that "the court cannot adjudge the accused in contempt unless it is perfectly clear from a careful consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity." This request was denied, and the court ruled instead that "the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer," and that "there must be real or substantial danger that the answers . . . would lead to a charge of crime or to the securing of evidence to support a charge of crime."

The Supreme Judicial Court, at the outset of its opinion, undertook to pass upon the correctness of the ruling that, it will be observed, was made practically in vacuo, since the trial judge had excluded all the proffered evidence of the circumstances, against the background of the questions, most of which he refused to answer, although admonished by the court to do so, under claim of privilege against self-incrimination. He was thereupon ordered to show cause why he should not be adjudged in contempt.

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3 These were: "a. Will you tell us, sir, if you are acquainted with the young lady, approximately twenty years old, who goes under the name of Mickey Taylor? b. Now sir, are you acquainted with a young lady, approximately eighteen years old, who goes under the name of Carolyn Diabo? c. Tony, were you born on August 26, 1908? d. Did you know a man by the name of Peter Jordan? e. Will you tell us what time it was on the 11th or 12th that Joseph Angie DeMarco arrived at your restaurant, the Coliseum, at 144 Hanover Street? f. Now in regard to the early A.M. hours of November 12, 1959, do you know what time Joseph Angie DeMarco left the Coliseum? g. Now sir, directing your attention to November 11, that is the holiday, and November 12, 1959, will you tell us whether or not you were in the city of Boston, Mass.? h. Now, sir, will you tell us whether or not you are in the city of Cambridge, Mass., today?" The witness answered the questions "c" and "h."

4 This language was taken bodily from the opinion in Arndstein v. McCarthy, 254 U.S. 71, 72, 41 Sup. Ct. 26, 26, 65 L. Ed. 138, 142 (1920).

5 The trial judge, although he refused to admit in evidence the probation record of the witness, nonetheless announced that he was "taking notice" of it, and would have its contents in mind as facts he would "consider in determining the issue."
which the allegedly incriminatory questions had been put. In the second part of its opinion, the Court ruled that the exclusion of the evidence was error, presumably because it deprived the accused of an opportunity to have a judicial determination whether compelling answers to questions which were harmless on their face would in fact violate the constitutional prohibition of compulsory self-incrimination.

Although the Court reversed the judgment of conviction for contempt on account of the improper exclusion of the defendant's evidence, it sustained the trial judge's rulings as to the test of questions, the answers to which would be incriminatory within the meaning of the constitutional prohibition. The issue, as the Court saw it, was whether the Constitution means that the claim of privilege must be allowed unless it is perfectly clear that answers to the questions will not tend to incriminate, or that the claim of privilege must be disallowed unless there is reasonable ground to apprehend danger to the witness if he is compelled to answer.

In concluding that the latter rather than the former proposition correctly stated the law, the Court said that it was following, as it had in an earlier case, the decision of the Supreme Court of the United States in Mason v. United States, in which a comparable provision of the federal Constitution was construed. The Court went on to say that it rejected the doctrine of more recent decisions of the Supreme Court because those decisions, while they did not overrule Mason, undoubtedly "substantially modified" it. The Court preferred what it regarded as the classic doctrine expressed by the Queen's Bench in Regina v. Boyes, approved by the Supreme Court of the United States in Mason: "To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer . . . ."

The nuances among these various statements of doctrine are so subtle as to make them seem to border on exercises in semantics. At best, the treatment of such statements as definitive rules tends to make courts forget that the declaration of the privilege against self-incrimination, like the other great ordinances of bills of rights, is the expression of a basic ideal, and that the judicial function is to determine the applicability of the ideal in various factual situations. Likely to be overlooked is the teaching of Mr. Justice Miller, when he said, over

7 244 U.S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198 (1917).
8 U.S. Const., Amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
eighty years ago, of the technique of expounding the due process clause of the Fourteenth Amendment:

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the states. 12

Despite the broad generalizations found in some of the reported opinions, examination of the decisions themselves reveals that what a court traditionally does is to inquire whether, on the facts of the particular case, the claim of privilege comes within the policy set forth in the instrument that created the privilege.

