Chapter 10: Constitutional Law

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§10.1. Racial discrimination in housing. Discrimination against members of minority groups on account of such things as race, creed, or national origin has been a substantial part of the stuff from which constitutional doctrine has been fashioned in recent years. It is a fair generalization that, when such discrimination is practiced by or under authority of a state, it is in violation of the equal protection clause of the Fourteenth Amendment and may be forbidden by judicial action, either directly under the Constitution or under appropriate federal legislation. An equally fair generalization is that discrimination not practiced by or under authority of a state is not in violation of the Constitution. The shortcoming of these generalizations is that it is often difficult to determine whether a discrimination is by a public agency or a private individual and, indeed, whether given.
conduct constitutes discrimination, no matter who may be the agent whose conduct is in question.\(^5\)

Even when private discrimination is not forbidden by the Constitution, however, it does not follow that individuals have the constitutionally protected right to practice it. One of the features of our system of federalism is that social objectives not attained by federal law can often be reached by state law, and vice versa.

Some time ago it was noted in these pages\(^6\) that Massachusetts legislation contains a complex of statutes designed to protect minority groups and their members from invidious discriminatory treatment by others. Beginning with prohibition of discrimination against patrons or would-be patrons of commercial establishments open to the public,\(^7\) the statutes deal with group libel,\(^8\) selection of public\(^9\) and private employees,\(^10\) tenants in public housing,\(^11\) and students in schools and colleges\(^12\) on the basis of race, color or religion. The pattern has spread so as to forbid like discrimination in the rental and sale of "publicly assisted" housing accommodations,\(^13\) and, more recently, of "multiple family" or "contiguously located" housing facilities, whether "publicly assisted" or not.\(^14\)

The validity of the "multiple family" restriction was placed in issue in *Massachusetts Commission Against Discrimination v. Colangelo*.\(^15\) There, one Fowler, a Negro, sought to rent an apartment in a 120-unit apartment building, which had been privately financed without any governmental guaranty, insurance or other public assistance. When his application was refused, he complained to the commission\(^16\) against the owner and the rental agent of the building. The commission, after hearing (in which the respondents did not participate, save to question the constitutionality of the proceeding), found that Fowler had been refused a lease because he was a Negro, and ordered the respondents to cease and desist from discriminating against Fowler and to give him a lease of an apartment in the building. The commission petitioned the Superior Court for an enforcement order, and


\(^7\) G.L., c. 272, §§92A, 98.

\(^8\) Id. §98C.

\(^9\) Id. §98B.

\(^10\) Id., c. 151B, §4(1-5).

\(^11\) Id., c. 121, §26FF(e).

\(^12\) Id., c. 151C.

\(^13\) Id., c. 151B, §4(6).

\(^14\) Ibid., as added by Acts of 1959, c. 239, §2.


\(^16\) G.L., c. 6, §56; c. 151B, §5.
on report to the Supreme Judicial Court, the full Court, with one dissent, directed that an enforcement decree should issue.

The claim of the respondents, laid upon both Federal and state Constitutions, was, in substance, that the statute, in requiring them to rent private property to persons other than tenants of their choice, unlawfully invaded their "liberty of contract." This might have been a persuasive claim in a day when judges, state and federal, identified expressions of laissez faire economic doctrine with constitutional dogma, but that day is long past in the history of constitutional adjudication. Indeed, in the only reported case in which comparable legislation was invalidated, only two judges questioned the power of the state to impose non-discrimination limitations upon the property owner's power of disposal of his property. The other three members of the majority saw an equal protection objection to the statutory prohibitions applying only to "publicly assisted" housing, and there were overtones suggesting that this objection was based mainly on retroactive aspects of the statute (the property owner had a mortgage, insured by the Federal Housing Administration, which antedated the statute).

While it would be unrealistic to say that constitutional due process clauses impose no limitations upon legislative powers over property rights which courts can enforce, courts have come to recognize that they may not properly question the validity of statutes unless the social objective is clearly beyond the legislative power, or unless the public benefit is so clearly disproportionate to the individual disadvantage.


