Chapter 11: Constitutional Law

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PART III

Public Law

CHAPTER 11

Constitutional Law

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§11.1. Introduction. The 1970 Survey year saw an unusually large number of cases in which the constitutional validity of Massachusetts statutes and procedures was challenged in the federal courts either by way of collateral attacks upon state court convictions through federal habeas corpus proceedings or applications for injunctive and/or declaratory relief under federal civil rights legislation.

§11.2. Obscenity law: State–federal friction. An index of this trend was noted in the 1969 Survey with reference to litigation involving an allegedly obscene film entitled I am Curious (Yellow).1 After the exhibitor had been convicted in the Superior Court for showing an obscene film, a three-judge United States district court, not questioning that the film was “legally obscene,” issued a preliminary injunction against further prosecutions for exhibiting it to adults who were willing to view it after being informed of the nature of its content.2 The United States Supreme Court stayed the enforcement order pending disposition of an appeal,3 noted probable jurisdiction of the appeal,4 and will likely decide the case during the 1971 Survey year.4a

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4a On February 23, 1971, the Supreme Court announced its decision in Byrne v. Karalexis, 39 U.S.L.W. 4236 (U.S. Feb. 23, 1971). The Court held that the injunction issued by the three-judge district court was improper because there was no finding that the movie exhibitor’s First Amendment rights could not be adequately protected in a single state criminal proceeding. In a per curiam opinion, the Court
The state and federal courts were brought close to direct conflict in the litigation over the musical stage production, *Hair*. The show contained scenes in which the players were nude and in which there was simulation of sexual intercourse or deviation. The producers sued for an injunction against threatened prosecutions for lewdness and lascivious behavior and for presenting an obscene show. The Supreme Judicial Court ruled that the show was not obscene, but it proceeded to predicate injunctive relief upon clothing all the players throughout the performance and elimination of all simulation of sexual intercourse or deviation. Unwilling to comply with those conditions, the producers applied for relief to the United States District Court for the District of Massachusetts. A three-judge court, one judge dissenting, ruled that the statute prohibiting lewdness and lascivious behavior and the common law prohibiting indecent exposure, as applied to the conduct of stage actors, were deficient for overbreadth, and that the threatened multiple prosecutions for separate portions of the presentation exerted an unacceptable "chilling effect" upon exercise of the First Amendment right to present the show. An injunction was ordered forbidding prosecution under either the statute or the common law offense of indecent exposure. The majority opinion explained that if, instead of proceeding against the objectionable scenes in isolation, the prosecutor were able to establish that those scenes were so dominant or offensive as to pervade or distort the production as a whole, a charge under the obscenity statute might be maintained for production of the play itself. The United States Supreme Court declined to stay the injunction in this case. An appeal has been docketed, and the case will likely be heard and decided at the 1970-1971 Term.

Other cases arose involving clear-cut conflict between the Supreme Judicial Court and the lower federal courts. In the 1969 Survey, reference was made to two obscenity cases tersely disposed of with the comment: "There was no error in the trial and convictions of the defendants on complaints under G.L., c. 272, §28A. Judgments affirmed." As was also noted, the Supreme Court of the United States denied remanded the case for consideration in light of Younger v. Harris, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971), decided the same day as Byrne v. Karalexis. That case held that a federal district court could not enjoin a state prosecution that did not involve harassment of the plaintiffs and the threat of great and irreparable harm that could not be eliminated in the state prosecution.


G.L., c. 272, §16.


Since jail sentences had been imposed, the prisoners sought federal habeas corpus under 28 U.S.C. §2241. Two petitions were filed, as affected prisoners were confined in different jails. Both were denied, but an opinion was reported in only one of the cases. The report reveals that the prosecution was for sale of magazines featuring photographs of nude young women "in poses and postures that center the attention of the viewer on the vulva and the surrounding area." The court found that they were obscene within the criteria set forth in Roth and Fanny Hill— that, taken as a whole, they appealed to a prurient interest in sex, were patently offensive because they affronted contemporary community (national community) standards and were utterly without redeeming social value.

The cases were heard together upon appeal, and the dismissals of the petitions for habeas corpus were reversed. The First Circuit Court of Appeals did not question the analytical findings made by the district court. If anything, it underscored the fact that the conventionally described ingredients of legal obscenity were present in the publications involved in the prosecution. The court of appeals was shown, however, copies of magazines upon which the Supreme Court, in per curiam decisions based upon the per curiam decision in Redrup v. New York, had summarily reversed state obscenity convictions. The court found these magazines indistinguishable in any relevant respect from those in the case before it and felt that the course of Supreme Court decisions had established that, as a matter of law, "no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in, or however lacking in social value, can be held obscene." How the court arrives at the distinction between active and inactive photographic models is not explained.

The Commonwealth has taken an appeal from this decision and the case is pending on the docket of the Supreme Court for its 1970-1971 Term. It could be the vehicle for clarification of the widespread uncertainty of the present constitutionally permissible scope of state and federal laws dealing with obscenity. As frankly set forth in the per curiam opinion in Redrup v. New York, the Justices have long been unable to reach a consensus on the reasons for decision in various obscenity cases. Summary reversals and summary affirmances in this area have abounded, as have denials of certiorari. Sometimes summary

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17 386 U.S. 767 (1967).
action has evoked dissent indicating disagreement with the result on the merits, sometimes indicating preference for fuller consideration of the case. Denials of certiorari sometimes are accompanied by dissents calling for grant of review with summary reversal, sometimes by dissents calling simply for full review. These actions and dissents furnish no real basis for framing a pattern which would be helpful in predicting the reaction(s) of a majority of the Court to any given kind of obscenity problem.19

§11.3. Birth control: Eisenstadt v. Baird. Another case of conflict between the state and federal judiciaries grew out of the activities of William Baird, a self-appointed campaigner for extirpation of so-called birth control laws. Baird was convicted in the Superior Court of giving a package of a contraceptive chemical to an unmarried woman. In response to a certified question, the Supreme Judicial Court ruled that, while Baird's exhibition of contraceptive devices during a lecture to university students was constitutionally protected by the First Amendment, the act of delivering such a device to one of his listeners was not so protected. The Court went on to rule that the statutory provision prohibiting delivery of such articles was valid as a measure for protection of the public health.1 The conviction was affirmed by a 4 to 3 vote, and the United States Supreme Court denied certiorari.2

In a subsequent case,3 the Supreme Judicial Court ruled, in a declaratory judgment proceeding brought by licensed physicians, that the same statute, again viewed as a health measure, validly prohibited the giving of contraceptive advice to unmarried women, although it is now permissible for physicians to give such advice to married women. The Court felt that the exception of married persons from the class to which the giving of such advice is forbidden is the necessary corollary of Griswold v. Connecticut4 and the recognition therein of a constitutionally protected right of marital privacy. It was ruled that the exception did not change the basic character of the law as a health measure, as explicated in Baird. There were two dissents; Justice Whittemore, one of the Baird dissenters, had died.

Baird proceeded to apply for federal habeas corpus relief. The district court denied his petition,5 and appeal was taken to the United States Court of Appeals for the First Circuit. That court disagreed sharply with the Supreme Judicial Court.6 It expressed doubt that the statute was in reality one enacted in the interest of public health.


4 381 U.S. 479 (1965).
However, even viewed as a health measure, the statute failed to meet the constitutional requisite of equal protection of the laws. The court could find no rational basis for separate classification of the married and the unmarried for purposes of applying the statutory prohibitions. Treating the statute as a regulation of public morality, the court concluded that:

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.7

The court of appeals compared the statute, violation of which is felonious, with the fornication statute,8 violation of which is a petty misdemeanor: "We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor."9

A troublesome aspect of the case is the question of Baird's standing to raise the constitutional issues. The court indicated that somehow Baird had standing because he was in jail by reason of the statute and, almost by way of afterthought, pointed out that the Supreme Judicial Court had considered his presentation of the issues on the assumption that he had standing to raise them. In this respect, the case may be reminiscent of *Tileston v. Ullman*,10 in which an early attempt to challenge the Connecticut statutes dealing with traffic in contraceptives failed precisely because the protesting physicians lacked standing to complain of the adverse impact of the laws upon their patients. The Commonwealth has filed an appeal from the instant decision, and that appeal is pending on the Supreme Court docket for the 1970-1971 Term.11

§11.4. **Scope of federal habeas corpus: Fisher v. Scafati.** Another point of divergence in state and federal judicial opinion is represented by the case of *Fisher v. Scafati*.1 The case involved application of the doctrine of *Miranda v. Arizona*,2 namely, that a person in police

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7 Id. at 1402.
8 G.L., c. 272, §18.
9 429 F.2d 1398, 1401 (1st Cir. 1970).
10 318 U.S. 44 (1943).

custody must not be interrogated until and unless he has been given
the fourfold warning that (1) he need not answer questions, (2) any
answers he gives may be used in evidence against him, (3) he is en-
titled to have counsel present, and (4) if he is unable to obtain counsel,
a lawyer will be provided.

Fisher was convicted of murder partly on the basis of statements
he had made at the police station. At a pretrial hearing on a motion
to suppress his statements, it appeared that, while the police were
investigating the murder, they learned that Fisher had been at a party
attended by the deceased; accordingly, he was invited to appear at
the police station. There, Fisher was questioned generally about events
on the evening in question, and, after some period of questioning,
a police officer noticed scratches on the defendant's neck. The officer,
then suspicious of Fisher's guilt, recited the Miranda warnings and,
after a long interval (during which Fisher was transferred from Spring-
field to Boston for lie-detector tests, then back to Springfield), the
statements in question were made by the accused. The motion to sup-
press was overruled, the trial court finding that the Miranda warnings,
given promptly when suspicion focused upon Fisher, were timely.

Fisher then filed a writ of habeas corpus in the United States Dis-
trict Court for the District of Massachusetts. Initially, the district
court found that the record in the state court did not adequately
support the ruling of the trial judge on the motion to suppress evi-
dence, since it was made on the basis that the Miranda warnings were
timely when given at the time when suspicion focused upon Fisher.
This result, the court said, was apparently reached by way of applica-
tion of the distinct doctrine of Escobedo v. Illinois, namely, that the
right to the assistance of counsel is crystallized when the individual
questioned becomes a suspect. Miranda requires that warnings be
given when the individual is placed in police custody. Since the state
court record did not make clear at what point Fisher's status changed
from that of a voluntary visitor at the police station to that of one
who would not have been allowed to leave had he tried (Fisher did
not actually attempt to depart), the court ordered an evidentiary hear-
ing pursuant to Townsend v. Sain.

At the evidentiary hearing, it appeared that, well before the neck
scratches on Fisher were noticed, the police realized that some of his
statements were inconsistent with information they had received from
other sources. This, while it did not arouse suspicion that Fisher was
the murderer, caused the police to believe that he was probably con-
cealing information. The court concluded that Fisher would not have
been allowed to leave the police station at least until the discrep-

ancies in his statements had been clarified, and that failure to give the *Miranda* warnings at that time tainted the subsequent interrogation, including that portion made after the warnings had in fact been given. Accordingly, the court held that the record, as expanded in the federal court hearing, revealed that the motion to suppress should have been granted, and the conviction must be set aside.

The significance of the case as an episode in federal-state judicial relations is somewhat complicated by the district court's doubts, generated at the evidentiary hearing, as to whether the police had actually given the full *Miranda* warnings, specifically whether they had explained to Fisher that he was entitled to have counsel furnished if he could not obtain an attorney himself. The case, however, is a striking illustration of the potential scope of federal habeas corpus proceedings in instances where it becomes appropriate for a federal court to look beyond the state court record.

§11.5. Cases arising under the Massachusetts Constitution. During the 1970 Survey year, several cases arose under various provisions of the Constitution of the Commonwealth, including a case in which, in substance, a provision of that constitution was itself held to be unconstitutional.

Technically, *Burg v. Canniffe* arose under G.L., c. 51, §1, which provides that a registered voter must have lived in the Commonwealth for one year, and in the city or town for six months next preceding the election at which he desires to vote. Identical qualifications are set forth in Mass. Const. amend. art. III. That constitutional provision, however, was not immediately relevant to the instant case, as it is directed at qualification of voters in elections of state officers. Burg was refused registration for participation in a special election to fill a congressional seat because, although he had resided in the town of Marblehead for six months preceding the election, he had lived outside Massachusetts for at least part of the antecedent six months.

A district court of three judges held that the statute — and the constitutional provision would logically seem subject to the same principle — unlawfully discriminated between persons who had lived in a town for six months after living outside Massachusetts and persons who had lived in the town for six months after living elsewhere in Massachusetts. Reading recent decisions of the United States Supreme Court as mandates to regard any classification of voters as suspect unless the classification can be justified by a compelling state necessity, the court could find no interest of the state which would be

advanced by the establishment of two categories of potential voters and the allowance of voting eligibility to members of only one such category.

The court recognized that, as recently as 1965, the Supreme Court summarily affirmed, per curiam, a decision upholding a Maryland voter-qualification standard similar to that of Massachusetts, but it felt that that case had been implicitly repudiated by subsequent cases in which the Court, through full opinions, rejected various residency requirements imposed by state laws, including voting laws. An appeal has been taken by the town of Marblehead and the Commonwealth of Massachusetts.

Of perhaps more far-reaching significance was Cohen v. Attorney General, which involved the question of permissible methods of bringing about constitutional amendments. Traditionally, amendments may be proposed to the electorate for vote at a general election either by the legislature sitting in a joint session as a constitutional convention or by a general constitutional convention called by legislative act. An outgrowth of the 1917-1918 Constitutional Convention was the Forty-eighth Amendment, which provided for popular initiative and referendum. The amendment authorizes introduction of specific proposals of constitutional amendments into the legislature by popular petition. Such proposals are considered by joint sessions of the legislature and, if a proposal receives approval of not less than one-fourth of the entire membership in two successive legislatures, it is placed upon the ballot for consideration by the voters at the next general election. There is also provision for initiative petition for enactment of a law. Such a petition is admitted to the legislature, and, if the legislature does not act favorably upon it, a supplemental petition may entitle the proposal to placement on the ballot at the next state election for consideration by the voters. A favorable vote at the election would have the effect of making the proposal a law.

The Cohen case grew out of an initiative petition for enactment of a law to establish a general constitutional convention to consider revision, alteration, and amendment of portions of the Massachusetts Constitution. The suit was brought to prohibit the placement of the petition upon the ballot at the 1970 election. The Supreme Judicial Court, considering the extended discussion and debate in the 1917-1918 Constitutional Convention over the initiative and referendum, concluded that a proposal to call a constitutional convention was not a proposal of a law within the meaning of that word as used in the Forty-eighth Amendment. The majority of the Court felt that this conclusion was compelled by analysis and comparison of the initiative procedures provided for proposed laws and those provided for pro-

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4 See note 2 supra.
posed constitutional amendments, as well as by the convention history of the amendment itself. Three Justices felt that, in the literal context of the amendment, an initiative petition for a constitutional convention was one for enactment of a law, but they agreed that it was clearly not the purpose of the amendment to provide for constitutional amendment by the initiative process, apart from initiative proposals of specific amendments.

Several problems arose under the so-called Home Rule Amendment. In a request for an advisory opinion, the Justices of the Supreme Judicial Court were asked whether the legislature could enact a statute limiting the right of the town of West Springfield to tap water resources in the town of Southwick when it was requested to do so by Southwick but not by West Springfield. The answer was in the affirmative, since the amendment reserved to the legislature power to regulate matters of general state and regional concern, and the proposed legislation was seen to be effective in a class of “not fewer than two towns.”

In *Chief of Police v. Town of Dracut*, a basic question was whether the town, which had accepted (pursuant to the local option provisions of the statute) G.L., c. 41, §97A, concerning organization of a local police department, could in effect rescind its acceptance so as to accomplish a reorganization of the department. The Supreme Judicial Court ruled in the negative, pointing out that the Home Rule Amendment expressly reserved to the legislature the power to repeal general laws and that the acceptance of the statute by the town rendered it a general law operative in the community.