Thus, in Regina v. Boyes, 13 a witness was questioned about an election bribe to which he had been privy. He claimed privilege (as he was undoubtedly entitled to do), whereupon the Crown counsel gave him a pardon under Great Seal. He persisted in his claim of privilege, arguing that, while the pardon would protect him from prosecution in the courts by the Crown, it would not protect him from impeachment by the House of Commons in Parliament. Chief Justice Cockburn rejected the claim, saying that the fear of the asserted eventuality was ridiculous, since the Commons had never undertaken to punish directly in such cases. 14

13 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861). It is of some interest that this, like the Sandrelli case, was a proceeding in the nature of an advisory opinion. It was not a prosecution of the witness for unwarranted assertion of privilege, but it was an anomalous projection of the case against the original defendant pursuant to a stipulation that if the testimony of the witness (he apparently did not press his claim of privilege) was in fact incriminatory, it would not be held against the defendant. Chief Justice Cockburn protested against this procedure, and ordered that it should not be followed in any other case. 1 B. & S. at 328, 121 Eng. Rep. at 737.
14 In a portion of the opinion not quoted in the Sandrelli case, the following passage occurs: “We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: there being no doubt, as observed by Alderson, B., in Osborn v. The London Dock Company (10 Exch. 698, 701), that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a Judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.” 1 B. & S. at 330, 121 Eng. Rep. at 738.
Again, in *Mason v. United States*, a grand jury, investigating gambling, asked a witness whether cards were being played at the table at which he sat in an Alaska billiard hall. The Court held that no sufficient showing had been made of circumstances indicating that an answer would tend to involve the witness in danger. It pointed out that it is not unlawful to be a spectator at a card game, or even to join in a game if it is not being played for valuable stakes. This, of course, is an almost unbelievably naïve appraisal of the situation since, as Judge Hastie more recently pointed out, "the normal connotation of a card game in a frontier saloon is not that of a game of Old Maid on a supervised public playground." The decision may have been wrong, but what is important for present purposes is that the technique of the Court was to inquire whether the record showed the existence of circumstances which would attach a sinister significance to questions which, on their face, were innocent.

Certainly, the Court showed a higher degree of sophistication in *Hoffman v. United States*, in which a grand jury investigating racketeering asked a witness what his occupation was, and whether he had talked with one Weisberg during the week. It was shown that the witness had a public reputation of being a racketeer, and that Weisberg was being sought as a witness before the grand jury, but could not be located. The Court agreed that, in these circumstances, the claim of privilege was well taken. It took cognizance of the fact that the chief occupation of some persons involves violation of law, so that an answer by Hoffman to the question as to his occupation might well be directly incriminating. Furthermore, questions as to contacts with Weisberg, put to one with Hoffman's background, might well call for answers that would constitute links in a chain of proof of charges that Hoffman was unlawfully sheltering the fugitive witness.

It is possible, of course, that a court can be oversophisticated in arriving at conclusions as to the significance of surrounding circumstances. One case, for example, arose out of an investigation by the House Committee on Un-American Activities into Communist infiltration into unions. A witness was questioned as to his acquaintance with a number of named individuals, and as to positions they had held in a union. When it was shown that the witness was general secretary of the union, that he had been suspected of Communism, and that the persons named in the questions had also been suspected of Communism, the majority of the Court was of the opinion that these circumstances justified the witness in his refusal to answer, because his answers might have been used as links in a chain of proof of charges of filing false non-Communist affidavits. Mr. Justice Harlan dissented. He felt that the majority, in making this judgment of the significance of the surrounding circumstances, was "painting with

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16 United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952).
too broad a brush.” His quarrel, however, was with the judgment which the majority made, not with the fact that they had made a judgment.

If the Massachusetts Court, in the Sandrelli case, really differs with the Supreme Court of the United States on the doctrine of self-incrimination, it is, of course, perfectly free to do so. Fourteenth Amendment due process does not require states to accept the federal standards of the privilege against self-incrimination. Indeed, on more than one occasion, the Court has refused to follow the Supreme Court of the United States in determining the scope of regulatory power left to the state by the due process concept.

§10.3. Sunday laws: Constitutionality. The so-called Lord’s Day Statute was sustained against attack on constitutional grounds by the Supreme Court of the United States. A divided federal district court of three judges had held the statute invalid, both because Section 5, in prohibiting the doing of business on Sundays, constituted an establishment of religion, and because Section 6, in setting up “an almost unbelievable hodgepodge” of exceptions to the prohibition, constituted a denial of equal protection of the laws.