18 Invoked were the due process clause of the Fourteenth Amendment of the Federal Constitution; Article I of the Massachusetts Declaration of Rights, including among "natural, essential, and unalienable rights," "that of acquiring, possessing, and protecting property"; Article X of the same Declaration: "Each individual of the society has a right to be protected by it in the enjoyment of his life, Liberty and property, according to standing Laws"; and Part II, c. 1, §1, Art. IV of the Massachusetts Constitution, which sets forth that "full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth . . . ."


as to force the conclusion that the restriction of individual freedom is arbitrary. In Colangelo, all members of the Court, including the dissenter, were agreed that elimination or reduction of discrimination on the basis of race or color was a proper public objective. The dispute within the Court was as to the means chosen to achieve the legislative purpose. While it may be, as the dissenting opinion complains, that the analogies cited in the Court's opinion do not compel the conclusion that the statute before the Court was a valid one, this is beside the point. The basic point is that when legislation is challenged on due process grounds its validity need not be affirmatively established by or for judges. Its enactment by the legislature gives it prima facie validity. The advocates of invalidity have the burden of establishing arbitrariness. The dissenting opinion hardly sustains such a burden by the rhetorical device of suggesting that the statute is symptomatic of Chinese Communism.

There was also division in the Court in Colangelo with respect to the scope of the commission's order. The majority decreed enforcement of those portions of the order which called upon the respondents to cease and desist from discriminating against Fowler and to give him a lease of an apartment. The order also directed the respondents to cease and desist from discriminating among prospective tenants at the apartment building on the basis of race, creed, color or national origin. This, and other provisions of the order covering issuance of instructions to employees at the apartment building, posting notices of the commission's order, including reference to it in advertising, compensation of the complainant for damages occasioned by the violation, and reporting on compliance, were denied enforcement, one Justice dissenting in part.

The opinion on these points is not as thoroughly articulated as are those parts dealing with the substantive merits. There appeared to be a desire on the part of the Court, since the case was one of first impression, to have the commission give further consideration to the scope of the order, particularly as to unspecified portions of it which might be regarded as ultra vires. Mr. Justice Spiegel, while spelling out his view that the order properly prohibited general racial discrimination in tenant selection as well as specific continued discrimination against the complainant, did not explain his agreement with

25 The majority opinion pointed to (1) cases sustaining anti-discrimination legislation in (a) places of public accommodation and resort, (b) private employment, and (c) union membership; (2) cases upholding restrictions on land use and enjoyment by (a) zoning, (b) compelled remodeling, and (c) establishment of historic districts; (3) cases sustaining public rent control of private property; and (4) cases sustaining prohibitions of race discrimination in publicly assisted housing facilities.
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the majority on remanding the subsidiary provisions of the order to
the commission.

This aspect of the case raises the same type of problem that has
caused difficulties for courts reviewing orders of federal regulatory
agencies.\textsuperscript{27} The drafting of an agency order, like the drafting of an
equity decree, frequently involves the striking of a delicate balance.
If the order is too specific, and too narrowly drawn, it can, perhaps,
be too easily evaded and frustrated. If, on the other hand, its scope
is made broad, the respondent may find himself facing contempt or
other enforcement proceedings for conduct, with respect to the legality
of which he has had no hearing. The problem is compounded in the
case of administrative enforcement orders. Typically, as in the case
of orders of the Commission Against Discrimination,\textsuperscript{28} they find their
sanctions in judicial enforcement orders, which, in turn, are sanctioned
by the court's contempt power. The statutory scheme, however, is
one of leaving to the agency, in the first instance, the determination
of whether given conduct constitutes illegal action, e.g., discrimination.
An order of too broad scope may put a court, in the exercise of its con­
tempt power, in the position of having to do the work of the agency,
namely, determine in the first instance whether conduct of a respond­
ent amounts to a second violation of the statute.

Although \textit{Colangelo} appears to be a case of first impression in Mas­
sachusetts on the point of scope of administrative orders, it is not un­
likely that, particularly as experience is gained under the Administra­
tive Procedure Act,\textsuperscript{29} problems of this type will recur. The Supreme
Judicial Court, with the assistance of the bar and of the agencies con­
cerned, will have to fashion guidelines for the development of new
doctrine in this area.

§10.2. Illegal searches and seizures: Evidence in state criminal
cases. When, on June 19, 1961, the Supreme Court of the United
States decided that material obtained by law enforcement officers
through unreasonable search and seizure may not be used as evidence
in state criminal trials,\textsuperscript{1} its ruling marked, in one sense, the culmina­
tion of evolution of a legal doctrine.\textsuperscript{2} In another sense, however, it
stands as the starting point of the development of doctrine.