Another case grew out of a by-law adopted by the town of Brookline providing for public control of rentals charged for housing accommodations. The question squarely presented was whether such a regulation falls within the scope of municipal legislative power. Massachusetts Const. amend. art. 89, §6, purports to grant broad powers to towns. It provides that a town may, by adopting by-laws, exercise any power which the legislature has power to confer upon it. This grant, however, is qualified by Section 7, which provides inter alia that municipal power shall not include power “to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power.” The Court held that the by-law was one which governed the civil relationship between landlord and tenant and that, in order to stand, it must be shown to be in exercise of some police power of the town. For example, the Court said, a by-law requiring landlords to maintain lighting in common

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7 Mass. Const. amend. art. 89.
passageways could be sustained as incident to the general power to provide for public safety. No such relationship to a police power could be found in the rent control by-law. At best, said the Court, such a by-law is merely incident to a power to control rents. Such circuitous rationalization was not acceptable.

The specific issue raised by the case became academic within three months when the legislature enacted a statute expressly authorizing the town of Brookline to formulate by-laws regulating housing rentals. Also enacted was a temporary rent control statute which may be adopted by cities and by towns of over 50,000 population; moreover, it extended and expanded the authority of the city of Boston to regulate rents and evictions by ordinance. The instant case will have abiding value as an indicator of the guidelines for determining the scope of municipal legislative power.

The fiscal crisis currently facing private elementary and secondary schools occasioned the filing of alleviatory legislation, and the bills were referred to the Justices of the Supreme Judicial Court for advisory opinions. The first bill, Senate Bill 1278, would have provided for “purchase of educational services” by the Commonwealth. This would consist of reimbursing nonpublic schools their actual expenditures for salaries to teachers of “secular subjects” in their schools. It was ruled that enactment of the bill would violate Mass. Const. amend. art. 46, which provides that public money or credit may not be used for the purpose of “aiding” any school wherein denominational doctrine is inculcated, or any school which is not publicly owned and under the exclusive control of public officers. The Justices concluded that the proposed assistance to nonpublic schools from public funds would amount to “aiding” within the meaning of the amendment.

A second bill, House Bill 5145, would have provided allotment of state funds to each pupil attending elementary and secondary schools in the amount of up to $100, but not exceeding (in the case of private schools) the apportioned part of the established tuition charge allocated to teaching of secular subjects, and (in the case of public schools) the actual cost of the teaching program. Payment would be made through vouchers to private school pupils to be endorsed over to their respective schools. In the case of public schools, amounts payable in respect of the pupils would be paid directly into the municipal treasury. The Justices advised that the proposal would involve an indirect form of the “aid” to nonpublic schools which is forbidden by Mass. Const. amend. art. 46.

Walsh v. Secretary of the Commonwealth involved malapportion-

ment of the state senate. The 1965 census revealed a population distribution which would call for senate districts of an average of 132,382 persons each. The districts under the existing apportionment statute varied in population from 211,265 to 84,366. The Supreme Judicial Court held that this was a gross departure from the requirement of equality but declined to undertake the task of redistricting by judicial action. The Court contented itself with ordering a declaratory judgment that the existing apportionment had become unconstitutional and could not be used as the basis of the 1970 election. Within three weeks, the legislature reacted by passing, over a gubernatorial veto (based upon policy, not constitutional, considerations), a new act, redistricting the senate.

The perennial controversy over the statutory scheme whereby the operational costs of Suffolk County are borne entirely by the city of Boston, without contribution from the public treasuries of the cities of Chelsea and Revere and the town of Winthrop, the other municipalities within the county, was resurrected in Thompson v. City of Chelsea. The scheme was sustained against the claim of improper discrimination made by 17 taxable inhabitants of Boston. Without going so far as to raise an estoppel against Boston, the Supreme Judicial Court pointed out that (1) the scheme of Suffolk County government had originally been established at the request, and with the consent, of Boston (partially in exchange for the chartering of Boston as a city), and (2) not only was Boston given administrative control of the county government, but it also was the recipient of most of the benefits of county operations. The case was disposed of by sustaining demurrers of the defendants but, in the light of the Court's discussion of the merits, it is highly doubtful that a pleading with additional factual allegations would receive a more favorable judicial response.

§11.6. Division of legislative authority: Federal and state concerns. Several cases decided during the 1970 Survey year addressed questions involving the proper allocation of legislative powers between the Federal Government and the states.

Congress, since 1934, has exercised its taxing power to control traffic in certain classes of "firearms," for example, sawed-off shotguns, machine guns, etc. The validity of the legislation and of the implementing regulations has been sustained, although the constitutional

17 See the line of cases ranging from Baker v. Carr, 369 U.S. 186 (1962), through Kirkpatrick v. Preisler, 394 U.S. 526 (1969), in which the Supreme Court has spelled out, with increasingly greater precision, the criteria for implementing the constitutional principle of equality of voters' power.
20 St. 1821, cc. 109, 110; St. 1909, c. 490, §52.

privilege against self-incrimination is a bar to enforcement in some circumstances.\(^3\) In the Omnibus Crime Control and Safe Streets Act of 1968, Congress undertook to exercise regulatory power over traffic in a larger class of weapons. *United States v. Trioli*\(^5\) posed the question of whether Congress could establish qualification standards for purchasers of guns in intrastate sales and make it a criminal offense for such a purchaser to omit from a statement taken by the dealer a fact (conviction of one of specified offenses) which would render him ineligible to make the purchase. The United States Supreme Court held that the act fell within the power of Congress to regulate commerce among the several states. Adverting to findings set forth in the act itself, as well as to evidence reflected in the reports of committees of the Senate and House of Representatives, the Court concluded that Congress was justified in its belief that the ready mobility of guns and their potential for causing harm in states other than the state of purchase warranted federal control of the traffic at the point of purchase. The Court found the case to be governed by the principles of *Heart of Atlanta Motel v. United States*\(^6\) and *Katzenbach v. McClung*,\(^7\) wherein the impact of local racial discrimination in hotels and restaurants upon interstate movement of persons and food was held to warrant federal regulation to remove the cause of the restraint upon commerce.

The *Trioli* case did not call for consideration of the effect, if any, of the Federal Crime Control Act upon state regulation of traffic in weapons. An analogous question did, however, arise in *Penn Central R.R. v. Dept. of Public Utilities*.\(^8\) That case grew out of a regulation adopted by the DPU requiring self-propelled Budd passenger railroad cars to carry certain tools and emergency lighting equipment. The railroads, seeking review of the order, contended that the subject matter of the regulation had been pre-empted by federal legislation. The Supreme Judicial Court examined the federal Boiler Inspection Acts\(^9\) and the Safety Appliance Acts,\(^10\) and the Interstate Commerce Commission regulations pursuant thereto, and concluded that the specific equipment prescribed by the regulation was not covered by federal law. While it recognized that there is a certain amount of ambiguity in the course of Supreme Court decision,\(^11\) the Court held

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\(^3\) Haynes v. United States, 390 U.S. 85 (1968).
\(^7\) 379 U.S. 294 (1964).
\(^11\) Some cases seem to say that federal regulation of a thing amounts to federal “occupation of the field” consisting of the category which includes that thing, while others seem to say that, unless a thing is specifically subjected to federal regulation, it remains open to state regulation. See, e.g., Napier v. Atlantic Coast...
that where, as here, a safety regulation is involved, the state should be free to impose such regulation in the absence of a specific federal regulation.

The Supreme Judicial Court proceeded to observe, however, that not only did the subject matter of the regulation fall within a twilight area with respect to federal-state jurisdiction but, since the affected cars operate in more than one state, there may be serious question whether the regulation imposes an excessive burden on commerce among the states. The Court concluded that, although the rule-making procedures mandated by the Administrative Procedure Act do not call for the plenary proceedings required for agency exercise of adjudicatory power, the DPU should, nonetheless, have compiled a full record which would enable itself and a reviewing court to make an informed judgment as to whether the regulation was reasonably necessary in the interest of public safety. The case was remanded to the DPU for further proceedings to this end.

The Supreme Judicial Court thus recognizes the delicacy of the problem of adjusting state demands for autonomy in preserving public safety and national demands for freedom and efficiency of commerce among the states. The Court's insistence upon a clear showing of justification of state action which impinges upon commerce comports with reactions of the United States Supreme Court when confronted with orders of the Interstate Commerce Commission invoking the Shreveport doctrine. It is clear that the ICC, the agency designated by Congress to enforce the Interstate Commerce Act, has constitutional power to make orders which have the effect of superseding state laws in appropriate cases. But, when judicial review of such an order is sought, the Supreme Court will not enforce it unless it is supported by adequate administrative findings, based upon an appropriate record. In a federalist system, the agencies of each government must demonstrate a decent respect for the rights and prerogatives of the other government.

Where conflicts between local and national concerns evolve through administrative action, it is both feasible and appropriate to require clarification at the administrative level so that fully informed judgments of the conflict can be made. Sometimes, however, the potential for conflict is contained within a statute, and manifests itself only when a judicial proceeding arises directly under the statute. In such a case, a call for legislative clarification may be impracticable, and the issue must be resolved in other ways.

Line R.R., 272 U.S. 605 (1926), and Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914), respectively.

12 G.L., c. 30A, §§2, 3.
13 G.L., c. 30A, §§.
14 The Shreveport Case, 234 U.S. 342 (1914).
As noted four years ago,\textsuperscript{16} such a conflict arises in prosecutions of Interstate railroads for violation of the statute\textsuperscript{17} which forbids obstruction of a highway by a railroad train for longer than five minutes. As applied to a train engaged in switching automobiles of out-of-state origin from a yard in Framingham to an assembly plant in the same town, the statute was held not to impose an undue burden on commerce among the several states.\textsuperscript{18} Commonwealth v. Penn Central R.R.\textsuperscript{19} was a prosecution for obstructing a street for about eleven minutes. The offending train, composed of 127 cars, was en route from a yard in Framingham to points in Michigan and Illinois, and could not complete the highway crossing within five minutes because it was subject to a speed limit of 15 miles per hour. It further appeared that, if the railroad were forced to halve the length of its trains in the area, it would be faced with additional costs of $71,000 per year in this division of its route alone. The Supreme Judicial Court reached the judgment that, even though the train was on a through journey to an out-of-state point, not on a switching operation incident to a through journey, and the record contained specific data as to the measure of the burden the statute would place upon the railroad, there was not enough evidence to establish that the burden upon commerce was disproportionate to the convenience of highway users which was sought to be promoted by the statute.

State tax laws, of course, can be unconstitutional burdens upon commerce among the states. This was true of the Massachusetts corporate excise tax\textsuperscript{20} as applied to a New York company engaged exclusively in interstate business in Massachusetts. The Appellate Tax Board made a finding that all the activities of the taxpayer companies in Massachusetts were either interstate transactions or "in aid of" the business of lending money from New York to Massachusetts borrowers. In such circumstances, the imposition of a Massachusetts corporate excise upon a foreign corporation "with respect to engaging in the Commonwealth exclusively in interstate commerce" is impermissible.\textsuperscript{21} Such circumstances, however, are probably of rare occurrence. Those who engage in interstate operations are usually also involved in some local activity. Thus, in a case cited by the Supreme Judicial Court in the instant decision,\textsuperscript{22} General Motors' presence in Washington con-

\textsuperscript{17} G.L., c. 160, §151.
\textsuperscript{22} General Motors Corp. v. Washington, 377 U.S. 436 (1964).
sisted of personnel whose function was to promote sales of motor vehicles and parts from Michigan to Washington. A subsidiary function, however, was to assist dealers in making strictly local sales. And, in *Eli Lilly & Co. v. Sav-on-Drugs*, a pharmaceutical manufacturer was represented in a state only by salesmen whose purpose was to obtain orders for their out-of-state employer’s products. Significantly, they also acted as missionaries, “educating” local physicians as to the virtues of those products. These incidental activities sufficed to bring the respective companies, General Motors and Eli Lilly, within the state jurisdiction.

*Board of Assessors of Wilmington v. Avco Corp.* involved a phase of the perennial problem of intergovernmental tax immunity. Avco had a contract with the United States Air Force for testing certain radar design performance. The contract provided that the Government would reimburse Avco the cost of acquisition and installation of necessary test equipment, and that title to such equipment would pass to the Government upon its acquisition by Avco. The equipment, consisting of radar towers, was imbedded by Avco in a field which it leased from the owner thereof, the lease containing a provision that Avco would reimburse the owner the amount of taxes assessed against the land. The local tax assessed against the land included the value of the Government-owned fixtures.

Avco sought abatement of the tax under G.L., c. 59, §5, which exempts “Property owned by the United States so far as the taxation of such property is constitutionally prohibited.” The Supreme Judicial Court ruled that the exemption was not applicable. The equipment was taxed not as property of the United States but as property of the taxpayer. The case was held governed by the principle announced in three cases handed down in 1958, sustaining Michigan taxes imposed with reference to Government-owned property being used by private individuals in the conduct of private business, notwithstanding the fact that their business was with the Government. As long as the tax had no adverse impact upon the Government’s title to the property, no constitutional objection would obtain.

§11.7. First Amendment rights: Recent Massachusetts decisions. In addition to those discussed in Section 11.2 supra, several other cases decided during the 1970 survey year involved alleged infringements of constitutional rights guaranteed by the First Amendment.

23 366 U.S. 276 (1961). This case, not cited in the Supreme Judicial Court’s rescript opinion, does not involve state taxing power. It is, however, germane to the issue of a state’s jurisdiction over a foreign corporation.


26 Under G.L., c. 59, §3, things affixed to the land are taxable to the landowner, even though they are, by agreement, removable by another.

In one such case, the chairman of the art department at the University of Massachusetts, pursuant to an informal practice which had developed at the university, arranged with an art instructor to hang an exhibition of the latter's paintings on the walls of a corridor in the student union building for a period of three weeks. The paintings provoked controversy, some viewers finding them offensive. After they had been on exhibition for only five days, the university administration ordered them removed. The instructor then brought suit for a declaration that he was entitled to have the exhibition placed on display for the balance of the agreed period. The United States District Court for the District of Massachusetts held that exhibition of the paintings was a form of constitutionally protected speech. While the painter did not have an unlimited right to use university buildings as a gallery for showing his works, the court felt that, absent specific regulations containing standards of quality of art exhibits, the university was not free to terminate exhibition rights granted under usual procedures simply because, in its view, the content of the pictures was "inappropriate."

At most the exhibition was a source of some annoyance or embarrassment, but this is far from providing adequate justification for infringement of plaintiff's constitutional right to free expression. Reinstatement of the exhibition was ordered.

On appeal, the United States Court of Appeals for the First Circuit reversed, concluding that the absence of specific regulations concerning premature termination of exhibitions was not controlling. In this connection, the court suggested that the standard objections of vagueness and overbreadth customarily raised against legal limitations upon free expression are not persuasive where there is no sanction stronger than an order to desist. Affirmatively, the court held that the university could properly consider the interests of persons using the corridor and weigh them against the interests of the artist in making a judgment as to whether passersby should be spared unwelcome sights. The plaintiff sought review in the Supreme Court, but his petition for certiorari was denied.

Another case pointed out that there are limitations upon control of campus expression by public educational authorities. By statute, "activity fees" paid by students at state colleges are collected in a fund and disbursements are made in the discretion of the college president for the support of various student activities. At Fitchburg

2 Id. at 1112.
3 424 F.2d 988 (1st Cir. 1970).
6 G.L., c. 73, §1B.
State College, a student newspaper was financed by such disbursements. On one occasion, the student editor decided to print an essay by a nationally known social militant. When the proposal came to the attention of the college president, he refused to allow funds for the publication, and the essay was not printed in the student paper. The president then informed the editor that he had created a board of faculty members, and that no funds would be disbursed to pay for future issues of the paper unless they were limited to publication of materials approved by the faculty board.

In an action brought by the editor under the Civil Rights Act, the United States District Court for the District of Massachusetts ruled that the requirement of clearance of articles through the faculty board constituted a forbidden "prior restraint" of future issues of the campus newspaper. Even though there was indication that the faculty board proposed to exercise its censorship powers only for the suppression of obscenity, which is not constitutionally protected "speech," the proposed arrangement was procedurally defective under the standards set in Freedman v. Maryland. That case held that a censorship statute requiring prior approval of motion pictures by the Maryland State Board of Appeals must (1) cast the burden of obscenity upon the censor, (2) not give an effect of finality to the censor's adverse ruling, and (3) make adequate provision for prompt judicial review of adverse rulings of the censor. In a significant footnote to the instant opinion, the court expressed some doubt as to whether it would be possible to provide for newspaper censorship through a regulation meeting these requirements:

Under the circumstances, we need not decide whether adequate procedural safeguards could ever be formulated supporting prior restraint of a weekly newspaper. It is extremely doubtful. Newspaper censorship in any form seems essentially incompatible with freedom of the press.