In the Supreme Court the case was one of four appeals in which the Court reviewed the Sunday laws of Maryland and Pennsylvania, as well as those of Massachusetts. The principal opinion was written in the case from Maryland, and the statutes of that state, as well as those of Pennsylvania and Massachusetts, were upheld.

As to the equal protection objection, the Court pointed to the “wide scope of discretion” that a state is permitted in making legislative

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19 349 U.S. at 212, 75 Sup. Ct. at 708, 99 L. Ed. at 1013.


§10.3. 1 G.L., c. 136, generally, and §§5, 6, specifically.


4 176 F. Supp. at 472.

5 The other cases were McGowan v. Maryland, 366 U.S. 420, 81 Sup. Ct. 1101, 6 L. Ed. 2d 393 (1961); Two Guys v. McGinley, 366 U.S. 582, 81 Sup. Ct. 1185, 6 L. Ed. 2d 551 (1961); Braunfeld v. Brown, 366 U.S. 599, 81 Sup. Ct. 1144, 6 L. Ed. 2d 563 (1961).

classifications, and also to the presumption of validity which, Chief Justice Warren said, "has not been dispelled." 7

As to the objection that the statutes were forbidden "laws respecting an establishment of religion," the Court acknowledged that in their colonial origins the statutes in question had apparent "religious orientation." 8 It pointed out, however, that from about the middle of the eighteenth century the purpose of the legislation "was no longer solely religious," 9 and that increasingly "secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come." 10 The conclusion was reached that the statutes "for the most part, . . . have been divorced from the religious orientation of their predecessors," 11 and, "as presently written and administered, most of them, at least, are of a secular rather than of a religious character . . . ." 12

Justices Frankfurter and Harlan concurred separately, on the ground that, over the centuries since the first Sunday statute of Henry VI in 1448, 13 there has been an evolutionary institutionalization of Sunday, so that, "for many millions of people life has a hebdomadal rhythm in which this day, with all its particular associations, is the recurrent note of repose." 14 This fact, in the light of broadened concepts of the scope of state police power, 15 is ample justification for the legislation.

In the Maryland case 16 and the Two Guys case, 17 both of which involved ordinary commercial operations in violation of the statutes, Justices Brennan and Stewart joined in the opinion of the Court. They dissented, however, in the Braunfeld 18 and Gallagher 19 cases. They felt that application of Sunday closing laws to Orthodox Jews or others under a religious obligation of Sabbatarian observance con-

15 366 U.S. at 497n, 81 Sup. Ct. at 1174n, 6 L. Ed. 2d at 439n.
17 366 U.S. 582, 81 Sup. Ct. 1135, 6 L. Ed. 2d 551 (1961).
stated a prohibition of free exercise of religion. Mr. Justice Douglas dissented in all four cases, because he felt that any application of Sunday closing laws interfered with free exercise of religion.

The decisions apparently establish the firmness of the foundation of Sunday closing laws, except perhaps such as may be found "to use the State's coercive power to aid religion." There remain a number of prudential questions (which may have been pointed up by the litigation) as to the desirable scope of prohibition and of exemption therefrom. These questions have been complicated by recent legislation making the provisions of the Sunday closing laws applicable on certain legal holidays. The Governor of Massachusetts appointed a committee of citizens in various walks of life to investigate and recommend revisions of the Sunday laws. The committee has held hearings, and has submitted majority and minority reports which may result in action by the 1962 session of the legislature.

§10.4. Illegal searches and seizures: Evidence in state criminal cases. On June 19, 1961, the Supreme Court of the United States resolved, with apparent finality, the controversial issue of the availability of the fruits of illegal searches and seizures as evidence in criminal cases. It decided that, by virtue of the due process clause of the Fourteenth Amendment, such material may not be used at trials in state courts.

It had been the established law of the federal courts, since 1914, that material seized, at least by federal officers, in violation of the search-and-seizure clause of the Fourth Amendment is excludable from federal criminal trials. At first, and for many years, the exclusionary rule did not apply to unlawful seizures by nonfederal personnel. In 1949, however, the Supreme Court ruled that unreasonable searches and seizures, which if conducted by federal officers would violate the prohibition of the Fourth Amendment, are forbidden by the Fourteenth Amendment to state officers. At this time, however,

20 This conclusion was reached by the Supreme Judicial Court. Commonwealth v. Chamberlain, 1961 Mass. Adv. Sh. 1091, 175 N.E.2d 486, was a prosecution against the owner of a coin-operated automatic laundry for leaving his premises open to public use on Sunday. The Court concluded that the conduct of the defendant constituted a violation of the statute, but withheld its decision in order to be guided in its ruling on the validity of the statute on the federal constitutional points by the result of the appeal in the Crown Kosher Super Market case.