The ruling that Fourteenth Amendment due process will not tol­
erate a prosecutor's use of illegally obtained evidence gives rise to a
variety of questions, particularly in states, such as Massachusetts, in
which the law had been based upon a diametrically contrary assump­

\textsuperscript{27} FTC v. Ruberoid Co., 343 U.S. 470, 72 Sup. Ct. 800, 96 L. Ed. 1081 (1952);

\textsuperscript{28} G.L., c. 151B, §§5, 6.

\textsuperscript{29} Id., c. 30A.

\textsuperscript{1} Mapp v. Ohio, 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Some of these questions were raised in cases decided during the 1962 Survey year.

The question whether the Mapp doctrine would be given retroactive operation has been raised, but has not been categorically answered.4 Commonwealth v. Spofford5 was a prosecution for possession of obscene, indecent and impure pictures for the purpose of exhibition.6 It appeared that two police officers, without warrants, entered the defendant's apartment and took some pictures from a closet shelf. Prior to trial, the defense counsel, "in optimistic anticipation of the Mapp decision,"7 moved to suppress the evidence thus obtained. The motion was denied and, on October 13, 1960, several months prior to the Mapp decision, the defendant was found guilty. The appeal came on for hearing November 6, 1961, and was finally heard January 5, 1962, both dates being subsequent to Mapp. The Supreme Judicial Court ruled that the appeal must be decided on the basis of the law as it stood at the time of decision, and ordered judgment for the defendant.

That this does not mean that all criminal convictions prior to June 19, 1961, will be subject to scrutiny for the taint of illegally obtained evidence at the trials which preceded them was indicated three months later. Dirring, Petitioner,8 was a habeas corpus proceeding, brought after the Mapp decision, to attack the validity of convictions in 1958 for possession of burglaryous implements9 and for unlawfully carrying firearms.10 Although it was testified at the hearing on the habeas corpus petition that the incriminating evidence had been obtained by police search of the trunk of an automobile, the Court sustained dismissal of the petition, indicating that questions as to the admissibility of evidence must be raised in the criminal proceeding, and may not be raised for the first time in a collateral attack upon a conviction. Since it did not appear that the issue of illegal search and seizure had been raised at or before the criminal trial, the Court declined, in the habeas corpus proceeding, to go into the question of the admissibility of the evidence.

As a practical matter, this probably forecloses re-examination of any pre-Mapp convictions on the basis of admission of illegally obtained evidence, since it is extremely unlikely, in the light of the then established law of the Commonwealth, that defense counsel took steps to oppose prosecution use of evidence on such a basis. Indeed, it is intimated that, even if timely objection had been taken at the trial, it

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4 In Dirring, Petitioner, 1962 Mass. Adv. Sh. 1001, 1002, 183 N.E.2d 300, 301, it was said: "Retrospective effect of the Mapp rule is enshrouded in doubt. We do not puzzle as to something which must be, for us, inscrutable."
5 343 Mass. 703, 180 N.E.2d 673 (1962), also noted in §11.7 infra.
6 G.L., c. 272, §28A.
9 G.L., c. 266, §49.
10 Id., c. 269, §10.
would, if overruled, have been unavailing in the absence of a direct appeal from the criminal conviction.\textsuperscript{11}

The scope of the exclusionary rule was one of the points involved in \textit{Commonwealth v. Holmes}.\textsuperscript{12} This was a prosecution for assault and battery with a dangerous weapon, namely, a knife.\textsuperscript{13} It appeared that the accused and two other men were engaged in a drinking bout when an altercation took place and one of the other men was stabbed. The accused went to his own house and got into bed. Later, two police officers, who had been informed about the altercation, were admitted to the home of the accused by the latter's wife. They awakened him, questioned him about the fight, told him that his name had been mentioned and that they would like to "get it cleared up." While helping him dress, they found a knife in his pocket and asked him if this was the knife he used. He replied, "I don't know; it might be." They then took him to a hospital to be identified by the injured man. Although the officers did not have a warrant, the Court ruled that (a) the accused was arrested; (b) the arrest was lawful, because the officers could have reasonably believed that the accused had committed a felony;\textsuperscript{14} and (c) the knife was discovered in a reasonable search incident to a lawful arrest, and could, therefore, be used in evidence against the accused.

Another phase of the scope of the exclusionary doctrine was dealt with in the \textit{Spofford} case.\textsuperscript{15} It appeared that, after the police took some pictures from the defendant's closet, the defendant entered his apartment and was invited to accompany the officers to the police station. During the course of interrogation there, the defendant stated that he had more pictures, and he returned to the apartment where he delivered additional pictures to a policeman. The Court held that the second lot of pictures was inadmissible.