The court further recognized that educational authorities must have power to make adequate provision for maintenance of "the order and discipline necessary for the success of the educational process." Their regulations, however, must be seen to be reasonably related to this, and not some other, end. It might, for example, not be improper for an administration to prescribe that the school newspaper publish only articles composed by students. Such a regulation
could be justified as a device for assuring students opportunities to acquire journalistic expertise. But when an administration undertakes to censor the content of articles before those articles appear in print, it assumes the unacceptable position of imposing thought control.

Keefe v. Geanakos\(^{13}\) posed an interesting problem also involving freedom of expression within the academic context. Plaintiff, a high school instructor, assigned to his senior English class the reading of an article in the Atlantic Monthly. He discussed the article and explained the author’s use of a word appearing therein.\(^{14}\) As a result, the instructor was suspended, and the school committee brought charges seeking his dismissal. In an action under 42 U.S.C. §1983, in which the instructor sought to restrain the dismissal proceedings, the United States District Court for the District of Massachusetts denied a preliminary injunction, holding that there was no probability that the plaintiff would ultimately prevail. The First Circuit Court of Appeals reversed,\(^{15}\) holding that the article was not obscene, even under obscenity standards governing communications to juveniles.\(^{16}\) While recognizing that the classroom episode might well be offensive to parents who learned of it, the court concluded that parents’ sensibilities are not the full measure of what is proper education. The court was also impressed with the absence, from school department regulations, of narrowly drawn criteria governing the scope of classroom utterances of teachers.

The foregoing trilogy of cases would seem to convey the message that freedom of expression in an academic setting must be evaluated by taking into account the entirety of the setting. Thus, the art teacher whose paintings were excluded from the public corridor might find justification in exhibiting them on the walls of his classroom. And the teacher who was sustained in using shocking language in a lecture to his class might well be subjected to discipline if he repeated the performance at a school football rally.

In the case of Yenofsky v. Silk,\(^{17}\) the requirement that the licensing authority adhere to clear, narrowly drawn standards, particularly significant when licensing power over public assemblies is asserted, was applied. A group of peace advocates desired to make a public demonstration of opposition to the military action of the United States in Vietnam. It was to take the form of a parade through the streets of the town of Randolph by some 200 marchers, terminating on the steps of the town hall with a reading of the names of American soldiers killed in Vietnam. An application for the requisite parade permit was

\(^{13}\) 305 F. Supp. 1091 (D. Mass. 1969). This case is the subject of student comment in §11.11 infra.

\(^{14}\) As the First Circuit Court of Appeals put it, “The word, admittedly highly offensive, is a vulgar term for an incestuous son.” 418 F.2d 359, 361 (1st Cir. 1970).

\(^{15}\) Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).


denied without specification of reason(s). The only pertinent regulation was one which simply provided that there should be no parade in the town streets without a permit. The United States District Court for the District of Massachusetts, in an action under the Civil Rights Act, concluded that the regulation gave the licensing officials arbitrary power and, furthermore, that it had been exercised in an arbitrary way. The case was held to be governed by the principle of Shuttlesworth v. Birmingham, and the town was ordered to issue a permit for the parade as well as protect the paraders from traffic and other hazards.

In another development involving claimed contravention of First Amendment rights, the city of Boston adopted a censorship ordinance which would require sellers of books, magazines and pictures, who keep their wares or parts thereof in "adults only" sections of their shops, to register with the city clerk and to cause their registration numbers to be imprinted on all books, magazines and pictures sold by them. The ordinance also provided that no person finally convicted of violation of the obscenity statutes would be eligible for registration, and that registrants must disclose not only the names of all persons having financial interest in the business but the names of the suppliers of books, magazines and pictures as well.

The United States District Court for the District of Massachusetts issued an injunction against enforcement of the ordinance, holding it unconstitutional on several grounds. In the first place, permanent disqualification from future selling after a conviction was objectionable as analogous to the previous restraint of future publications condemned in Near v. Minnesota. The requirement of disclosure of names of business associates and suppliers was held to have a chilling effect on circulation of constitutionally protected material. Secondly, the requirement that a registration number be stamped on each article sold could not be justified as a means of enforcing the laws as to sales of pornographic material to minors. Such a requirement, imposed for this purpose, might well amount to invasion of the constitutional privilege against self-incrimination. In the third place, the requirement of stamping all materials sold, and not merely things which are contraband for minors, renders the ordinance overbroad and inhibits the stocking and sale to adults of materials which may lawfully be sold to adults.

In 1961, the Supreme Judicial Court, in Demetropolos v. Commonwealth, construed the general obscenity statute as one which requires knowledge of the obscene character of a sold publication as a

20 283 U.S. 697 (1931).
24 G.L., c. 272, §28A.
necessary ingredient of the offense of selling obscene materials, even though the statute did not itself expressly predicate guilt upon scienter. In so doing, the Court preserved the statute, admittedly susceptible of constitutional attack, from invalidity under the First and Fourteenth Amendments of the Constitution: "[W]here a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation." 25 In Commonwealth v. Girard, 26 the Court was faced with the statute forbidding transfer of certain obscene (as defined by statute) materials to juveniles. 27 The statute expressly provided that proof of the defendant's knowledge of the offensive character of the book, picture, etc., is not necessary to establish guilt of violation of the statute. The Court held that this omission is constitutionally objectionable, in that it would tend to make sellers hesitant to sell any publication with which they were not familiar in detail, thus exerting an unacceptable chilling effect upon legitimate publication. In a companion case, 28 the Supreme Judicial Court held that not only is the defendant's scienter an element of the offense of sale of obscene materials, but such scienter must be alleged in the complaint or indictment charging the crime.

§11.8. Criminal procedure: Recent Massachusetts decisions. Commonwealth v. Brady 1 raised the issue of whether a defendant is entitled to a jury trial of factual issues which form the basis of a motion to dismiss an indictment. Brady moved for dismissal of indictments against him on the ground that an unauthorized person was present in the grand jury room while the grand jury was considering the indictments. The person named in the supporting affidavit, a member of the Massachusetts state police, was unquestionably not an "authorized person." The sole issue presented at trial was whether that person was, in fact, present in the grand jury room during the jury's deliberations. Under G.L., c. 278, §30A, the trial judge, "being of opinion that a question of law was presented of such doubt and importance as to require the decision of this court," 2 reported the following question: "Does the defendant have a right to a trial by jury on the question of fact as to whether an unauthorized person was present in the grand jury room during the testimony of the defendant before the grand jury?" 3

In its resolution of that question, the Supreme Judicial Court analogized to the disposition of pretrial motions to suppress evidence based upon the ground of unconstitutional search and seizure. 4 Factual

27 G.L., c. 272, §30.

2 Id. at 460, 257 N.E.2d at 466.
3 Ibid.
issues generated by such motions are adjudicated by the judge and not by a jury.

... Often such motions involve issues of fact as well as law, but the legality of the search is none the less a question for the judge.5

Likewise, a post-sentence motion to vacate a plea of guilty on the ground that it was not voluntary presents factual issues for resolution by the court rather than a jury.6

In another case,7 it appeared that one Gilday had been convicted in the Superior Court on a charge of armed robbery in 1964. At his trial he testified in his own behalf, and the prosecution introduced, for impeachment purposes, records of five previous convictions. In three of the cases, he had not been represented by counsel, although in the two more recent (and more serious) cases he did have counsel. Having been sentenced to a long penitentiary term, Gilday applied for federal habeas corpus relief on the ground that the state's use of the records of his uncounseled convictions violated rights declared to be constitutionally protected in the 1967 Supreme Court decision of Burgett v. Texas.8

The case raised the familiar, but difficult, question of whether Burgett, insofar as it announces "new" constitutional doctrine, must be given "retroactive" effect, that is, whether a trial court decision in conflict with Burgett, but made prior to it, is subject to successful collateral attack after the "new" doctrine is announced. The United States Court of Appeals held that the answer must be in the affirmative. Without proper waiver, absence of defense counsel "so jeopardizes the fairness of a trial that any ensuing conviction is likely to be unreliable."9 The court concluded that this is a relevant consideration, whether the prior uncounseled convictions are used as part of the proof of guilt, or for the purpose of enhancing punishment, or to impeach the credibility of the defendant who testifies in his own behalf.

The court of appeals proceeded, however, to rule that failure of the trial court to anticipate the Burgett ruling did not necessarily so taint the trial as to demand reversal of the conviction. Running parallel to the doctrine of "retroactivity" of newly propounded constitutional law (where applicable) is the doctrine that, if shown beyond a reasonable doubt that the error was harmless to the defendant, such error will not fatally flaw the conviction.10 The court proceeded to review the entire trial record, satisfying itself that the testimony of eyewitnesses against Gilday was overwhelming and that his own story was as un-

7 Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970).
9 428 F.2d 1027, 1029 (1st Cir. 1970).
convincing as his attempt to explain incriminating circumstantial evidence; hence the erroneous admission of the three uncounseled convictions was not reversible error. Gilday unsuccessfully sought Supreme Court review.\textsuperscript{11}

\textit{Commonwealth v. French}\textsuperscript{12} was a murder case brought against defendants alleged to be leading members of the organized underworld. After the indictments for the murder of one Deegan had been returned, Cassesso, one of the defendants, first through an intermediary, and later directly, approached one Glavin, who was serving a life sentence for murder. It was proposed that Glavin confess, falsely, to the murder of Deegan so as to exculpate Cassesso. The inducement was an undertaking to make financial provision for Glavin’s family. Glavin, fearing that his life was in danger, reported the proposal to FBI agents and, at their suggestion, had further talks with Cassesso, ostensibly to “school” Glavin on the details of the Deegan murder in order to make his proposed false confession of that murder plausible. It was objected that this procedure was an unlawful use of Glavin as a decoy for the prosecution, in violation of Cassesso’s rights under \textit{Massiah v. United States}.\textsuperscript{13} That case held that use of a false friend of an indicted person to induce him to make incriminating statements which could be overheard by the police was an invasion of the constitutionally protected right of an indicted person to the assistance of counsel. Recognizing that \textit{Massiah} has been construed as forbidding any and all use of police decoys surreptitiously to obtain incriminating statements from indicted persons,\textsuperscript{14} the Court felt that it should not be so construed in the circumstances of this case. The two cases are distinguishable, the Court held, in that the \textit{Massiah} decoy took the initiative in extracting the incriminating statements, whereas here the statements were offered by Cassesso on his own initiative, and Glavin merely listened. The Court was also impressed by the fact that Cassesso’s statements were made in pursuance of his own plan to engineer a further unlawful act, the proposed false confession.

Another of the many defense exceptions in the case was based upon denial of various motions for severance of the trials of the various defendants. These were based primarily upon \textit{Bruton v. United States},\textsuperscript{15} which held that when one defendant makes an out-of-court confession implicating a codefendant, admission of the confession, even though qualified by instructions limiting it to use as evidence against the first defendant, violates the codefendant’s right of confrontation because of the danger of the jury’s disregard of the limiting instruction. The Court decided that \textit{Bruton} should be limited to its precise facts. It found the present case distinguishable in that (1) none of the

\textsuperscript{13} 377 U.S. 201 (1964).
\textsuperscript{14} Hancock v. White, 378 F.2d 479 (1967).
\textsuperscript{15} 391 U.S. 123 (1968).
present defendants had made confessions (as distinguished from admissions), (2) some of the defendants took the stand and were thus available for cross-examination, and (3) here, unlike the Bruten situation, there were conspiracy charges necessitating substantial relaxation of the usual hearsay rules.

Not surprisingly, numerous search-and-seizure decisions were rendered by the Supreme Judicial Court during the 1970 Survey year. Perhaps the most interesting of these was Commonwealth v. Perez, in which the Court carefully elucidated the application of various basic principles of the law of arrest and search to a particular fact situation. In its narration of the facts known to the police at the time of Perez' arrest for murder, the Court clearly found sufficient circumstantial evidence to constitute probable cause which would both justify the arrest and support an application for a warrant to search the apartment of the accused. Concededly, the police had continually used the expression "suspicion of murder" in effecting the arrest and in subsequent actions; and their obsession with the jargon of "suspicion" had led them to book the accused (upon the advice of a court clerk) for vagrancy. Moreover, the absence of evidence supporting the subsequent charge of vagrancy was undisputed. However,

... the fact that the arresting officer used the word "suspicion" does not operate to convert probable cause to arrest, if it existed, into mere suspicion. ... Neither is it controlling that the police applied for a complaint charging vagrancy. Certainly the detaining of a suspect on a charge of vagrancy for the purpose of conducting further investigation of another crime cannot be condoned.

The crucial fact in the case, therefore, was the arrest of Perez for murder with probable cause; the subsequent booking on an unfounded charge of vagrancy for the purpose of continuing investigation of the felony was immaterial.

Another case in which the accused unsuccessfully sought to invalidate his conviction on the ground of improper search and seizure of evidence was Commonwealth v. Ellis. Specifically, Ellis contended, inter alia, that the affidavit upon which the search warrant was based was inadequate under G.L., c. 276, §2b, under Mass. Const. art. 14, and under U.S. Const. amend. IV. Perhaps the lasting significance of Ellis resides in the Court's enlightening discussion of the sort of recitals required to be made in an affidavit in support of an application for a search warrant.

Two other cases involved the increasingly controversial problem of

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18 Id. at 553, 258 N.E.2d at 7.
the constitutional status of laws imposing the penalty of death for crimes. The Massachusetts statute\(^{20}\) provides that an individual whose beliefs preclude a finding of guilty in a capital case may not serve as a juror in such a case. In a jury venire summoned for trial of a murder case, there were eight persons who indicated upon voir dire examination that they were opposed to capital punishment. One of them indicated that his opposition would preclude his agreement to a verdict of guilty. Four others indicated that their beliefs would render them unable to make an objective judgment in considering whether to recommend that the death sentence not be imposed in the event of a verdict of guilty. The other three prospective jurors were not queried as to whether their beliefs would affect their determinations as to either guilt or punishment. All eight were excused as not standing indifferent. A motion for mistrial based upon the excuse of these jurors for cause was denied, the trial proceeded, and the defendant was found guilty, the jury recommending against imposition of the death penalty.

The recommendation of leniency took the case out of the principle announced in *Witherspoon v. Illinois*,\(^{21}\) that a sentence of death imposed by a jury from which opponents of capital punishment have been excluded is constitutionally impermissible. That case, and the companion case, *Bumper v. North Carolina*,\(^{22}\) however, made it clear that a jury so composed is not, at least as a matter of law, so prosecution-oriented as to lack the impartiality required of a jury. While the Supreme Judicial Court would have preferred an inquiry at the voir dire examination as to whether the jurors' opposition to capital punishment "would interfere with a determination of the guilt of the defendant,"\(^{23}\) the failure of the trial judge to make such inquiry before excusing three of the jurors was not reversible error.\(^{24}\) The Court declined to find that a jury so composed affected the "integrity of the fact-finding process," citing *Linkletter v. Walker*,\(^{25}\) where the quoted language was used to justify the Supreme Court's refusal to give retroactive effect to the doctrine announced in *Mapp v. Ohio*.\(^{26}\) It is difficult to understand how, if exclusion of opponents of capital punishment from juries does not establish the juries as prosecution-oriented, inclusion of such persons in juries would, without more, make the juries impermissibly defense-oriented.

The difficulty is not resolved by consideration of the subsequent case of *Commonwealth v. Mangum*.\(^{27}\) There, the trial judge had fully ex-

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\(^{20}\) G.L., c. 278, §3.
\(^{22}\) 391 U.S. 543 (1968).
\(^{25}\) 381 U.S. 618 (1965).
explored the impact of prospective jurors' opposition to capital punishment upon their ability to return findings of guilty in capital cases where the evidence so warrants. Nine jurors were excused upon findings that their beliefs would affect their judgment. A tenth juror said, in response to pertinent questions, only that she did not know. She, too, was excused as not standing indifferent. Judgment against the defendant was affirmed on the authority of the Connolly case. The opinion of the Court focused upon the excuse of the tenth juror, and the Court observed that the impartiality or indifference of a juror is a quality which must appear affirmatively. One is reluctant to believe that a corollary of this requirement is that partiality is a quality which may be inferred from a lack of sympathy with the pertinent rules of law.

It may well be that issues about the standards of impartiality of jurors are not of constitutional dimension, and that the Supreme Judicial Court need not have done more than decide whether the exclusion of jurors opposed to capital punishment fell within the statutory authority of the trial judge. Jury statutes which have tended to promote the choice of juries composed of members of a particular economic or intellectual class, or of a particular political leaning, have been considered to present constitutional problems; but the problems have been resolved in favor of the statutes, albeit by divided courts.