23 At the present writing the reports of the committee have not been printed and have been made available only in the form of mimeographed press releases.


3 Ibid.

the Court refused to extend to state courts the obligation to exclude from evidence the products of unlawful seizures. Later, in 1960, in the light of the new doctrine that the Constitution forbids unreasonable searches and seizures by state, as well as federal, officers, the exclusionary rule of *Weeks* was extended so as to apply in federal prosecutions to material illegally seized by state officers and given by them "upon a silver platter" to federal prosecutors. Thus *Mapp*, by overruling that part of *Wolf* that refused to extend the exclusionary rule to trials in state courts, rounded out the evolution of a doctrine that material obtained by search and seizure in violation of the Constitution is not proper evidence.

The doctrine announced by the Supreme Court is completely at variance with the rule that had long obtained in Massachusetts and in a great many other states. In many jurisdictions it had been well established that evidence, if relevant, was admissible, no matter how obtained, even if a violation of a constitutional provision was involved in the seizure.

The rule of the *Mapp* case, as a statement of the supreme law of the land, is, of course, mandatory in all state criminal prosecutions, but the case itself leaves unanswered many procedural questions as to how the substantive doctrine is to be applied.

A litigation in the United States District Court for the District of Massachusetts indicates one way in which the constitutional doctrine may not be enforced. A newsdealer, contending that certain allegedly obscene publications had been unlawfully seized by the local police, applied to the federal court for their return to him prior to his trial in the state court. In an unreported opinion, Caffrey, J., denied relief, saying: "A proper respect for federal-state relations requires that this complaint be dismissed on the authority of the *Stefanelli* case." Subsequently the same plaintiff applied to a district court of three judges for an injunction against prosecution in the state court and against use as evidence of the seized publications. This relief also was denied, the court pointing out that the plaintiff's recourse was to litigate through the state courts and, if unsuccessful there, to seek review upon the federal question in the Supreme Court of the United States. Although these decisions were handed down before

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7 A tabulation of state court decisions, prior to the Weeks case, and prior and subsequent to the Wolf case, is set forth in an appendix to the majority opinion in Elkins v. United States, 364 U.S. 206, 224, 80 Sup. Ct. 1437, 1448, 4 L. Ed. 2d 1669, 1682 (1960).
8 U.S. Const., Art. VI, cl. 2.
Mapp was decided, there is no reason to believe that the principle of federalism upon which they rest is not still applicable.

Prior to the decision of the Mapp case the Massachusetts legislature provided for the establishment of a special commission to recommend laws concerning the use of illegally obtained evidence. The commission has been formed, and it will likely present legislative proposals for procedure to apply the rule of exclusion. When there is, as in this matter, no controlling act of Congress, the implementation of federal constitutional doctrine by state courts must be by state procedural law.

A further problem, one that can be resolved only by judicial decision, is whether the exclusionary rule has retroactive operation, i.e., whether it can be the basis of collateral attack upon convictions in decided cases prior to Mapp in which illegally obtained evidence was used by the prosecution. When the Supreme Court decided, in 1956, that denial of a trial transcript for an indigent defendant's appeal could constitute a denial of equal protection of the laws, the new doctrine was later held to be applicable to set aside the conviction of a person whose appeal had been prejudiced by the unavailability to him of a trial transcript.

§10.5. Fair trial: Prejudicial publicity. Another chapter in the Brink's Robbery Case, which has been noted in these pages before, was written by the United States Court of Appeals for the First Circuit.

The case, which grew out of the spectacular robbery involving a loss of over $1,200,000 in cash, resulted in conviction of Geagan and seven others in the state court. The Supreme Judicial Court, rejecting the contention that massive prejudicial pre-indictment and pre-trial publicity emanating from official sources had made it impossible for the defendants to obtain a fair trial, affirmed the conviction, and the Supreme Court of the United States denied certiorari. A collateral attack upon the conviction was made by way of a petition for habeas corpus in the United States District Court. That court determined that it had jurisdiction, but on the merits it agreed with the Supreme Judicial Court that the record of the voir dire examination of jurors

12 Resolves of 1961, c. 103.


sufficiently showed that the jurors actually selected for the trial were free from prejudice caused by the publicity. Accordingly, the petition for habeas corpus was denied. After the appeal was argued, the Supreme Court decided the case of *Irvin v. Dowd*, in which it set aside a murder conviction on the ground that massive pre-trial publicity, inspired in part by public officials, had so inflamed the community, and the adjoining county to which the case was removed for trial, that it had apparently been impossible to find twelve jurors without any preconception of the defendant's guilt. This, the Supreme Court ruled, was incompatible with the constitutional requirement of a fair trial.