The police questioning, including that as to the existence of other photographs and similar material, received impetus from the improperly acquired material. The defendant's purported consent and the second lot were an offshoot of the original unreasonable search and seizure. Its acquisition was branded with the initial taint.\textsuperscript{16}

The three cases are significant more for the questions they pose than for the precedents they establish. One such question is, whether the standards for implementing the constitutional exclusionary rule are to be found in state or federal law. In \textit{Spofford},\textsuperscript{17} it was said: "The \textit{Mapp} case (p. 655) [of 367 U.S.] seems to foreclose any State fashioning

\textsuperscript{12} 1962 Mass. Adv. Sh. 1005, 183 N.E.2d 279, also noted in §11.7 \textit{infra}.
\textsuperscript{13} G.L., c. 265, §15A.
\textsuperscript{14} Id., c. 274, §1.
\textsuperscript{15} 343 Mass. 703, 180 N.E.2d 673 (1962).
\textsuperscript{16} 343 Mass. at 708, 180 N.E.2d at 676.
\textsuperscript{17} 343 Mass. at 707, 180 N.E.2d at 676.
the incidents of the exclusionary rule within the bounds of due process. We, accordingly, look to Federal law." Yet in Holmes, the lawfulness of the arrest, as well as the fact of arrest to which the seizure was held to be incident, was determined according to state law. A dictum in Dirringer intimates that the issue of exclusion must be raised by following the federal procedure of pre-trial motion for suppression, when feasible, but it is not spelled out whether this result is reached from constitutional compulsion or by adoption of the federal practice as state law. In other areas, the procedure by which claims of federal constitutional right are raised in state courts is determined by state law. Thus, when state law provides that objections to the structure of a jury must be made by pre-trial challenge to the array, not by post-conviction motion for a new trial, a claim of deprivation of constitutional right in the systematic exclusion of Negroes as jurors at the criminal trial of a Negro comes too late when raised by a motion for a new trial, even though the state attorney general admits in open court that such systematic exclusion took place.

There are many other difficult problems of application of the Mapp doctrine. What constitutes "fruit of the poisonous tree"? When is a seizure (without a warrant) incident to an arrest? Where lies the burden of proof on an allegation that there has been an unreasonable search and seizure? What are the criteria of a valid warrant? Some of these and similar questions can probably find answers only in a case-to-case course of decision. Others can be resolved, at least in a fairly categorical way, by resort to a legislative process. Shortly before the Mapp decision was handed down, the General Court cre-

191962 Mass. Adv. Sh. 1001, 1002, 183 N.E.2d 300, 301, citing Segurola v. United States, 275 U.S. 106, 111-112, 48 Sup. Ct. 77, 79, 72 L. Ed. 186, 189 (1927), in which the Court said: "... except where there has been no opportunity to present the matter in advance of trial, ... a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence."

24 Marcus v. Search Warrant, 367 U.S. 717, 81 Sup. Ct. 1708, 6 L. Ed. 2d 1127 (1961). This decision, rendered the same day that Mapp v. Ohio was decided, may have as much impact upon state administration of criminal justice as the Mapp case is having. It is calculated to bring practice under the Massachusetts warrant statute, G.L., c. 276, §§1-6, under close scrutiny. Cf. United States v. Elliott, 210 F. Supp. 357 (D. Mass. 1962).
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ated a commission to make studies and recommendations for statutory regulation of suppression and inadmissibility of illegally obtained evidence. The commission was organized subsequent to the Mapp case, and held one meeting, at which it agreed that an agenda should be formulated. The chairman of the commission, however, has failed to call any further meetings, and the commission has, seemingly, lapsed into innocuous desuetude.

The field assigned to the abortive legislative commission could, and perhaps should, be filled by the courts. The Supreme Judicial Court and the Superior Court appear to have ample statutory authority, and perhaps inherent power to promulgate rules governing the procedures for handling problems involved in the use of illegally obtained evidence. Such rules, drafted with the assistance of an advisory committee of the bar, could provide an efficient and realistic pattern for administration of constitutional doctrine, and could also remove many of the uncertainties presently hovering in this area.

§10.3. Electronic eavesdropping. Closely related to, and potentially identifiable with, unreasonable search and seizure is the technique of invading privacy by surreptitiously listening to conversations by means of concealed electronic devices. One attempt to have the two declared identical was rejected during the 1962 Survey year.