**Student Comments**

**§11.9. Right to public trial: Commonwealth v. Marshall.**

Defendant had been indicted for the crimes of sodomy; unnatural and lascivious acts with boys under 16; indecent assault and battery upon boys under 14; and being a lewd, wanton and lascivious person in speech and behavior. At the trial, before any evidence was taken, the district attorney moved that the proceeding be conducted in a private hearing. The trial judge allowed the motion, stating that "because of the age of the victims" everyone except the witness was to be excluded from the courtroom. Among those excluded were the defendant's mother, sister, brother and a friend. The defendant excepted, assigning as reasons the following: (1) the trial judge had violated the constitutional right of the defendant to a public hearing, and (2) the judge had misconstrued the provisions of G.L., c. 278, 28 Fay v. New York, 332 U.S. 261 (1947); Moore v. New York, 333 U.S. 565 (1948).


2 G.L., c. 272, §34 (sodomy); id. §35A (unnatural and lascivious acts); G.L., c. 265, §13B (indecent assault and battery); G.L., c. 272, §53 (being a lewd, wanton and lascivious person).
§16A, dealing with the exclusion of the public from the trial of sex offenses involving minors.  

The Supreme Judicial Court, in reversing the judgment of the trial court, HELD: Defendant had been deprived of the right to a public trial in violation of the Sixth Amendment, and the trial judge had misconstrued G.L., c. 278, §16A. In construing the statute, the Supreme Judicial Court relied heavily on the construction given it by Chief Justice Qua, speaking for the majority in *Commonwealth v. Blondin*. In that case Blondin and the defendants in companion cases had each been convicted of the crimes of rape and of abuse of a female child under 16 years of age. One of the reasons urged for reversal was the denial of the right to a public trial, the trial court having excluded the public in reliance upon the provisions of Section 16A. The Court in *Blondin* stated that the statute had been passed as a reasonable measure taken by the legislature to better serve the public interest. The Court also noted that the statute which distinguishes between the general public and those persons having a direct interest in the case “is to be strictly construed in favor of the general principle of publicity.”

Recognizing the legislative intent to distinguish between persons having a legitimate interest and those attracted only by the sensational issues involved, the Court in *Blondin* held that the statute must not be construed so as to exclude parents, spouse or even a friend of the defendant if he desires their presence, because they might give him assistance or comfort without interfering with the trial. In the instant case, the Supreme Judicial Court, relying on *Blondin*, held that the exclusion of Marshall’s relatives and friend was beyond the permissible scope of Section 16A because such a ruling by the trial court was not a strict construction in favor of the general principle of publicity.  

In protesting the trial judge’s granting of the district attorney’s motion to exclude everyone except the witnesses, Marshall also raised the issue of the possible violation of his constitutional right to a public trial. In deciding this question the Court held that the exclusion was in violation of the Sixth Amendment, which requires that “In all

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3 G.L., c. 278, §16A, reads: “At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.”

5 Id. at 569, 87 N.E.2d at 459.
6 Id. at 570-571, 87 N.E.2d at 459-460.
7 Id. at 571, 87 N.E.2d at 460.
8 Ibid.
criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. ..." (Emphasis added.) The rationale for this holding was predicated upon the Supreme Judicial Court's stated assumption that the Sixth Amendment right to a public trial would be held by the United States Supreme Court to be applicable to this trial. Upon the basis of this assumption, the Supreme Judicial Court stated that, even if the violation of Section 16A were held to be harmless error, the conviction must still be reversed, as a showing of prejudice has been held not to be necessary when the conviction is not a result of public proceedings.

In assuming the applicability of the Sixth Amendment right to a public trial to the instant proceedings, the Supreme Judicial Court relied on the leading case of In re Oliver. In that case the Supreme Court reversed petitioner's conviction for criminal contempt on the ground that the conviction and the sentence were handed down in the secrecy of the grand jury chamber. The cause of the contempt conviction was that petitioner, who had been called before a Michigan one-man-judge grand jury investigation, gave testimony which the judge did not believe because it did not "jell" with testimony previously given in secret by at least one other witness. In holding that an accused can not be tried and convicted for contempt of court in grand jury secrecy, the Court, speaking through Justice Black, stated:

In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused can not be thus sentenced to prison.

Although the Supreme Court did not squarely decide that the Sixth Amendment right to a public trial must be applied in state proceedings, the Supreme Judicial Court's assumption that the right would be held to so apply would seem to be valid. This is clear when viewed in the light of the decision in Oliver and the Supreme Court's recognition in that case that all courts have held that an accused is, at the very least, entitled to have his lawyer, relatives and friends present.

The validity of the assumption becomes even more apparent when

10 Id. at 1318, 253 N.E.2d at 335.
11 United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); Davis v. United States, 247 F. 394, 398-399 (8th Cir. 1917).
12 333 U.S. 257 (1948).
13 Id. at 273.
one considers the trend in modern case law. Since the decision of *Gideon v. Wainwright* in 1963, the United States Supreme Court has been unmistakably moving toward total application of Sixth Amendment rights to state criminal proceedings. Indeed, the federal courts of the Fourth Circuit have already held, citing *Oliver*, that the right to a public trial has been extended to the state proceedings under the due process clause of the Fourteenth Amendment. If the Supreme Court intends that the rights afforded by the Sixth Amendment be extended to defendants in state criminal prosecutions, it must logically provide a safeguard against the denial of these rights in secret proceedings. This would be most easily accomplished by applying to the states the additional right to a public trial.

The traditional Anglo-American fear and distrust of secret judicial proceedings has been interpreted by some as a reaction to the horrors created by the Spanish Inquisition and the abuse of the *lettre de cachet* by the monarchs of France. Others have attributed it to the excesses of the English Court of Star Chamber. Whatever the source of this fear and distrust, there evolved from it the fundamental notion that no man's life, liberty or property may be taken until there has been a charge fairly made and fairly tried in a public proceeding. These procedural safeguards of due process are considered part of "the law of the land" and are reflected in the Sixth Amendment of the Federal Constitution. The intention to prevent the evils of secret judicial proceedings is also reflected in the constitutions.

16 372 U.S. 335 (1963). This case applied the Sixth Amendment right to counsel to defendants in noncapital state criminal proceedings.

17 Turner v. Louisiana, 379 U.S. 466 (1965). This case applied the right to be tried by an impartial jury to a defendant in state criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965), so applied the right of confrontation. Turner also gave to the defendant in state criminal proceedings the right of cross-examination. The duty of affording an accused person a speedy trial was made mandatory on the states by Klopfer v. North Carolina, 386 U.S. 213 (1967).

18 Caudill v. Peyton, 368 F.2d 563 (4th Cir. 1966); Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965); Via v. Peyton, 284 F. Supp. 961 (W.D. Va. 1968).

19 Radin, The Right to a Public Trial, 6 Temp. L.Q. 381, 388 (1932). The *lettre de cachet* was an order from the French monarch that one of his subjects be immediately imprisoned or exiled without a trial or an opportunity to defend himself. The device was the principal means used to prosecute crimes of opinion. Louis XV is supposed to have issued more than 150,000 *lettres de cachet* during his reign.

20 Id. at 388-389.

21 Davis v. United States, 247 F. 394, 395 (8th Cir. 1917); Keddington v. State, 19 Ariz. 457, 459, 172 P. 273, 274 (1918); Dutton v. State, 123 Md. 373, 387, 91 A. 417, 422 (1914); Williamson v. Lacy, 86 Me. 80, 82-83, 29 A. 943, 944 (1899).


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statutes and decisions of most states. Although there is no express provision in the Massachusetts Constitution granting the right to a public trial, that right has, by implication, been recognized in Section 16A. As demonstrated in Blondin and again in Marshall, the statute must be construed to favor the general principle of publicity.

While the public has the general privilege to attend the proceedings, the right to have members of the public in attendance is that of the accused, in order to guarantee that he will be fairly tried and not arbitrarily condemned. The prime purpose in affording an accused the right to a public trial is to effectuate that right. Marshall's family and friend did not have the constitutional right to be present. Attendance of members of the public is designed to aid in protecting the defendant's rights by keeping the trial judge and prosecutor aware of their public responsibility and to check any tendency toward an arbitrary application of the law. The attendance of family and friends of the defendant also secures some degree of testimonial trustworthiness by inducing in the witness a fear of exposure of false testimony. If a trial is conducted secretly in the judge's chambers, the defendant may be denied the opportunity to demonstrate — and the public to know — that he has been unfairly tried or illegally convicted of a crime. It would seem to follow that if the rights to counsel, confrontation, cross-examination and an impartial jury have been held to be applicable to state criminal proceedings, then the accused should also be afforded the right to a public trial as a guarantee that the other rights will in fact be granted.

While the right to a public trial is almost universally accepted in the United States, it is quite difficult to define the exact scope of the concept of publicity. Held to its literal meaning, a "public" trial would be one which every member of the community would be allowed to attend. As a result of such an interpretation, the trial, in some instances, would have to be held in an auditorium. However, it


25 Dutton v. State, 123 Md. 373, 91 A. 417 (1914).


28 Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944); People v. Jelke, 308 N.Y. 56, 62-63, 123 N.E.2d 769, 772 (1954).

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has been held that "the constitutional right to a public trial is not a limitless imperative."29 The term public is relative then, its interpretation being determined by conditions and circumstances surrounding the trial.30 There are obvious situations where the nature of the matters presented would warrant the exclusion of the general public. Where the transcript of grand jury proceedings is to be read, requirements of secrecy in such proceedings would demand that the general public not be present at that time.31 The same result occurs in the conduct of juvenile proceedings,32 or where allegedly obscene films are to be shown.33 Because of the necessary limits which may constitutionally be applied to the public nature of a trial, it would seem to follow that the trial judge has certain discretionary power to exclude members of the public from the courtroom.

Protection of the process of an orderly trial is a prime duty of the court, for an orderly trial is an indispensable condition of the fair administration of criminal justice.34 For this reason, there has been a universally accepted reservation to the trial judge of the power to exclude disruptive persons from the courtroom. This discretionary power, when exercised, must be reasonably employed in furtherance of an orderly trial and not productive of a broad, arbitrary exclusion of individuals or classes of people.35 The removal of an individual or group which is disorderly, blocking the aisles, or interfering with the conduct of the trial is a valid exercise of discretion and is not a denial of the right to a public trial.36

As previously noted, allowing the public to view the proceedings and comment thereon gives some assurance of a fair administration of justice by reminding both judge and prosecutor of their responsibility. However, when comment by the public takes the form of applause at remarks by the prosecutor,37 or the introduction of television or radio broadcasting equipment,38 the policy guaranteeing a public trial dictates the regulation of public accessibility to the trial under these or similar circumstances.

The need to exclude persons from the courtroom is probably greatest when their presence39 or their actions40 intimidate the prin-

29 Lacaze v. United States, 391 F.2d 516, 521 (5th Cir. 1968).
30 Geise v. United States, 262 F.2d 151, 157 (9th Cir. 1958).
32 In re Oliver, 333 U.S. 257, 266 n.12 (1948).
33 Lancaster v. United States, 293 F.2d 519 (D.C. Cir. 1961).
35 Geise v. United States, 262 F.2d 151, 156 (9th Cir. 1958); State v. Osborne, 54 Ore. 289, 298, 103 P. 62, 66 (1909); People v. Murray, 89 Mich. 276, 288, 50 N.W. 995, 999 (1891).
36 Davis v. United States, 247 F. 394, 395 (8th Cir. 1917).
37 Lide v. State, 133 Ala. 43, 63, 31 So. 953, 959 (1902).
40 United States ex rel. Orlando v. Fay, 350 F.2d 967, 970 (2d Cir. 1965).
cial witness, or when their hostility reaches such a degree as to affect the outcome or verdict. On the grounds of possible intimidation of the witness, it has been held proper to exclude the public in order that attorneys may elicit from young, emotional or immature witnesses a clear and definite statement of fact which might well not have been given if the public had been allowed to remain. A clear example of this would be the examination of a young person in a prosecution for crimes involving sex.

It was precisely on this account that the trial judge in Marshall granted the prosecution's motion for a private hearing. Because of the ages of the witnesses and the nature of their expected testimony, everyone, including relatives of the defendant, was denied admission in reliance upon G.L., c. 278, §16A. Originally derived from “An Act to protect female witnesses involved in illegitimacy proceedings and in crimes involving sex,” the statute was intended to encourage free testimony, “so that more justice would be accomplished, if they [the witnesses] could be relieved from the inhibitions imposed by the presence of a curiosity impelled audience.” In Marshall the trial judge sought to protect the Commonwealth’s right to a full presentation of the evidence in order that a proper adjudication might be made as to the guilt or innocence of the accused. Although clearing the courtroom in such instances has consistently been upheld, all courts have held that an accused is entitled to have his family and his lawyer present, “no matter with what offense he may be charged.”

An exercise of discretion which limits the public’s admittance must involve the balancing of the witness’s level of maturity and emotional stability with the right of an accused to a public trial. It would seem that the policy favoring that right of the accused far outweighs the possible embarrassment of a young witness. Because of the importance of having other members of society present at trial, any statute purporting to limit the defendant’s right to that presence must be strictly construed in favor of the general principle of publicity. In those cases, such as those within the scope of Section 16A, which warrant limited attendance at the trial, any prejudice which might arise incident to the exclusion of the general public will be counteracted by the presence of friends and relatives of the accused. Although the pres-

41 Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966); Geise v. United States, 262 F.2d 151, 156 (9th Cir. 1958); People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954); State v. Damm, 62 S.D. 123, 131, 252 N.W. 7, 10 (1933); Moore v. State, 151 Ga. 648, 659, 108 S.E. 47, 52 (1921); State v. Callahan, 100 Minn. 63, 69, 110 N.W. 342, 345 (1907); Grimmett v. State, 22 Tex. Ct. App. R. 36, 40, 2 S.W. 631, 633 (1886).

42 Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966).


ence of Marshall's friends or relatives at his trial would apparently have had little effect on the outcome,47 his conviction still required reversal48 because his right to a public trial had been denied.

Had the trial court in Marshall excluded the general public, yet allowed the family and friends to be present, there would have been no denial of the right to a public trial. As we have shown, the statute in question is not, as construed in Blondin, a denial of that right, nor is it a denial of due process.49 That courts of necessity possess the discretionary power to exclude members of the public from judicial proceedings is obvious. That power has, in this Commonwealth, been expressed in G.L., c. 278, §16A. In the exercise of this discretion the courts must act within the limits of the Sixth Amendment right to a public trial which, for the purpose of assuring a fair and impartial administration of justice, entitles a defendant to have present at least his lawyer, family and friends.

JOSEPH H. ROY, JR.

§11.10. Injunctive relief from state prosecution in federal courts: Doctrine of abstention and application of Dombrowski v. Pfister.

I. Introduction

A long line of cases1 has held that where the constitutionality of state action is being challenged in federal court, but where there are still questions of state law which could be dispositive of the case, the federal court should normally refrain from granting equitable relief from state criminal prosecutions on the bases of both abstention and comity. This doctrine reflects the belief that out of regard for the independence of the state governments, and for the smooth working of the federal judiciary, the federal courts should avoid needless friction with state policies. Such friction may result from tentative constructions of state statutes and premature adjudication on their constitutionality by the federal courts.

The foregoing policy, with its recognition of the underpinnings of abstention and comity, seems to place great restrictions on the power of federal courts to intervene in state criminal prosecutions. This comment will consider the relevant guidelines formulated by the

48 See note 11 supra.
49 Melanson v. O'Brien, 191 F.2d 963, 965 (1st Cir. 1951).

United States Supreme Court and the recent attempts by lower federal courts to apply them on a case-by-case basis.