The Court of Appeals distinguished *Irvin v. Dowd*, first, on the score that that case, involving as it did particularly revolting multiple murders, was calculated to arouse a different kind of public hysteria than was the Brink's robbery, which "excited widespread public interest and no little general public amazement." Secondly, the two cases were unlike in that "no very serious difficulty, as in *Irvin v. Dowd*, was encountered in finding jurors who at least professed not to have formed an opinion of guilt." Accordingly, the denial of the petition for habeas corpus was affirmed.

The convicts have applied for a writ of certiorari, but, after four months of the October, 1961, Term, the Supreme Court has not acted upon the petition. It may be that the Court is holding the case pending decision of another case involving what may be comparable issues. *Beck v. Washington* raises questions as to whether the indictment and trial of a union official for misuse of union funds were vitiates by massive adverse publicity. The case was argued November 14, 1961.

The Supreme Court, by its decision in *Irvin v. Dowd* and its acceptance of jurisdiction in *Beck v. Washington*, has indicated concern over the impact of free and loose discussion of defendants and cases upon the administration of criminal justice. In the process of accommodating the public interest in punishing the guilty to the equally important interest in having fair and impartial trials, the Court is faced with the necessity of drawing extremely fine lines of distinction. The task of drawing the lines is not simplified by the pleadings in the *Geagan* case. As has been pointed out in the reported opinions in the case, the defendants did not make the conventional motions for change of venue or for continuance. Their apparent theory was that the adverse publicity would have been equally prejudicial in any

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6 292 F.2d 244, 247 (1st Cir. 1961).
7 Ibid.
8 292 F.2d 244 (1st Cir. 1961).
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county to which the trial might be transferred, and they did not want, by asking for a continuance, to waive their statutory right to be discharged on their own recognizances unless placed on trial within six months after their arrest. Instead, they moved for dismissal of the indictments against them, on the ground that it would be impossible for them to have a trial at once speedy and fair.

In other cases in which community feelings against the accused have vitiated trials for want of fairness, the prosecution has had the alternative of postponing the trial until a more neutral atmosphere has been established in the locality. In the Geagan case, however, such an alternative did not exist in any real sense. The trial could have been postponed, but only upon condition of release of the accused from custody, so that there would have been no assurance of their availability for trial at any future date.

§10.6. General. Certain other decisions handed down during the 1961 Survey year should be noted at this point, although they do not seem to call for extended discussion.

The constitution of Massachusetts, unlike that of the United States, does not contain an express prohibition of multiple jeopardy for the same crime. That type of constitutional provision, however, has been said to be declaratory of a basic principle of the common law, and conversely it may be said that judicial application of the principle is on the level of constitutional adjudication. In Massachusetts, the principle is implemented, in part, by legislation.

The principle and the statute came up for construction and application in Commonwealth v. Burke. There the accused had been tried under an indictment charging murder in the second degree. The jury returned a verdict of not guilty of murder in the second degree, but guilty of manslaughter. Sentence was imposed on the manslaughter verdict, but on appeal the judgment was reversed on account of errors at the trial. At a new trial on the original indictment, the accused filed a plea in bar to so much of the indictment as charged murder. On report of the question by the trial judge, the Supreme Judicial Court held that the plea in bar should be sustained, since the appeal from the manslaughter conviction waived only immunity from a second trial for manslaughter, and the verdict of not guilty of murder

11 G.L., c. 277, §72.

§10.6. 1 U.S. Const., Amend. V: "... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."
2 Commonwealth v. Roby, 12 Pick. 496 (Mass. 1832).
3 G.L., c. 265, §7: "A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits; but he may plead such acquittal in bar of any subsequent prosecution for the same crime...."
6 G.L., c. 278, §80A.
Was as effective to bar a second prosecution for murder as it would have been if returned on an indictment charging murder and manslaughter in separate counts.