Commonwealth v. Dougherty was a prosecution for murder. The two defendants, upon their arrest, were placed in cells in a police station. Their cells were separated by an intervening vacant cell, but they were able to carry on conversations through the barred openings in the doors at the front of their respective cells. The police had hidden a microphone where it could pick up their conversations so that they could be heard by officers in another part of the building. The conversations so heard were recorded and read into evidence at the trial. Upon appeal from the convictions, the Supreme Judicial Court held that there was no error. Without going into the question whether use of a concealed microphone could constitute a search and seizure within the meaning of the constitutional provision, it held that the police station was not a "constitutionally protected place," so that there was no invasion of a constitutionally protected right of privacy.

26 Resolves of 1961, c. 105.
27 G.L., c. 213, §§. See also id., c. 211, §§, establishing supervisory powers of the Superior Judicial Court.

2 U.S. Const., Amend., Art. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The opinion did not refer to the provision in Mass. Const., Declaration of Rights, Art. XIV: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions."
It thus became unnecessary to pass upon the further question, whether information gained by electronic eavesdropping is properly admissible in evidence.

Eavesdropping, the act of those who “listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales,” 4 is indictable at common law, and, since 1920, eavesdropping by means of electronic devices has been a statutory crime; 5 but, as the Court pointed out, the statute is expressly made inapplicable to persons who install and use such devices on premises under their exclusive control. 6 It was not, however, until 1928 that electronic eavesdropping assumed the dimensions of constitutional problems.

In Olmstead v. United States 7 the United States Supreme Court rejected a contention that unauthorized wiretapping was in violation of the Fourth Amendment, and that, consequently, evidence obtained by such means was inadmissible at a federal criminal trial under the doctrine of Weeks v. United States. 8 Although the wiretap in that case was effected by placing the “tap” wire in direct contact with the telephone line (as contrasted with the more sophisticated technique of placing an induction coil in the vicinity of the line without making contact with the latter), the Court felt it significant that the tapping took place off the defendant’s premises, and there was no physical seizure of any tangible property of the defendant.

This specific doctrine was short-lived. In 1934 Congress passed the Communications Act, 9 which forbids interception and divulgence, by any unauthorized person, of communications covered by the act. 10 In short order, the Court ruled that evidence obtained in violation of the act was inadmissible at a criminal trial, 11 and that information obtained in consequence of an unlawful wiretap is likewise inadmissible. 12 These were the applicable rules of evidence in federal trials, even when the wiretaps were perpetrated by state officers, acting in conformity with state law. 13 Meanwhile, it had been held that there was no federal requirement of excluding wiretap evidence from a state trial. 14 In this line of cases the expressed or implied assumption was that the rule of exclusion, when applicable, was the mandate, not of the Constitution, but of the Communications Act.

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5 G.L., c. 272, §99.
7 277 U.S. 438, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928).
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Notwithstanding this, opinions in cases involving use of electronic eavesdropping devices not covered by the Communications Act take on overtones of constitutionalism, reflecting the dissenting opinions, particularly that of Mr. Justice Brandeis, in the Olmstead case. In 1942 the Court disposed of the objection of one whose conversation was overheard through a detectaphone placed against a partition wall in an office building on the ground that this situation was indistinguishable, in principle, from that in the Olmstead case. But during the next ten years, the Court dealt severely with outrageous police methods in the preparation of cases, and it was not improbably on this account that the Court, in 1952, felt impelled to treat in more than a perfunctory way On Lee’s claim that his constitutional rights had been invaded when a Government informer, carrying a concealed portable radio transmitter, broadcast from On Lee’s shop conversational statements of the latter which were picked up on a radio receiver by a Government agent outside the shop. Two years later, although no opinion commanded the assent of a majority of the Court, all of the Justices seemed to agree that police entry into a house and concealment therein of a microphone through which officers stationed outside could hear conversations in the house would, if done by federal officers, constitute a search and seizure forbidden by the Fourth Amendment. Since, however, the case came from a state court and involved trespasses by state officers, the majority of the Court felt constrained by the decision in the Wolf case not to question the admissibility of the evidence obtained through the hidden microphone. The Court had earlier ruled that evidence obtained in violation of the Communications Act need not be excluded at a state criminal trial if it would be admissible under state law.