Two recent such attempts in Massachusetts are *Karalexis v. Byrne*\(^2\) and *P.B.I.C., Inc. v. Byrne*.\(^3\) In the former, plaintiffs were convicted in state court of possessing, with intent to exhibit, and exhibiting, an "obscene" film — *I Am Curious (Yellow)*.\(^4\) They sought declaratory and injunctive relief in federal district court. That court declined to abstain and did enjoin future prosecutions in connection with the showing of the film. In support of its order, the court held that the applicable statute was unconstitutionally overbroad and had a chilling effect upon the exercise of First Amendment freedoms. This temporary injunction was later stayed by the Supreme Court,\(^5\) pending disposition of the federal appeal to be decided by that Court during the 1970 Fall Term.\(^6\)

In *P.B.I.C., Inc. v. Byrne*, the district attorney had advised the producers and performers of the live theater production *Hair* that they would be prosecuted\(^7\) if certain conduct in the play were not discontinued. Plaintiffs sought injunctive and declaratory relief in the state courts, but the Massachusetts Supreme Judicial Court ruled that injunctive relief would not be granted against prosecution unless certain "lewd and lascivious" acts were deleted, notwithstanding the fact that the play was not otherwise constitutionally obscene. Refusing to make the deletions, plaintiffs brought this action in a federal district court seeking declaratory and injunctive relief against the imminent state prosecution. That court considered abstention inappropriate, ruling that the applicable state statute and the common law of indecent exposure were so broad as to invade the area of protected freedoms. Justification for this interference was found in certain "special circumstances" — the threat of multiple prosecutions, substantial financial loss, and the chilling effect of an overly broad statute on First Amendment rights. This case, too, is being appealed.\(^8\)

In order to determine whether these court actions are consistent with, or logically flowing from, United States Supreme Court decisions, it will be necessary to examine the doctrine of abstention and the appropriate guidelines as set forth by that Court.

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\(^4\) In violation of G.L., c. 272, §§28A, 32.
\(^6\) Subsequent to the writing of this comment, this appeal was decided, Byrne v. Karalexis, 39 U.S.L.W. 4236 (U.S. Feb. 23, 1971). The Court held that because the district court was without the guidance provided by Younger v. Harris (see note 51 infra), the judgment below should be vacated and remanded for reconsideration in the light of that decision. The Court noted that the three-judge district court had made no finding that the movie exhibitor's rights could not be adequately protected in a single state criminal proceeding.
\(^7\) Under G.L., c. 272, §§16, 32.
II. Abstention

The doctrine of abstention is aimed at the avoidance of unnecessary interference by federal courts with the orderly processes of state proceedings. It reflects the belief that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. This principle does not involve the abdication of federal jurisdiction, but only the postponement of its exercise. Thus the abstention doctrine presents this question: When should a federal court abstain from, or defer in, the exercise of its jurisdiction in order to permit all or some of the issues to be resolved by a state court?

There are two reasons for the policy of abstention: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) the belief that the federal system works most efficiently when there is minimal federal involvement in the good faith administration of state law.

Comity reflects the practice of one jurisdiction giving effect to the laws of another. This policy underlies the rule of abstention that federal courts should avoid needless jurisdictional conflict with a state's administration of its own affairs. Comity has two policy considerations: first, courts of one jurisdiction will ordinarily give effect to the laws and judicial decisions of another out of deference and respect, not obligation; second, the court which first acquires jurisdiction of the issue has precedence.

Thus the policies of abstention and comity, as they evolved, instructed federal courts to refrain from exercising jurisdiction if a state court interpretation of applicable state law might obviate the necessity of deciding a federal constitutional issue, or if the federal court's interpretation of unsettled state law was likely to interfere with the state's administration of its own affairs.

It is important to note that the abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; rather, it involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the "special circumstances" prerequisite to its application must be made on a

13 United States v. McLeod, 385 F.2d 734, 746 (5th Cir. 1967).
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The general rule, as stated in Douglas v. City of Jeannette, has been that while the federal court can intervene in exceptional cases in order to prevent irreparable injury which is clear and imminent, the exercise of discretionary powers should be withheld if only slight or inconsequential grounds are asserted. In Douglas, the United States Supreme Court had upheld a district court's refusal to enjoin the application of a city ordinance to a religious solicitation, even though the ordinance was on that same day held unconstitutional as applied in another case.

III. Dombrowski v. Pfister

In Dombrowski v. Pfister, the United States Supreme Court clearly dispelled any notion that federalism requires automatic deference to state courts. This was the first in a series of cases which have sanctioned federal intervention in state court proceedings. The case involved a civil action seeking declaratory and injunctive relief from threatened prosecution under a state antisubversive statute. Plaintiff alleged, first, that the prosecution was instituted in bad faith solely to discourage civil rights activities and, second, that the statute was an unconstitutionally overbroad and vague regulation of freedom of expression. The federal district court ordered dismissal. On appeal, the Supreme Court reversed, endorsing the Douglas doctrine of noninterference with state criminal proceedings, but distinguishing Douglas and Dombrowski by emphasizing the "special circumstances" in the latter. Among these circumstances was that there would be no adequate remedy at law, since "defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights;" also, there would be irreparable injury were they obliged to await the state court's disposition of the case, since "a substantial loss or impairment of freedoms of expression will occur...." Finally, a chilling effect would result from prosecution or the threat of prosecution under an overbroad statute.

The central holding in Dombrowski was that federal abstention was improper (1) where statutes are justifiably attacked on their face as abridging free expression, or (2) where the purpose of their actual or threatened application is to discourage protected activities. Under the first part of this holding, the success of a suit for declaratory or injunctive relief depends upon whether the statute is unconstitutionally

17 Railroad Commn. of Texas v. Pullman Co., 312 U.S. 496, 500 (1941).
18 319 U.S. 157, 163 (1943).
20 380 U.S. 479 (1965).
23 Id. at 486.
24 Id. at 487.
25 Id. at 489-490.
overbroad on its face. Furthermore, it must be unlikely that the statute could be rehabilitated in a single state prosecution. Lastly, plaintiff's conduct must not be so clearly objectionable as to be prohibited under any construction of the statute. Common sense would seem to dictate that once the law is deemed unconstitutional on its face, the issue of bad faith and threatened prosecution should be irrelevant, since an overbroad statute prescribes protected activity regardless of the manner in which the statute is enforced.

Under the second part of the holding, the success of a suit for declaratory or injunctive relief depends upon whether a valid statute is used for the purpose of discouraging activities which come within the ambit of First Amendment protection. Here threatened prosecution and bad faith are relevant, since the failure to enjoin bad faith enforcement may deter people, fearful of being taken to court, from protected conduct.

One important, though often underplayed consideration in determining whether the federal court is to abstain, is the likelihood of the appropriate state tribunal being able to construe the statute in question in such a way as to save it from overbreadth. Obviously, if the statute is capable of reasonably foreseeable court interpretation confining it within constitutional bounds, the argument calling for federal intervention loses strength. It is generally accepted that a federal court will not exercise jurisdiction to enjoin the enforcement of a state statute which has not been authoritatively construed by the state supreme court. However, a federal court has broad discretion in deciding whether a statute can be saved and whether a state court has, in fact, construed it or at least been given the opportunity to do so. For example, in P.B.I.C., Inc. v. Byrne, the federal district court, noting that the Massachusetts Supreme Judicial Court, in an earlier hearing for an injunction, did not specifically find the statute unconstitutional as applied, decided not to abstain. It can be argued, of course, that the court should not have intervened, especially where the challenged statute might have been saved and where the issues could have been resolved in an appeal from the Supreme Judicial Court to the United States Supreme Court.

In Dombrowski, as in most cases wherein a plaintiff seeks federal court intervention, the Anti-Injunction Act, 28 U.S.C. Section 2283,

was raised as a defense. Section 2283 is a codification of the distinction that has long been made between pending and future prosecutions. This distinction is embodied in the general rule that a court of equity has no jurisdiction to enjoin criminal proceedings under the state law, except when such a proceeding is brought to enforce an allegedly unconstitutional statute. If the federal court first obtains jurisdiction over the subject matter, it has the right to hold and maintain such jurisdiction to the exclusion of all other courts. However, even under these circumstances, the federal tribunal cannot interfere when proceedings are already pending in a state court.

In *Dombrowski*, the Supreme Court held that Section 2283 was inapplicable because there were no pending proceedings; plaintiffs had sought injunctive relief before any indictment, and the indictments that were in fact pending were handed down after the lower court had wrongfully declined to issue temporary injunctive relief. Hence there were in law no valid pending proceedings. As a result it was unnecessary to resolve the question whether the suit came under the expressly authorized exception to the Anti-Injunction Act.

When faced with a similar question in a later case, *Cameron v. Johnson*, the Supreme Court held that because of the lower three-judge court’s finding that the prosecutor’s bad faith had not been established, it was unnecessary to decide whether Section 2283 is a bar to pending state prosecutions. Thus, to date, the Supreme Court has not decided whether or not Section 2283 is a bar to injunctive relief when suit has already begun in the state court. Several circuits considering this question have split. For example, courts in at least two circuits have held that Section 2283 bars the injunction of pending state criminal proceedings, for the reason that Congressional prohibitions cannot be modified by judicial improvisation. Courts in two other circuits have held that it is not an absolute bar. The grounds for this position have been stated:

... §2283 is non-jurisdictional in that it is no more than a statutory enactment of the principle of comity for application in the

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30 Ex parte Young, 209 U.S. 123, 162 (1908).
31 Ibid.
32 380 U.S. 479, 484 n.2 (1965).
33 390 U.S. 479, 484 n.2 (1965).
34 Most recently, in *Byrne v. Karalexis*, 396 U.S. 976 (1969), the Supreme Court avoided the issue by staying, pending appeal, a temporary injunction against institution of new prosecutions of the defendants and the execution of any sentence imposed upon them in the pending state case.
35 Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963).
relationship between federal and state courts. As such, it is to give away in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights.\(^\text{37}\)

This latter view seems to be the most persuasive, especially since a strict interpretation of Section 2283, barring federal action unless commenced before proceedings are begun in the state courts, appears to be incompatible with the spirit of *Dombrowski*. Even though there were no valid pending proceedings in *Dombrowski*, there were threats of prosecution and harassment.

**IV. The Supreme Court after Dombrowski**

*Dombrowski v. Pfister* cannot be dismissed as a narrow exception to existing law, in view of two important cases involving the *Dombrowski* doctrine which the Supreme Court has decided since 1965. In *Zwickler v. Koota*\(^\text{38}\) the appellant had sought injunctive and declaratory relief in a federal district court from threatened enforcement of a state statute making it unlawful to distribute anonymous political handbills. Appellant contended that this statute was an overbroad regulation of expression. A three-judge court declined to intervene, reasoning that abstention was justified since there were no "special circumstances" entitling appellant to an injunction against criminal prosecution.

The Supreme Court reversed and remanded, concluding that, irrespective of the propriety of federal injunctive relief, it was inappropriate to abstain from declaratory relief.\(^\text{39}\) The Court noted that the claimed constitutional infirmity was overbreadth and that no possible state court construction could obviate this vice.\(^\text{40}\) Federal forbearance, it reasoned, would result in delay during which the valid exercise of First Amendment rights might be inhibited.\(^\text{41}\)

The *Zwickler* opinion emphasized that in *Dombrowski* the issues of injunction and abstention were treated separately. The majority opinion agreed with the lower court that in the absence of bad faith there could be no injunction issued against the enforcement of the statute. However, it noted that even if there were no grounds for injunctive relief, this did not necessarily mean that the federal court must abstain; it could issue a declaratory judgment if the state law was clearly unconstitutional.\(^\text{42}\)

The second case, *Cameron v. Johnson*,\(^\text{43}\) involved a claim that the Mississippi Anti-Picketing Statute was unconstitutional on its face or,


\(^{38}\) 389 U.S. 241 (1967).

\(^{39}\) Id. at 254.

\(^{40}\) Id. at 249-250.

\(^{41}\) Id. at 252.

\(^{42}\) Id. at 254.

\(^{43}\) 390 U.S. 611 (1968).
alternatively, had been selectively enforced with the purpose of discouraging constitutionally protected activity. A district court dismissed the complaint, holding that the statute was not void on its face and that appellants had failed to show sufficient irreparable injury to warrant injunctive relief. On appeal, the United States Supreme Court affirmed, finding the statute to be constitutional on its face, and agreeing with the district court that neither discriminatory nor bad faith enforcement had been shown.\footnote{Id. at 619-620.}

The Cameron opinion places a great deal of emphasis on bad faith enforcement and appears to use bad faith to rationalize both parts of the Dombrowski rule, namely, where statutes are attacked on their face as abridging free expression, \textit{and} as applied when the purpose is to discourage protected activities. However, a more likely interpretation is that the Court refused to issue an injunction because it \textit{first} concluded that the challenged statute was constitutional on its face, and then determined that there was no showing satisfactory to the majority that the statute was being applied in bad faith. Moreover, even if it is alleged that the threatened prosecution under a statute regulating expression is part of a plan to harass petitioners, a federal court should not grant injunctive relief if there is any evidence to support a conviction in the state criminal proceeding.\footnote{Ibid.}

To summarize the rulings of the Supreme Court with respect to injunctive relief against state prosecution under an allegedly overbroad statute, it can be stated that a federal court should not abstain when a statute regulating expression is attacked as overbroad and the applicant demonstrates a resulting deprivation of certain First Amendment rights. If the statute is found to be overbroad, the court may declare the statute unconstitutional but cannot enjoin its enforcement solely upon that finding.\footnote{Maraist, Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski, 48 Texas L. Rev. 535, 578 (1970).} If a finding of overbreadth is made, then injunctive relief may be warranted if there is a threat or probability of prosecution which results in a chilling effect upon the exercise of freedom of expression.\footnote{Ibid.}

\section{V. The Lower Courts}

Application of these Supreme Court rulings by lower federal tribunals has hardly been uniform. This is particularly true with respect to the question of whether bad faith and statutory unconstitutionality are alternative grounds for federal intervention or whether both are required. One group of cases has adhered to and sometimes expanded the holding of Dombrowski that either bad faith enforcement or facial unconstitutionality of a statute regulating freedom of expression may...
justify federal equitable relief from state criminal prosecutions. In Sheridan v. Garrison the Fifth Circuit Court of Appeals, in a refinement of Dombrowski, held that two elements were required to overcome the prohibitions of the Anti-Injunction Act:

(1) a bad-faith use of the state's legal machinery with the purpose of inhibiting the exercise of the right of free speech (or, alternatively, the existence of a statute unconstitutional on its face affecting free speech) and (2) a probability of irreparable injury, which is established if there is a showing of a significant chilling effect on speech that cannot be avoided by state court adjudication.

Thus it may be inferred that where freedom of expression is at stake, any chilling effect on that expression constitutes irreparable injury per se.

Harris v. Younger, presently being appealed, is the first clear attempt to liberalize Dombrowski. In that case a federal district court ruled that, regardless of the presence or absence of bad faith, it should not abstain if the criminal statute in question has an inherently limiting effect upon free expression and is susceptible to an unduly broad application. Perhaps indicating an even further extension of Dombrowski, the petitioner had been indicted by the state and his prosecution was pending.

These cases have not stressed Cameron's emphasis on bad faith, considering it, instead, merely an alternative to facial unconstitutionality. Even where the statute is constitutional on its face, a growing number of cases have justified federal intervention, not on the basis of bad faith, but on the grounds of irreparable injury and the chilling effect upon plaintiff's First Amendment rights caused by multiple prosecutions or the threat of prosecution.

49 415 F.2d at 699 (5th Cir. 1969).
50 Id. at 709.
51 281 F. Supp. 507 (C.D. Cal. 1968). This case has been decided subsequent to the writing of this comment, Harris v. Younger, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971). The United States Supreme Court reversed the judgment of the three-judge district court. It noted that there was no bad faith nor threat of multiple prosecutions, and further, that a proceeding was already pending in the state court which would afford an opportunity for adjudication of respondent's constitutional claims. Also, there was no showing of irreparable injury, which the Court required to be "both great and immediate" before federal interference with state criminal prosecutions would be allowed. Noting that there may be "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of . . . bad faith and harassment," the Court nonetheless concluded that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it . . . ." Id. at 4206.

This decision of the Court appears to represent a reaffirmation of the principles enunciated in Dombrowski and a reaction against the rather broad interpretation of that decision by the lower federal courts.

A second group of cases, however, has set forth a more narrow and restrictive application of the Dombrowski doctrine based upon the premise that the federal judiciary cannot ordinarily halt the prosecution in bona fide state proceedings. It has been held, for example, that before a federal court can enjoin a state criminal proceeding, those seeking interference must show a chilling effect upon the right of free speech stemming from the application of a statute that is unconstitutional on its face and which is being applied in bad faith. One district court has limited the application of the Dombrowski doctrine to situations involving an important First Amendment public right, such as free speech or debate, but not where the only interests sought to be protected are private and commercial, such as the right to exhibit a film. Perhaps the most extreme example is a case wherein it was held that all of the following criteria must be present before the federal court could assume jurisdiction: (1) a statute unconstitutional on its face; (2) bad faith enforcement of the statute; (3) a chilling effect on the exercise of First Amendment rights; and (4) no adequate remedy in the state judicial system to delimit and enforce the constitutional rights of the aggrieved parties.