Twice the Supreme Judicial Court dealt with issues of federalism. *Courtney v. Charles Dowd Box Co.*\(^7\) was a suit by a union to enforce a collective bargaining agreement against an employer whose labor relations were apparently assumed to be subject to the provisions of the National Labor Relations Act, as amended.\(^8\) It was contended that, since Section 301(a) of the Taft-Hartley Act\(^9\) gives federal district courts jurisdiction of suits for violation of collective bargaining agreements, state courts are ousted of jurisdiction to decide such cases. The Court held that state and federal courts have concurrent jurisdiction of such cases, saying: “In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts.”\(^10\) The defendant applied for a writ of certiorari, which was granted,\(^11\) but the case was not reached for argument at the October, 1960, Term of the Supreme Court. It has been carried over as Case No. 33 in the October, 1961, Term.\(^12\)

In another case,\(^13\) an insurance company claimed immunity from the excise\(^14\) on domestic insurance companies measured by their gross premiums for policies written during the tax year, insofar as it took into account premiums from policies covering risks in Hong Kong and Surinam. The company argued that, in the light of the Supreme Court’s decision\(^15\) that the business of insurance is interstate commerce which is subject to the Sherman Act,\(^16\) the writing of the Hong Kong and Surinam policies was foreign commerce, and as such exempt from state taxation. The Supreme Judicial Court rejected this contention, pointing out that, whatever the situation might be otherwise, the McCarran Act,\(^17\) as interpreted by the Supreme Court,\(^18\) fully removed any negative implications of the commerce clause\(^19\) that might be taken

\(^{12}\) On February 19, 1961, the Supreme Court made it unnecessary for the state court to submit to involuntary “abdication” of its jurisdiction. The decision noted was affirmed. 368 U.S. 502, 82 Sup. Ct. 519, 7 L. Ed. 483 (1962).
\(^{14}\) G.L., c. 63, §22.
\(^{19}\) U.S. Const., Art. I, §8, cl. 3.
to bar taxation by a state of insurance companies doing business within its borders. The company also contended that the tax was repugnant to the import-export clause of the federal Constitution, but the Court pointed out that the tax was not on the policies (if, indeed, the policies were properly called exports) but on the franchise of the company. The company also challenged the tax as wanting in due process of law. The contention was that the gross premiums from the foreign policies were not delivered to the company in Massachusetts, but were paid to and retained by its foreign representative abroad. Only net balances, after deducting amounts necessary to pay claims and expenses, were remitted to the local company. Hence, it was argued, the gross premiums for the foreign risks were beyond the geographical jurisdiction, and thus outside the tax jurisdiction, of Massachusetts. Again, however, the Court pointed out that the tax is an excise upon the franchise of a domestic corporation, the valuation of which is a matter traditionally committed to the broad discretion of the state. On the record before it, the Court was unwilling to conclude that the use of gross premiums as a measure of the value of the franchise was other than a “fair approximation” of the value of an admittedly taxable subject.

In another case, the Court rejected a contention that would have put common law doctrine beyond the power of the legislature to change. It is settled common law that an out-of-state administrator of a foreign decedent is not amenable to the process of local courts, because his rights and liabilities cannot extend beyond the jurisdiction of the sovereign which appointed him. In 1952 the Massachusetts legislature amended the statute which provides that nonresident motorists, by using the highways of the state, constitute the registrar of motor vehicles an attorney upon whom may be served process in an action growing out of an accident in which the motorist has been involved while operating a vehicle on such highway. The amendment provided that the registrar should also be authorized to accept service of process in actions against the executors or administrators of nonresident motorists. The present case grew out of an accident that occurred while a Connecticut motorist was driving a Massachusetts resident along a Massachusetts highway. Neither the driver nor the passenger survived the accident. The latter's administratrix brought a wrongful death action against the person who had been appointed administrator of the driver's estate by a Connecticut court. There was no ancillary administration of the driver's estate in Massachusetts. The Supreme Judicial Court found no want of due process in the

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20 Id. §10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . ."
23 Beaman v. Elliot, 10 Cush. 172 (Mass. 1852).
25 G.L., c. 90, §3A.
statute which subjected the foreign administrator to the jurisdiction of Massachusetts courts. It pointed out that the same considerations which sustained the right of Massachusetts to make effective service of process upon the transient motorist himself were persuasive of the right of Massachusetts to reach his personal representative in case he does not survive to be sued in propria persona.