In 1961 the Court “distinguished” its decisions of the preceding decade, and held that the Fourth Amendment was violated when federal officers drove a spike, to which a microphone was attached, through a party wall of a row house so that the spike was in contact with a heating duct in the adjoining house, thus rendering the heating system a conductor of sound. The Court reversed a conviction on the ground that conversations heard through the spike microphone should not have been admitted in evidence. The Court protested that its decision “does not turn upon the technicality of a trespass

9. 385 U.S. at 512, 81 Sup. Ct. at 683, 5 L. Ed. 2d at 739.
upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area."

It is difficult to perceive just what the Court's distinction amounts to. Certainly there seems to be no indication of a repudiation of the doctrine that officers who trespass on a defendant's land are not precluded from testifying as to what they saw from their vantage point. Nor, on the other hand, does the Court show any sign of narrowing Fourth Amendment protection to "houses." After the Silverman case there were cited with approval cases in which this protection had been extended to such places as business offices, stores, hotel rooms, apartments, automobiles and taxicabs. At the same time, however, the Court said that the protection of the Fourth (and, therefore, the Fourteenth) Amendment did not extend to a jail, so that there was no constitutional bar to planting in the visitors' room a device by which a conversation between an imprisoned convict and his visitor could be overheard.

Technological developments in the sensitivity of microphones and similar devices tend to place the problems of electronic eavesdropping in a different perspective than they had when only rather primitive techniques were available to eavesdroppers. The Court recognized this fact in Silverman, but found it unnecessary to deal with it.

The possible lines of growth of doctrine in this area are many and speculative. Will the Court, after deciding that some electronic eavesdropping constitutes search and seizure, recede from its position that telephone wiretapping is not in that category? Will the Court, after repudiating its doctrine that the fruits of unreasonable search and seizure by state officers is not inadmissible in a federal trial, and after overruling its doctrine that, while the prohibition of unreasonable search and seizure extends to state as well as federal officers, evidence illegally obtained may be used at a state trial, find it necessary to re-examine its decision that wiretap evidence is not inadmissible at a state trial?

27 Ibid. The value of this statement as precedent is limited: (1) There was an adequate basis of state law for the decision below. (2) Two Justices not participating, and three Justices voting to dismiss the writ of certiorari, less than five members of the Court agreed upon the constitutional point. It is interesting to speculate whether the Court would have distinguished the situation of a convicted prisoner in a jail and that of one in detention pending trial, as in the case here under discussion.
Not to be overlooked is the possible danger of discussing problems in this area in terms of categories of too great breadth. Mr. Justice Harlan rather cryptically conditioned his concurrence in the plurality opinion in the *Lanza* case upon his understanding that he was not thereby committed to the proposition that "the 'liberty' assured by the Fourteenth Amendment, is, with respect to 'privacy,' necessarily coextensive with the protection offered by the Fourth." Perhaps this bespeaks a vote for a process of evaluating electronic eavesdropping by state officers in the light of the Fourteenth Amendment on a case-to-case basis according to the norm of "decencies of civilized conduct." The tides of decision have ebbed and flowed over the propriety of this process of expounding Fourteenth Amendment due process in other areas, and it is quite possible that they will continue to run in this one.

§10.4. **Freedom of publication.** In the years since the so-called First Amendment Freedoms were determined to be limitations upon state as well as federal regulatory power, the course of decision has been a process of distillation of ideas as to the standards that must be observed by legislatures in complying with these limitations. Insofar as repression of obscenity is concerned, the distillation has produced the proposition that the legality of a publication may be determined by the criterion, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

This criterion is, of course, binding upon all state courts and upon lower federal courts. This was postulated by all seven of the Justices of the Supreme Judicial Court, but in a case which called for application of the criterion, they divided, four to three. The case was an information brought by the attorney general, under the statute which provides for proceedings in rem against a book which is "obscene, indecent or impure." The book in question was Henry Miller's *Tropic of Cancer.* The trial judge found:

*3570 U.S. 139, 147, 82 Sup. Ct. 1218, 1223, 8 L. Ed. 2d 384, 390 (1962).*

*36 Rochin v. California, 342 U.S. 165, 173, 72 Sup. Ct. 205, 210, 96 L. Ed. 183, 190 (1952).*


*38 1 Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).*


*354 U.S. at 489, 77 Sup. Ct. at 1311, 1 L. Ed. 2d at 1509.*


*5 G.L., c. 272, §§28C-28H.*
Of the 318 pages of the book, there are sex episodes on 85 pages, some of which are described on two or more pages, and all of which are described with precise physical detail and four-letter words. The author’s descriptive powers are truly impressive and he rises to great literary heights when he describes Paris. And suddenly he descends into the filthy gutter. The literary experts testified that the book depicts a type of life in the thirties in a portion of Paris and that it has great literary merit.