There have been different judicial interpretations, not only from state to state, but also within a state or federal district over a period of a few years. Massachusetts affords a prime example. In 1965, in Benoit v. Gardner, the First Circuit Court of Appeals held that the plaintiff must exhaust available state remedies and that any constitutional rights that are his will be protected in those courts and by subsequent review. The mere possibility of erroneous initial application of constitutional standards does not amount to irreparable injury. In accord is Burhoe v. Byrne, holding that neither irreparable harm nor special circumstances justifying injunctive relief were alleged or shown, and therefore the convening of a three-judge district court was not warranted. More recently, in Hurley v. Hinckley, a Massachusetts district court has held that it is not enough merely to allege overbreadth of a statute in order to invoke a federal court to enjoin a state court proceeding. The court found no showing of “special circumstances” and no showing that the prosecution was acting in bad faith, requirements which it considered necessary to justify intervention.


Robinson v. Bradley \(^{60}\) involved a constitutional attack on the Massachusetts "threat" statutes, relating to the apprehension and punishment of persons who have threatened to commit a crime against the person or property of another. \(^{61}\) In Robinson, a Massachusetts district court considered Dombrowski to be unclear as to whether the facial unconstitutionality of vagueness and overbreadth, or the bad faith conduct of state officials, or both, would have been a sufficient ground for the relief sought. The Robinson court suggested in dicta that Cameron could be interpreted as requiring both a facially invalid statute and bad faith, especially the latter. \(^{62}\) It did not resolve this issue, however, since it did not consider the statute in question to be facially unconstitutional on the grounds of vagueness or overbreadth.

The two most recent Massachusetts cases, Karalexis v. Byrne and P.B.I.C., Inc. v. Byrne, are representative of a far more liberal application of Dombrowski. The courts in both cases found abstention inappropriate where a statute was alleged to be unconstitutional on its face, with a resulting chilling effect, even though there was no bad faith in either case on the part of District Attorney Byrne. \(^{63}\)

VI. Conclusion

As we have indicated, the major source of controversy concerns the circumstances under which a showing of bad faith will or will not be required in order to justify federal interference. Where a statute is not unconstitutional on its face, one must show bad faith. It has been suggested that the bad faith test should be replaced with a more objective test under which either of the following would suffice: (1) any proof of harassment, threats or selective enforcement (Cameron), that is, a more inclusive definition of bad faith; (2) a showing of insufficient cause, namely, proof that the law sought to be enforced could not, in the light of the First Amendment, reasonably and constitutionally be applied to the conduct in which petitioners were engaged. \(^{64}\)

Although there has been no formal espousal of such a change, some decisions have amounted to a practical endorsement. One court has held that a sufficient basis for equitable relief was established when plaintiff alleged that a vague or overbroad penal statute was being selectively enforced, thereby stifling First Amendment rights. \(^{65}\) Another court has held that conduct legally equivalent to bad faith

\(^{61}\) G.L., c. 275, §2.
prosecution occurs when state officials, in attempting to proscribe activities closely related to First Amendment rights, bring criminal proceedings under a clearly inapplicable state statute. The test of insufficient cause relates to the second part of the Dombrowski holding—where statutes are attacked as being applied for the purpose of discouraging protected activities. Even assuming that the attack on a statute is justified, it may not always be clear whether that statute is unconstitutional on its face or as applied. For instance, in P.B.I.C., Inc. v. Byrne, it is unclear whether the federal court should have found the obscenity statute unconstitutional on its face or only as applied to the context of live theatre. This determination may be crucial, because where a statute is valid except as applied, a showing of bad faith will likely be necessary to warrant federal intervention.

Few principles are more firmly established in our judicial system than the principle that the federal courts must not interfere with the administration of criminal justice by the state courts except in the most exceptional circumstances. Dombrowski and its successors signify a definite shift away from the passivity of abstention and comity to a philosophy of more active protection of First Amendment guarantees. Although the precise limits and scope of that philosophy are yet to be clearly defined, there is at least a recognition that where freedom of expression and statutory overbreadth are involved, "postponement of federal relief may amount to nothing less than an abdication of responsibility." 

Donald E. Segal

§11.11. Free speech in the classroom: Academic freedom: Keefe v. Geanakos. The appellant, Robert Keefe, was a tenured high school teacher in Ipswich, Massachusetts. He assigned as homework for his senior English class an article which used the word mother-fucker. Students could select another assignment if they so desired. The following day the article was discussed in class. Particular attention was given to the origin, context, and reasons for the inclusion of that word. The next day, Keefe was summoned to a meeting with the superintendent of schools and the principal of his school at which he was called upon to defend his use of the word in question. Five days later the superintendent of schools requested his resignation, which he refused to submit. About one month later, Keefe received two written notices. Each notified him of pending Ipswich School Committee meet-

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§11.11. 1418 F.2d 359 (1st Cir. 1969).
ings, one to consider his suspension for 30 days, the other to consider his dismissal.

Keefe then petitioned the United States District Court for the District of Massachusetts to enjoin the school committee meeting called to vote on his discharge. Five charges formed the basis for the meeting, but the district court considered only one of them: "Use of offensive material in the classroom on September 3, 1969, and subsequently, which use would undermine public confidence and react unfavorably upon the public school system of Ipswich." 3

The district court entertained arguments on Keefe's application for preliminary injunctive relief. The court noted that two conditions were necessary for granting preliminary injunctive relief. 4 The first requisite was that irreparable harm would result if the preliminary injunction were to be denied. The court felt that this condition had not been satisfied, that "if [the] plaintiff were ultimately to prevail monetary damages would appear to be an adequate remedy at law." 5

The second requisite for a preliminary injunction was that the plaintiff would probably prevail on the merits. The court held that this condition was not met because a recent case 6 was interpreted to be "strikingly similar on its facts to the instant case . . . ." 7 In that case, a high school teacher's contract had not been renewed because he had assigned *Brave New World* for reading and classroom discussion, despite a warning (which prefaced the reading list on which the book appeared) that a teacher should not assign a book to a student without having familiarized himself with the book, the student, and the moral standards of the community. The United States District Court for the District of Maryland found no violation of the teacher's First Amendment rights:

... Where the abridgement of the abstract right of free speech results from government action taken for the protection of other substantial public rights no constitutional deprivation will be found to exist. . . . 8

Keefe appealed to the Court of Appeals for the First Circuit for a reversal of the district court's denial of the preliminary injunction. In addition, he requested a temporary injunction pending the determination of the appeal. Acting summarily, 9 the court of appeals considered the question of the appeal itself, indicating that the ultimate

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3 Ibid.
4 Id. at 1092-1093.
5 Id. at 1093.
9 1st Cir. R. 5.
issue of the appeal had been "extensively brief and argued by both sides."\textsuperscript{10} It considered only that charge which the district court had considered, the "[u]se of offensive material in the classroom . . . . "\textsuperscript{11} In reversing the district court's order, the court of appeals HELD: that academic freedom would be irreparably damaged by censorship of such classroom speech;\textsuperscript{12} and that Keefe would probably prevail on the issue of lack of notice to him that a discussion of the article with his class was impermissible.\textsuperscript{13} Moreover, the court noted that at least five books in the school library contained the word in question. As a subsidiary holding, it stated that "[s]uch inconsistency on the part of the school has been regarded as fatal."\textsuperscript{14}

The instant case is significant in that the decision rests upon the theory of academic freedom, applies this theory at the high school level, and seems to treat the teacher as a special kind of state employee. The foregoing conclusions are based on a comparison of Keefe with previous decisions in this area.

The source of academic freedom is generally acknowledged by the United States Supreme Court to be the First Amendment.\textsuperscript{15} Like other First Amendment rights, it is not immune from regulation, and the Keefe opinion concedes that "'some measure of public regulation of classroom speech is inherent in every provision of public education.'"\textsuperscript{16} Recognizing that public school speech may be regulated, the court of appeals determined the issue to be a matter of balancing the need for regulation designed to protect school children from offensive language with the rights of teachers and students in the exercise of their academic freedom.

. . . [T]he question in this case is whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand.\textsuperscript{17}

Emphasizing the particular fact situation before it, the court noted the basis for its approach to this balancing process:

We of course agree with the defendants that what is to be said or read to students is not to be determined by obscenity

\textsuperscript{11} 305 F. Supp. 1091, 1092 (D. Mass. 1969). See 418 F.2d 358, 360 n.3 (1st Cir. 1969) for speculation by the court of appeals as to why the district court considered only one of the charges.
\textsuperscript{12} 418 F.2d 358, 363 (1st Cir. 1969).
\textsuperscript{13} Id. at 362.
\textsuperscript{14} Ibid.
\textsuperscript{16} 418 F.2d 359, 362 (1st Cir. 1969).
\textsuperscript{17} Id. at 361.
standards for adult consumption. . . . At the same time, the issue must be one of degree. A high school senior is not devoid of all discrimination or resistance. Furthermore, as in all other instances, the offensiveness of language and the particular propriety or impropriety is dependent on the circumstances of the utterance.\(^\text{18}\)

This balancing procedure is not unlike that used in libel cases, such as *Time, Inc. v. Hill*,\(^\text{19}\) and obscenity cases, such as *Ginsberg v. New York*.\(^\text{20}\) Ginsberg was convicted for selling to a minor magazines which contained pictures of naked women. The sale allegedly violated Section 484-h of the New York Penal Law. The United States Supreme Court weighed the interest of the state in protecting the well-being of the child\(^\text{21}\) against the interest in protecting freedoms of speech and press.\(^\text{22}\) Obscenity, it was held, was not a protected area of free speech or press; and the interest of the state in safeguarding its minors prevailed.

In *Time, Inc. v. Hill*, Hill sued for compensatory and punitive damages as a result of a play review in *Life*. Hill’s family had been held hostage by escaped convicts. This incident inspired a book on which the play was based; the *Life* article revealed the connection. A New York statute allowed an action for damages by anyone whose name or picture had been used without his permission for trade or advertising purposes. Although this was not a libel action by a private individual (or a statutory one by a public official), the United States Supreme Court applied the same rules as apply in the usual libel action. It balanced the state interest represented by the statute against the individual interest represented by constitutional guarantees of free expression.\(^\text{23}\) Here, the latter prevailed. It was held that the need for “breathing space” for First Amendment freedoms protects innocent or even negligent erroneous statements about matters of public interest. Only where a false report is published with knowledge of its falsity or with a reckless disregard for its truth will the wrongdoer no longer be protected.\(^\text{24}\) In short, in both *Ginsberg* and *Time*, the United States Supreme Court reached a conclusion about state regulation of First Amendment freedoms by weighing the need for regulation against the need to protect the freedoms in question.

The need to protect academic freedom, however, had never prevailed against the need for state regulation until *Keefe*. Virtually all cases concerning the behavior of a teacher have dealt with his extracurricular activities and their effect on his classroom ability. The court of appeals in *Keefe* stated that “[a]part from cases discussing academic

\(^{18}\) Id. at 362.

\(^{19}\) 385 U.S. 374 (1967).

\(^{20}\) 390 U.S. 629 (1968).

\(^{21}\) Id. at 638-641.

\(^{22}\) Id. at 635.


\(^{24}\) Id. at 390.
freedom in the large, not surprisingly, we find no decisions closely in point." 25 More specifically, the courts have been deciding issues which deal with a teacher's associations with organizations believed to be subversive. 26 One example is Shelton v. Tucker. 27 There an Arkansas statute required every teacher, as a condition of employment in a state-supported school, to file each year an affidavit listing all organizations to which he or she had belonged or contributed regularly within the past five years. Shelton's teaching contract was not renewed because he had failed to file the required affidavit. He argued that the statute deprived teachers in Arkansas of their associational freedom. The United States Supreme Court agreed, holding that a state may inquire into the fitness and competence of its teachers, 28 but that the statute was so sweeping as to interfere with associational freedom far beyond what might be justified by legitimate inquiry. 29

In each of those cases concerning a teacher's behavior outside of the classroom, the basis of the decision was either the inherent power of the authority in question (school board or state) or the presence or absence of due process. For example, in Faxon v. School Committee of Boston, 30 the Massachusetts Supreme Judicial Court based its finding on the inherent power of state authority to administer public schools and to protect public confidence in the school system. 31 In Faxon, a tenured high school teacher was dismissed by the school committee for asserting his constitutional privilege against self-incrimination. Before a duly accredited subcommittee of the United States Senate, he refused to answer questions about whether he was a member of the Communist party, whether he had tried to recruit students and others, and whether he had attended certain meetings of the Communist party. The Supreme Judicial Court upheld his dismissal on the basis of prior cases in which Massachusetts courts had upheld the dismissal of public employees whose exercising of constitutional rights "was deemed inconsistent with obligations voluntarily assumed in connection with their public employment." 32

Exemplary of cases concerned with the preservation and denial of due process is the recent case of Keyishian v. Board of Regents. 33 Therein Section 3022 of the Education Law of New York required

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25 418 F.2d 359, 362 (1st Cir. 1969).
27 364 U.S. 479 (1960).
28 Id. at 485.
29 Id. at 487-490.
31 Id. at 533-534, 120 N.E.2d at 773-774.
32 Id. at 535, 120 N.E.2d at 775.
33 385 U.S. 589 (1967).
the state Board of Regents to issue regulations for the disqualification or dismissal of personnel in the state schools on the basis of membership in subversive organizations. Section 105, subdivision 3 of the Civil Service Law, created pursuant to Section 3022 of the Education Law, made a "seditious" word or act grounds for dismissal. Seditious word or act was defined as "criminal anarchy." The United States Supreme Court held that both enactments were unconstitutionally vague, because no teacher could understand the difference between seditious and nonseditious utterances and acts. In addition, those enactments may prohibit the employment of a teacher who merely advocates a doctrine which is seditious and does nothing to incite others to commit seditious acts.34

Keefe varies from both Keyishian and Shelton. The United States Court of Appeals for the First Circuit was not concerned with a teacher's extracurricular activities, but with his behavior in the classroom. The court in Keefe brought the theory of academic freedom directly into play by regulating classroom conduct, that is, by establishing permissible bounds of classroom speech. Due process was not an issue as it was in Keyishian. The power of the school committee was at issue, as it was in Tucker and Faxon, but the court looked at that power as it related to academic freedom, not as it related to First Amendment associational freedoms.

In only two similar instances has the United States Supreme Court acted on the basis of academic freedom. The first, Sweezy v. New Hampshire,35 concerned the fate of a university professor who testified willingly at a hearing before the state attorney general (who was acting on behalf of the legislature) on all matters except his activities in the Progressive party and his lectures at the University of New Hampshire. He refused to answer those questions on the ground that they were irrelevant to the investigation and violated his First Amendment rights. When ordered to answer before the state court, he persisted in his refusal and was found guilty of contempt. The United States Supreme Court reversed on the ground that the investigation was a denial of due process of law under the Fourteenth Amendment, which applies First Amendment freedoms to the states. The Court found that Sweezy's liberties in the areas of political expression and academic freedom had been invaded, and stated that "[the] government should be extremely reticent to tread" upon them.36 The Court continued: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."37 This language implies that academic freedom is to be treated as a special area of First Amendment rights.

34 Id. at 597-604.
36 Id. at 250.
37 Ibid.
The other United States Supreme Court opinion which is based on academic freedom is *Keyishian*. This case is less noteworthy because it relies on *Sweezy* and is based primarily on the vagueness of the statutory meaning of *seditious*. On the other hand, it does say plainly that academic freedom is a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."39

The decision of the United States Court of Appeals for the First Circuit in *Keefe* is consistent with the recognition of academic freedom as a special First Amendment concern. Referring to the inconsistency of the school's having at least five books containing the word in question shelved in its library while prosecuting a teacher for the use of that word in the classroom, the court remarked: "we prefer not to place our decision on this ground alone, lest our doing so diminish our principal holding. . . ."40 The court held that "such rigorous censorship" of classroom speech would have a serious "general chilling effect" on that "‘free play of the spirit which all teachers ought especially to cultivate and practice. . . .’"41

The finding was premised not only upon the need for a "free play of spirit" in the classroom, but also upon the particular materials in question. The court examined the curriculum, an area which courts have been reluctant to enter. Chief Judge Aldrich and his two colleagues, Judges McEntee and Coffin, read the article and made a judgment on the value of its content, noting especially the context of the word being protested. While acknowledging that some parents may have been offended by the use of the word, the court stated that its proper concern was the education of their children.43 In analyzing the materials used, the court has entered an area (curriculum and classroom conduct) which previously has been the domain of the state and/or local school board.