The case points up, and the close division in the Court underscores, the extreme difficulty of giving concrete meaning to a formula of constitutional doctrine in this area. Phrases like “hard core pornography” and “redeeming social values” can, and apparently do, have different meanings for different men in a given context. While the majority thought that “the book at many places is repulsive, vulgar, and grossly offensive in the use of four letter words, and in the detailed and coarse statement of sexual episodes,” they nonetheless thought that the “book must be accepted as a conscious effort to create a work of literary art and as having significance, which prevents treating it as hard core pornography.” To the minority, however, “The book is pitched at the nadir of scatology. . . . Its detailed and sordid sex episodes, persistently inserted at intervals in what passes for narrative, leave an outweighing staccato impression. In our opinion it should be classified as pornography.”

The value of the case as precedent is speculative. Both opinions are incompletely articulated statements of reaction to the book. The majority appear to be saying, in substance: The author has a social purpose, however unclear it may be to many, or even most, readers. Unfortunately, he has used extremely bad taste in his choice of language and his development of his theme, but this does not strip him of constitutional protection. The dissenters, on the other hand, seem to say: The author’s language, and his choice and treatment of episode, simply echo Skid Row. The total effect thus created cannot be covered by the mantle of constitutionalism.

Explicit documentation of what leads to these conclusions, or impressions, is precluded by considerations of propriety. Offensive language and treatments of theme can be described in a judicial opinion only euphemistically. Even were it otherwise, a condensed statement or summary of a lengthy book would necessarily fail adequately to portray the subtle nuances which can determine the over-all impressions left upon individual readers.

The majority of the Court, somewhat hesitantly, suggested that a determinative factor, under the Supreme Court’s “prurient interest” criterion, would be their opinion that “Tropic is more likely to dis-
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courage than 'to excite lustful thoughts.' " Absent some such distinguishing element, it is difficult to see wherein the constitutional standard has really developed beyond what it was when the Massachusetts Court evaluated the books, Strange Fruit,11 God's Little Acre12 and Serenade,13 under the statutory standard "obscene," which was determined to set up practically a subjective criterion for jurors or judges.

§10.5. General. The "proportional and reasonable assessments" provision of the state Constitution1 was before the Supreme Judicial Court on two occasions during the 1962 survey year. In Bettigole v. Assessors of Springfield,2 it appeared that the local assessors had classified property in the city into various categories and had assessed the property in each category at a given ratio of its market value, ranging from 50 percent in the cases of single-family residence properties to 85 percent in the cases of public utility, commercial and industrial properties. This clearly imposed upon persons whose properties were assessed at the higher ratios a disproportionate share of the burden of the city's property tax. This notoriously widespread assessing practice has existed in the Commonwealth for some time, but attempts to obtain judicial relief against it had failed, for various reasons. In one case,3 mandamus was denied because a remedy by way of taxpayers' suit4 was available. When a taxpayers' suit was brought, relief was denied because of lack of standing in the particular taxpayer plaintiffs.5 In the Springfield situation, relief had been denied because, apart from standing of the plaintiffs and choice of remedy, one case had become moot,6 and in another the pleadings were inadequate.7 In Bettigole these difficulties were avoided in the identities of the plaintiff taxpayers and by timely filing of suit. Emphasis upon the public character of the claim involved and the inclusion of a count for declaratory relief8 satisfied the Court of the inadequacy of tax abatement procedures,9 and both injunctive and declaratory relief were awarded.10


§10.4. 1 Mass. Const., Part II, c. 1, §1, Art. IV.
2 343 Mass. 223, 178 N.E.2d 10 (1961), also noted in §17.4 infra.
4 G.L., c. 40, §53.
8 G.L., c. 231A.
9 Id., c. 59, §59.
10 The Court also noted that the assessing practice was in violation of G.L., c. 59, §38, which requires that property be assessed, for tax purposes, at its "fair cash valuation."
The other "proportional and reasonable assessment" issue was presented by a request for an advisory opinion, with respect to a proposed legislative exemption from real estate tax of the first $5000 of value of property owned by a resident of the Commonwealth and occupied by him as his domicile. The Justices advised that the proposal, if enacted, would be invalid, since it would discriminate improperly against rental properties. The proposal was distinguished from the statute exempting from the personal property tax $5000 worth of household furniture and effects kept at the taxpayer's place of domicile, on the ground that the latter exemption did not create invidious discriminations, since any taxpayer might obtain its benefits. The advisory opinion, however, went on, somewhat cryptically, to suggest that the proposed exemption with respect to real estate might also be objectionable for discrimination against nonresident and corporate property owners.