In its regulation of curriculum and classroom conduct, the court indicated that the teacher is to be treated differently than he has been treated in the past. Formerly, courts of every jurisdiction have held the view that a teacher is to be looked upon as any other state employee. The Tennessee Supreme Court in *Scopes v. State*, for example, upheld the conviction of a teacher who had been found guilty of violating a 1925 Tennessee statute for forbidding the teaching of evolution in the public schools. The Tennessee Supreme Court stated that the state was "dealing with its own employees engaged

39 Ibid.
40 418 F.2d 359, 363 (1st Cir. 1969).
41 Id. at 362.
42 Id. at 362 n.9.
43 Id. at 361-362.
upon its own work. ..." Massachusetts decisions concerning the state regulation of the conduct of teachers have reasoned similarly. One such case is Faxon. A case relied upon by the Supreme Judicial Court of Massachusetts in Faxon, Bell v. District Court of Holyoke, upheld the suspension of a fireman for the violation of a rule forbidding firemen, while off duty, to take another job. The Supreme Judicial Court stated that:

...[I]t seems to us that the inconsistency between the duty of a teacher in the public schools and the exercise of the right not to incriminate oneself with respect to association with Communist organizations is fully as great as in the instance of a policeman or a fireman who asserts similar rights with respect to other activities.

In Keefe, the court did not refer to the teacher as similar to a fireman or other public employee, but afforded him special standing by protecting his classroom speech in the interest of academic freedom. It said:

...[U]nwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. ... 

In addition to treating teachers like other state employees, state supreme courts have ruled in the past that the state has an exclusive power to deal with its employees, and to determine the terms of their employment. For example, the Tennessee Supreme Court in Scopes reasoned as follows:

...The plaintiff in error was a teacher in the public schools of Rhea County. He was an employee of the State of Tennessee or of a municipal agency of the State. He was under contract with the State to work in an institution of the State. He had no right or privilege to serve the State except upon such terms as the State prescribed.

...The statute ... is an Act of the State as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform.

50 418 F.2d 359, 362 n.9 (1st Cir. 1969).
51 154 Tenn. 105, 111, 289 S.W. 363, 364 (1927).
52 Id. at 111-112, 289 S.W. at 364-365.
In contrast, while the court in *Keefe* admitted that it is inherent in the nature of public education that classroom speech be regulated to a certain degree, the court found “it difficult not to think that its [the regulation of classroom speech] application to the present case demeans any proper concept of education.” The court rejected the theory that a state has an exclusive power to regulate the conduct of its employees, particularly its teachers, and seemed to limit that power to that of implementing the “proper concept of education.”

It must also be noted that academic freedom had been discussed in past cases with reference only to colleges and universities, not to secondary schools. *Sweezy*, for example, was a professor at the University of New Hampshire. *Keefe*, however, is concerned with a secondary school situation. The reason that courts have considered the issue of academic freedom only in regard to colleges and universities may be that at the elementary and secondary levels of education there has been no strong tradition of intellectual freedom such as there is at the college and university level. The court in *Keefe* seemed to feel that the quality of instruction at the lower levels, especially at the high school level, depends to a large degree on the extent of academic freedom in the classroom and the intellectual integrity of the teaching force.

Moreover, the court was distinctly concerned with the welfare of the students whom the teacher instructs. In addition to its effect on *Keefe’s* academic freedom, the court considered the regulation of a teacher’s classroom conduct in relation to his students. The court stated that:

... [T]he question in this case is whether a teacher may, for demonstrated educational purposes, quote a “dirty” word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure, we would fear for their future.

In the past, the effects on students of the regulation of their teacher’s conduct have not been considered. The *Sweezy* opinion, for example, is based solely on the individual teacher’s freedoms, academic and political, although it does mention that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. . . .” Probably because past cases have

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53 418 F.2d 359, 362 (1st Cir. 1969).
54 Ibid.
57 418 F.2d 359, 361 (1st Cir. 1969).
been concerned with a teacher's extracurricular activities rather than his actions within the classroom, the effect on his students of regulating his conduct was not apparent. In other words, when a teacher's conduct within the classroom is restricted, the impression he can make on his students is directly affected; but where his conduct outside of the classroom is restricted, the effects of that restriction on his students are more indirect. Perhaps in *Keefe*, where the regulation of a teacher's conduct would have directly affected his students, those effects were more visible. In any case, *Keefe* clearly considered such effects as part of the balancing process.

*Keefe* has presented Massachusetts courts with a dilemma — whether to accept the First Circuit Court of Appeals interpretation of the demands of academic freedom, or to proceed as before in cases like *Faxon*. Two recent cases indicate what could follow if Massachusetts state courts would not comply with *Keefe*: avoidance of the state forum. One case, *Parducci v. Rutland*, involved a teacher who sued in a federal district court in Alabama, and who won reinstatement after her dismissal for assigning a short story by Kurt Vonnegut, Jr., to her eleventh grade English class. Like the court of appeals in *Keefe*, this district court read the story and found it not obscene. In fact, it relied on *Keefe*’s consideration of the effects on students of limiting their teacher’s conduct, and found that the shock of the story was not “too great” for an eleventh grade student. Moreover, it held that tenure was not an issue, since every teacher brings his First Amendment freedoms into the classroom.

The outcome of the most recent case in this area merits consideration. It involved a Lawrence, Massachusetts high school teacher, Roger A. Mailloux, who was dismissed for writing a four-letter word on a blackboard during class. The action, for reinstatement and $50,000 damages, was brought in the United States District Court for Massachusetts on First and Fourteenth Amendment grounds. Judge Wyzanski, in granting the preliminary injunction, noted that the word

... is a symbolic word for some radical groups. Flaunting the word has become part of the sexual revolution of our times. Because the word is such a well-known taboo word, and produces such strong reactions, and is so representative of the generational conflict, it has, in the opinion of some experts, unusual effectiveness in making students examine and understand the function of language and the relationship of language, social behavior, and social controls.

The district court considered itself bound by the *Keefe* decision, which

60 Id. at 355-356.
61 Id. at 356.
62 Id. at 354.

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it interpreted as holding that dismissal of a teacher who uses such a word in the twelfth grade for purposes of instruction is in contravention of the Fourteenth Amendment.

The Lawrence School Committee filed an appeal which was dismissed by the Court of Appeals for the First Circuit. The court upheld the preliminary injunction on the narrow ground that the appellant had not met his burden of proof, namely, he had not demonstrated "an abuse of the district court's discretion." But the court did not indicate which party would probably prevail, because it saw a possible distinction between an English teacher's discussing "a serious piece of writing" (the situation in Keefe) and discussing "social mores in the use of language with a chalking of a socially taboo word on the blackboard" (the situation in Mailloux). The court of appeals clarified its opinion in Keefe, saying that it had not intended "to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives." Moreover, by way of qualification of Keefe, the court specified that the lack of a regulation governing the word in question was not by itself proof of a violation of due process. The judgments of school officials, unless clearly wrong, are not to be disturbed.

In conclusion, it seems clear that academic freedom cannot operate if the teacher is treated as merely another public employee. The United States Court of Appeals for the First Circuit has expanded the scope of academic freedom by its decision in Keefe, although the Mailloux decision does indicate a narrowing of that scope. Massachusetts state courts have yet to regard academic freedom as an area for special First Amendment treatment. It is clear that teachers are bringing suits based on the theory of academic freedom in federal rather than state courts. If Massachusetts state courts do not follow the lead of Keefe, the federal court system will probably continue to be the only arena in Massachusetts in which academic freedom will be in issue.

As a right founded on the United States Constitution, academic freedom qualifies for federal district court disposition. Therefore, nothing prevents a complete usurpation of academic freedom questions by the federal courts. Massachusetts state courts will be continually bypassed for federal courts, as has recently occurred in both Alabama and Massachusetts. It seems ironic that individuals who claim an infringement of their constitutional rights within the state domain of public education will be obliged to abandon the state forum for assertion of those rights.

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64 Mailloux v. Kiley, 436 F.2d 565 (1st Cir. 1971).
65 Id. at 566.
66 Ibid.
67 Ibid.
§11.12 Increased sentence on appeal: Walsh v. Commonwealth. The petitioner was indicted on three counts for armed robbery. After pleading guilty he was sentenced by the Middlesex Superior Court to concurrent terms on each indictment of not less than 5 nor more than 10 years. Pursuant to the statutory provisions of Massachusetts, the petitioner appealed his sentence to the Appellate Division of the Superior Court. Thereupon, without stating any reason, the Appellate Division increased one count of the sentence to a term of not less than 8 nor more than 12 years.

On appealing this increase to the Supreme Judicial Court of Massachusetts, the petitioner argued first that his constitutional guarantee against being placed in double jeopardy was violated, and second that he was denied due process of law. That Court HELD: "[T]hat neither the double jeopardy clause of the Fifth Amendment nor the due process clause of the Fourteenth Amendment was violated either by increasing the petitioner's sentence or by increasing it without stating the reasons therefor." 3

The question raised by this decision is whether the appellate courts in Massachusetts should continue to increase a petitioner's sentence in light of recent trends in the law which would favor a curtailment of that practice. An alternate question is whether the appellate courts should be allowed to increase the sentence only when stating a justification for so doing. In determining the answer, the most significant arguments raised by the petitioner, double jeopardy and due process, will be examined. Another argument frequently raised in this type of case, that of equal protection, will also be considered. After examining how different courts have resolved these constitutional issues, it will be concluded that it is appropriate to make the first sentence given by a trial court the ceiling for all sentences on subsequent appeals.

Before reaching the constitutional issues, it should be noted that the current interest in this area of the law is of recent origin. A trend is emerging which would restrict a court from arbitrarily granting an increase in sentence. Some courts now require that reasons be given for an increased sentence. 4

Perhaps what has provided the greatest impetus for the courts' consideration of the problem of increased sentencing, as indicated by the number of times it has been cited, was a law review article written in 1965 by Professor William W. Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant. 5 In the article, Van Alstyne pointed out that harsher sentences upon recon-

2 G.L., c. 278, §§28A-28D.
5 74 Yale L.J. 606 (1965) [hereinafter cited as Van Alstyne].

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viction were permissible throughout the federal court system and in most of the states. He gave reasons why he felt this was unjust, basing his rationale on constitutional theories of double jeopardy, due process and equal protection. He concluded that the first sentence given should be the ceiling on any subsequent resentencing, provided the first sentence was within statutory limits. Since publication of this article in 1965, many courts, including the Court of Appeals for the First Circuit, have assimilated his views and rationales. However, the state courts in Massachusetts have yet to be convinced.

In most decisions reflecting partial or full acceptance of Van Alstyne's theories, the same constitutional issues have appeared. The first of these issues is double jeopardy. As stated in *Patton v. North Carolina*, the theory of double jeopardy involves three separate rules, which prohibit "(1) reprosecution for the same offense following acquittal; (2) reprosecution for the same offense following conviction; and (3) multiple punishment for the same offense." All courts recognize that one can be reprosecuted despite double jeopardy provisions if the first conviction is overturned for constitutional or procedural reasons. The double jeopardy protection is against unreasonable reprosecution.

The guarantee against double jeopardy is a concept which has been written into our Federal Constitution and into state statutes. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The Supreme Court has long allowed an increase in sentence upon a reconviction. The protection against receiving a second punishment for the same offense was expounded in *Ex parte Lange*. Later it

6 Professor Van Alstyne closed by saying: "The contention is, rather, that in all cases an original operative sentence within statutory limits and free of error prejudicial to the government must be regarded as a ceiling in any subsequent proceeding on the same offense, where the second trial is occasioned by a successful challenge to the original proceeding on constitutional grounds." Id. at 611.

7 Marano v. United States, 374 F.2d 583 (1st Cir. 1967).
8 381 F.2d 636 (4th Cir. 1967).
9 Id. at 643-644.
10 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 . . . ."
11 G.L., c. 263, §§7-8A. No provision concerning double jeopardy is found in the Massachusetts constitution or the amendments thereto.
13 85 U.S. (18 Wall.) 163 (1873). "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for

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was stated that the prohibition in the double jeopardy clause did not relate to "being twice punished, but against being twice put in jeopardy. . . ."14 Shortly thereafter, the Supreme Court emphasized the point that one who appeals his conviction and wins can not use his previous jeopardy as a bar to subsequent retrial.15 In 1919, this policy was further cemented into law by the case of Stroud v. United States.16 That case pointed out that the protection against double jeopardy related only to a second trial for the first offense. However, if the one convicted initiated an appeal which resulted in a reversed verdict, he would be considered to have "wiped the slate clean." Then, when a new trial was held, there would be no violation of double jeopardy within the meaning of the Constitution.

A landmark case was Green v. United States,17 in which a defendant was found guilty of second-degree murder but had his conviction reversed. He was tried again and convicted of first-degree murder, which carried with it the death penalty. His successful appeal of his second conviction, on the theory of double jeopardy, established the principal that a conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial.

The most recent pronouncement, and one on which great weight has been placed by petitioners and by the Supreme Judicial Court in the instant case, is North Carolina v. Pearce.18 That decision reaffirmed the old proposition that "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction."19

The federal courts are divided when it comes to the double jeopardy question. The First and Fourth Circuits prohibit an increase in punishment, while the Second, Third, Sixth and Seventh allow it. The major cases prohibiting an increase are Marano v. United States20

the same offence. And . . . there has never been any doubt of . . . [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." Id. at 168, 173.

15 Murphy v. Massachusetts, 177 U.S. 166 (1900).
16 251 U.S. 15 (1919).
17 355 U.S. 184 (1957).
19 Id. at 723. But see Justice Harlan (concurring in part and dissenting in part) in the same case: "I therefore conclude that, consistent with the Fifth Amendment, a defendant who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed." Id. at 751. Accord, Justice Douglas (concurring) in the same case: "It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." Id. at 726-727.
20 374 F.2d 583 (1st Cir. 1967).
and Patton v. North Carolina. In Patton the court could see no constitutionally significant distinction between the prohibition against increasing sentences once service has begun and an increase in punishment after retrial. In Marano the court felt that even though new evidence had been given on retrial, it would not be permissible to increase the defendant's sentence. The court continued: "We think that there must be repose not merely as to the severity of the court's view, but as to the severity of the crime."

The Third Circuit took issue with Marano and concluded that in the federal system, when a new trial is ordered, the trial judge may impose a sentence greater than the one vacated, without giving any reasons for so doing. The Second Circuit agreed:

... No policy of the double jeopardy clause is offended when, as a consequence of a retrial of the same offense resulting from proceedings taken by the accused to correct trial error, a higher punishment is imposed.

It was only as recently as 1969 that the double jeopardy clause of the Fifth Amendment was declared to embody "a fundamental ideal in our constitutional heritage," and was applied to the states through the Fourteenth Amendment. Shortly before this decision, several states began to prohibit increased sentences on appeal. Some cases are based on double jeopardy grounds, while others find their rationale in other principles. There are still those jurisdictions which find that imposing harsher penalties upon a second sentencing does not violate the double jeopardy clause. For example, the Connecticut Supreme Court in Kohlfuss v. Warden of Connecticut State Prison held that "the plaintiff was not put in double jeopardy, that due process of law was not denied to him, and that the heavier sentence imposed on him under the statutes was constitutionally valid."

It is statutorily both permissible and proper for the appellate courts in Massachusetts to increase or decrease the sentence of one who ap-

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21 381 F.2d 636 (4th Cir. 1967).
22 Id. at 645.
23 374 F.2d 583, 585 (1st Cir. 1967).
25 United States v. Coke, 404 F.2d 836, 841 (2d Cir. 1968).
27 Ibid.
30 Reeves v. State, 3 Md. App. 195, 238 A.2d 307 (1968), in which it was said: "The Court of Appeals of Maryland has consistently held that the imposition of a sentence at the second trial which results in a greater period of confinement ... is not unlawful." Id. at 202, 238 A.2d at 312. See Kohlfuss v. Warden of Connecticut State Prison, 149 Conn. 692, 183 A.2d 626, cert. denied, 371 U.S. 928 (1962).
31 Id. at 698, 183 A.2d at 629.
peals. To facilitate appeals, an Appellate Division of the Superior Court was established with safeguards appropriate to ensure a petitioner's receiving a fair disposition. The Appellate Division's only purpose is to review sentences and attempt to correct those which are extremely harsh or lenient. If leave to appeal is granted, the Appellate Division may or may not conduct a hearing, but under no circumstances will it increase a sentence without giving the petitioner an opportunity to be heard. The Massachusetts statute, unlike those of some other states, clearly provides that any time already served on an appealed sentence shall count toward a substituted sentence. However, of the states which afford review, most do not allow an increase in sentence.