Another tax case was of interest in that it pointed up the nature of the Massachusetts income tax as a property tax, rather than an excise. State Tax Commission v. Wheatland posed the question whether a Massachusetts resident must pay tax upon the proceeds of logging contracts under which he sold rights to cut lumber on land owned by him in Maine. While there is no constitutional bar to a state's imposing an excise against a resident in respect to income derived by him from out-of-state sources, the Court ruled that the Massachusetts income tax did not fall within this principle since, for historic reasons, it is a property tax, not an excise, so that the applicable constitutional principle is that a state may not tax property outside its borders.

An interesting equal protection decision was made in Hall-Omar Baking Co. v. Commissioner of Labor and Industries. The company was engaged in house-to-house sale of bakery products. It has some 185 trucks, the drivers of which traverse set routes, selling bread, cake and pastries to householders along the routes. By statutory definition each truck driver is a "hawker or peddler," and must obtain licenses from the Commonwealth and from each city and town in which he operates. The fee for the state license is $50, and the local license fees range from $4 to $26, varying with the size of the community.
There are certain exemptions from the operation of the statute. The principal one of these is persons engaged in the sale of milk, butter, cheese and eggs. As to them the only license requirement is that the owner of the business obtain a license and pay a license fee of fifty cents. The individual employees need not be licensed. The hawkers and peddlers statute originally included within its scope house-to-house sellers of dairy products, but they were exempted by statute in 1937.

Since the statutory licensing provisions had originally found their principal justification as devices for protection of the public against fraud and imposition, the bakery company contended that the statute should be held invalid as applied to it if it could show, in substance, that it was not a fly-by-night operator. The Court, however, ruled that this point was not well taken, and that hawkers and peddlers, however reputable, may be "specially regulated." But the Court accepted the company's alternative contention, namely, that there was no legitimate basis for putting vendors of bakery goods in a burdensome license fee category, when vendors of dairy products, who operate their business in an identical manner, have been taken out of that category. While the Court is unquestionably correct in pointing out that mere differences, from the standpoint of public health, between bakery products and dairy products do not justify differences in regulation merely between segments of the dairy merchandising system and segments of the bakery merchandising system, the force of this conclusion and of the decision itself is somewhat clouded by the implication in the opinion that it may still be possible to apply the license requirements to bakeries other than Hall-Omar.

The due process doctrine of "void for vagueness" came up for consideration in two cases. In O'Connell v. City of Brockton Board of Appeals, the Court set aside an ordinance which provided: "Where in a residence district . . . at least one-half of the buildings situated on either side of a street between two intersecting streets conform to a minimum setback line, no new building shall be erected . . . to project beyond such setback line." The Court held that this set up no intelligible standard. It was not clear whether reference was made to existing buildings on one side of the street or on both sides. Nor was it clear what was meant by "minimum" setback line: whether this was determined by reference to buildings nearest the street line

21 Id. §22.
22 Id. §15.
23 G.L., c. 94, §40.
24 Id. §41.
or fartherest therefrom or to some sort of average of existing setbacks. A similar contention with respect to a Pittsfield ordinance, however, was rejected. The ordinance made it unlawful to park on a street after 11:00 p.m. for the purpose of all-night parking. The Court ruled that "'all night parking' is definite enough to be understood."\(^{81}\)

An advisory opinion\(^{82}\) stated that, by reason of a general statute\(^{83}\) under the compact clause\(^{84}\) of the Federal Constitution, it was not necessary to submit the then proposed New England Interstate Corrections Compact\(^{85}\) to Congress for its approval. This matter is discussed in detail elsewhere.\(^{86}\)

Finally, the Court wrote what is seemingly the last chapter on the question of the legality of the redevelopment of the Back Bay section of Boston under what is popularly called the Prudential Insurance Company project. In a litigated case, it handed down a declaratory judgment,\(^{87}\) confirming what had been said in the advisory opinion\(^{88}\) upon which the project plans were founded. The details of this matter have heretofore been discussed at some length in these pages.\(^{89}\)


\(^{84}\) U.S. Const., Art. I, §10, cl. 3.

\(^{85}\) Subsequently enacted as Acts of 1962, c. 753.

\(^{86}\) See §11.2 infra.