Massachusetts traces its double jeopardy policy to United States v. Bal. and Murphy v. Massachusetts. It also relies heavily on Hicks v. Commonwealth, in which it was held that when a defendant has his prior conviction set aside on his appeal and is reconvicted, a longer sentence than initially imposed would not be objectionable.

32 G.L., c. 278, §§28A-28D.
33 Relevant parts of G.L., c. 278, §28A are as follows: "There shall be an appellate division of the Superior Court for the review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed, and for the review of sentences to the reformatory for women for terms of more than five years imposed by final judgments in such criminal cases. Said appellate division shall consist of three justices of the Superior Court to be designated from time to time by the chief justice of said court, and shall sit in Boston or at such other place as may be designated by the chief justice, and at such times as he shall determine."
34 Eighteenth Report of Mass. Judicial Council, Dec. 1942, Pub. Doc. No. 144 at 28-30. It should be noted that an appeal to the Appellate Division is supplementary to any appeal a defendant may wish to take to the Supreme Judicial Court. Either or both types of appeal may be pursued.
35 Relevant parts of G.L., c. 278, §28B are as follows: "If leave to appeal is granted in accordance with this section, the appellate division shall have jurisdiction to consider the appeal with or without a hearing, review the judgment so far as it relates to the sentence imposed, and also any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence, and shall have jurisdiction to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal."
36 G.L., c. 278, §28C.
37 ABA Project on Minimum Standards for Criminal Justice, Advisory Committee on Sentencing and Review, Standards Relating to Appellate Review of Sentences (Tent. Draft 1967) [hereinafter cited as 1967 Advisory Committee]. The four states that do permit an increase are Maryland, Connecticut, Maine and Massachusetts. Id. at 55.
38 163 U.S. 662 (1896).
39 177 U.S. 155 (1900).
The reasoning of the Supreme Judicial Court was that once the petitioner's prior conviction had been set aside by his appeal, he could not claim constitutional protection against double jeopardy. That Court reaffirms this rationale in Walsh.

Most of the cases in the area of increased sentences deal with appeals of conviction which result in a new trial and thus a new sentence. However, the situation can be treated the same whether the second sentence comes after a retrial or after an Appellate Division decision. The Court stated in Hicks: "We are of opinion that when a convicted defendant resorts to the statutory procedure prescribed by §§28A-28D for review of a sentence he assumes the same risks inherent in an appeal from a conviction."41

There is no provision in the Federal Constitution or laws that requires a state to have a system for appellate review, nor has the Supreme Court of the United States required this. That Court and others have held that once channels of appellate review have been established, "the state must refrain from placing unreasonable restrictions on access."42 To accept the benefits of appellate review, one does not have to forfeit other protected rights: "Enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right."43 Therefore, to conclude the double jeopardy argument, it should be noted that since the state of Massachusetts, through its statutes, has provided a channel of appeal for Walsh, he does not have to waive any rights to take advantage of that channel.

Walsh's second major argument on appeal was that his right of due process of law was violated by the unexplained increase of sentence.44 The Supreme Judicial Court reasoned that, if indeed it were a requirement to announce reasons for increasing a sentence, the purpose of such a rule would be to protect the petitioner from the vindictiveness of the judicial system or of one judge in particular. The petitioner in Massachusetts is protected from the latter possibility by reason of the statute regulating appeals procedure, which states: "[N]o justice shall sit or act on an appeal from a sentence imposed by him."45 The Court then discussed statistics showing the small percentage of increased sentences in the years 1964-1969, which it felt negated the charge of vindictiveness in the system. Finally the Court inferred that since North Carolina v. Pearce46 might require a specific charge of vindictiveness, the fact that it was not made supported the conclusion that no violation of due process occurred.

41 Id. at 91, 185 N.E.2d at 740-741.
45 G.L., c. 278, §28A.
North Carolina v. Pearce is the leading case and most recent pronouncement by the Supreme Court in this area. This was a case in which the defendant had his original conviction overturned on constitutional grounds. Upon being reconvicted he was resentenced to a term longer than his original sentence, with time already served being credited to his new sentence. The Court was concerned with possible vindictiveness on the part of courts in such situations, and especially with the appearance of any vindictiveness. The Court concluded:

In order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.47

Federal courts have not been quick to dismiss the due process argument.48 In Patton, the Fourth Circuit held that a sentence imposed at a second trial which increased punishment was unconstitutional because it violated due process and equal protection. "Even the appearance of improper motivation is a disservice to the administration of justice."49 The petitioner should not have even the slightest fear that his appeal will result in the imposition of a direct penalty.50 Agreement is found in a case which, however, supports an increased punishment.51 That case stated that if there were any evidence that an increased punishment had been given "because of the defendant's having prosecuted a successful appeal or other post-conviction remedy,"52 then this would be a denial of due process of law.

The rule adopted in Pearce—requiring affirmative reasons to increase sentence—had been advocated in prior state cases, especially State v. Jacques.53 In Jacques it was said that there was justification in law for a court to assess its sentence on the basis of facts which oc-

47 Id. at 726. But see Murphy v. Massachusetts, 177 U.S. 155, 158 (1900): "And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State to the accused upon such conditions as the State deems proper."
50 Marano v. United States, 347 F.2d 583 (1st Cir. 1967).
51 United States v. Coke, 404 F.2d 836 (2d Cir. 1968).
52 Id. at 842.
curred subsequent to the first sentencing. While not requiring affirmative reasons, *State v. Stafford* held that any evidence concerning a defendant's conduct, character and propensities should be considered whether it appears during the trial or in a presentence report.

There is no case which specifically requires a charge of vindictiveness to be lodged against the sentencing judge in claiming a due process violation. In fact it has been suggested that "it is an impossible task for the prisoner to prove improper motivation of the trial judge." Equally impracticable and most distasteful would be an attempt by a federal court to ascertain whether vindictiveness played a part in a sentencing judge's motives. If one accepts the premise that it would be nearly impossible to prove such a charge, then it follows that it would only be a useless maneuver to make the charges. It is generally agreed by appellate courts that a trial judge should be free to impose any sentence (within statutory and constitutional limits) that he deems appropriate at the time. However, in dealing with human judges, there is always the possibility that a vindictive decision will be meted out. Therefore, to eliminate even the suggestion of impropriety, it has been concluded: "In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old."

The third constitutional argument, raised in other cases challenging increased sentences, is based on the theory of equal protection. The courts currently apply the equal protection clause by recognizing the existence of classes of people. They hold that all members of the class must be treated equally. Everyone in the class of convicted persons is protected from retrial and resentencing until his sentence is vacated. Any right or privilege granted to that class "must be applied equally and indiscriminately."

However, some courts reason that when prisoners appeal, it can be determined that a new class — that of appellants — has been formed. Then, as long as the law applies uniformly to this class, there is no violation of equal protection. They recognize the right of the prisoner to appeal. It has been stated that the right is not absolute and that the state can exert a "chilling effect" on the right for the advancement

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54 Id. at 242, 239 A.2d at 250.
57 Ibid.
59 *Patton v. North Carolina*, 381 F.2d 636, 641 (4th Cir. 1967). *Contra*, State v. Stafford, 274 N.C. 519, 529, 164 S.E.2d 371, 378 (1968): "A rule that a new sentence can never exceed the old could cause such disparity in punishment at the same term of court as to create a festering sense of injustice in a prisoner and confuse the public."
60 Id. at 535, 164 S.E.2d at 382-383.
61 Ibid.
of legitimate state interests. The "chill" is effected by removing the convicted person from a protected class to another class in which there are risks of a harsher sentence. However, the prisoner would still enjoy the equal protection of the law as applied to his new class.

The contrary argument is that in the interest of fairness the class known as prisoners should not be further subdivided. A convict who appeals should not be forced to run a greater risk than one who does not. It is obvious that under the present Massachusetts law only those who pursue a postconviction remedy run the risk of being affected by increased sentences. The original sentences of those who do not appeal are just as likely to warrant review as the sentences of those who do, but the risk involved appears to be a substantial impediment to appeal. The result is that the pursuit of postconviction remedies is frustrated.

In order to become a member of the class subject to a harsher sentence, a prisoner must discover either a constitutional defect or a procedural error in his first trial. Then he must win a reversal. Upon reconviction he becomes eligible for a more severe sentence. Ironically, the only way a prisoner can receive a harsher sentence is by having the state admit he was initially denied a fair trial.

It seems that those who receive the lenient sentences, such as plea-bargainers, do not bother to appeal. Using the Supreme Judicial Court's own statistics, it is notable that the number of appellants whose sentences are reduced is more than four and one-half times as great as those whose sentences are increased. This implies that of those whose sentences are affected by appeal, the great majority have valid grounds for reduction of sentence. It should not be assumed that those who do not appeal have no grounds for reduction, or feel that they have no grounds. "The fact remains that, in certain cases, a defendant who has good ground for appeal will be dissuaded from appeal because of the possibility of receiving a greater sentence ... ." It is the proper function of the court to be vigilant to protect access to remedies, rather than to conceive doctrines which inhibit the exercise of the right to review.

63 Van Alstyne, note 5 supra, at 638.
64 Ibid.
66 Ibid.
67 Van Alstyne, note 5 supra, at 622.
Thus far the constitutional arguments concerning increased punishment on retrial or appeal have been discussed. It is apparent that there are many divergent opinions on this subject in the courts of this country.\textsuperscript{71} It is also evident that in the reasoning of those favoring increased punishments, strong emphasis is placed upon the fact that the defendant initiated the action himself.\textsuperscript{72} Professor Van Alstyne disputes this reasoning, saying that if one "can waive protection" or "must so waive" in order to appeal, then this is a denial that the "protection is absolute" or an admission that one "can be required to forfeit a constitutional right to absolute protection" as a prerequisite to securing the privilege of appeal.\textsuperscript{73} In a partially concurring opinion in \textit{Pearce}, Justice Harlan said: "In relying on this conceptual fiction [slate wiped clean after first sentence overturned], the majority forgets that \textit{Green v. United States}, supra, prohibits the imposition of an increased punishment on retrial precisely because convictions are usually set aside only at the defendant's behest and not in spite of that fact."\textsuperscript{74} Since the defendant must initiate an appeal, he cannot be penalized by losing any of his constitutional rights.

As a matter of policy, some states feel that they have a legitimate interest in retaining the power to increase sentences as well as to decrease them. These states fear a heavy administrative burden, were this provision to be relaxed. They envision an enormous number of frivolous appeals by petitioners who feel that they have nothing to lose. This legitimate state purpose has prevented the practice from being declared unconstitutional. However, in those jurisdictions where harsher resentencing is forbidden, there appears to have been no undue administrative burden.\textsuperscript{75} Harsher sentencing on appeal is forbidden in California and Virginia, in our military courts, in Germany,\textsuperscript{76} and

\textsuperscript{71} The following synopsis which divides lines of opinion on increasing sentences is found in State v. Stafford, 274 N.C. 519, 523-524, 164 S.E.2d 371, 374-375 (1968):

"1. Severer sentences are permissible and will be upheld unless they clearly flout constitutional standards of due process, and the judge need not articulate the reason for the differentiation in the sentence. [Citations omitted.]

"2. Increased sentences are absolutely prohibited. [Citations omitted.]

"3. Increased sentences are prohibited unless events warranting an increased penalty occur and come to the court's attention subsequent to the first sentence, and are made affirmatively to appear. [Citations omitted.]

"4. Increased sentences are permitted when the record affirmatively shows that the judge is not penalizing the defendant for having exercised his right to have his first sentence vacated. [Citations omitted.]

"5. After a defendant has been tried and convicted of murder in the first degree (or other capital crime), with a recommendation of life imprisonment, upon a retrial the prosecution may not seek the death penalty. [Citation omitted.]"


\textsuperscript{73} Van Alstyne, note 5 \textit{supra}, at 627.

\textsuperscript{74} 395 U.S. 711, 749 (1969).

\textsuperscript{75} Van Alstyne, note 5 \textit{supra}, at 618 n.33.

\textsuperscript{76} Ibid.
A petitioner with perfect grounds of appeal is now equally as deterred from seeking appellate review as one whose appeal rests on frivolous grounds. It seems a fundamental principal of American justice that if even one man is deterred from exercising his constitutional or statutory rights, then policy should be changed, if possible, to remove the deterrent. In practice the courts have tended to be pragmatic, concluding that the possibility of an administrative burden bars the full implementation of constitutional rights. However, jurisdictions which have prohibited increased sentences are not unduly burdened. Therefore, it should be incumbent upon all other jurisdictions to at least experiment with this rule for a period of time.

Justice Douglas has said: "The theory of double jeopardy is that a person need run the gauntlet only once." Professor Van Alstyne also was of the opinion that a person should be subjected to the gauntlet only once, as to both conviction and punishment. He proposed a rule limiting punishment and gave a summary of the technical arguments for applying the rule.

... When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly "acquitting" the defendant of a greater penalty. ... Thus, the range of penalties applicable to a given offense would be treated for double jeopardy purposes just the same as the range of degrees for a given offense. Failure to impose a higher penalty, like a failure to find guilt of a higher degree, would amount to an acquittal of that degree of punishment. At that point, double jeopardy protection from retrial for the same offense (or for the same degree of punishment) of which one has previously been acquitted would take hold: The defendant could still be retried and punished for the offense and up to the degree of punishment of which he was originally convicted, of course, because he "waived" his double jeopardy protection by appealing his conviction. He could not be retried for a greater offense or a greater punishment, however, for he obviously had not appealed from his implied acquittal of such offense or punishment and consequently cannot be said to have waived the protection provided by that acquittal.

Professor Van Alstyne received a great deal of support from the ABA Advisory Committee on Sentencing and Review. After examining the problem of increased sentences, the committee concluded that...
because the power to increase sentences is exercised infrequently by authorized courts, it is not very effective in remediying overly lenient sentencing. The committee suggested a new standard which was adopted by the ABA.

On a remand for the purpose of resentencing an offender, no sentencing court should be empowered to impose a sentence which results in an increase over the sentence originally imposed.

As has been indicated, some courts have begun to implement this standard in their decisions, while others take the more moderate view that sentences may be increased if new facts are presented before the second sentencing. The Advisory Committee on Sentencing and Review does not believe that the latter is a good practice. Even if new facts warrant a heavier sentence, it is better to have a standard that is "prophylactic in effect, and easily administered," under which an increased sentence could not be given.

Viewed in the light of the complex constitutional arguments, varied decisions and recent suggestions, if Pearce can be applied retrospectively, it can be argued that the Supreme Judicial Court did violate petitioner Walsh's constitutional rights by not informing him of the reasons for increasing the sentence. It would be relatively simple for a court to comply with the rule and give reasons for an increased sentence, if new facts seemed to warrant such a disposition. However, the underlying problem of discouraging appeals would not be solved. Defendants who have valid grounds for appeal, but know that their record might cause a harsher sentence, or who might have had a disciplinary problem in prison, would be afraid to come forward. Since there is no way a defendant can correct what he feels is an inequity of justice without appealing either the case or (where allowed) the sentence, it places a heavy burden on such a defendant to decide his course of action. Justice is not served when men fear to use judicial proceedings, while they feel in good faith that they have a valid argument for reduction in sentence.

The last impediment to a change of policy is the need for an appropriate constitutional basis of decision, in lieu of rewriting statutes. Courts in other states have managed to sidestep the constitutional issue entirely by deciding the question on procedural grounds. One such court stated: "We hold that as a matter of judicial policy such a

81 1967 Advisory Committee, note 37 supra, at 59.
82 Id. at 55, §3.4(b).
sentence is improper."\textsuperscript{86} Another court gave a more precise reason for its decision:

We do not find it necessary to decide the constitutional issues as we conclude that when the state grants a criminal appeal as a matter of right to one convicted of a crime, as it has, our \textit{procedural policy} should be not to limit that right by requiring the defendant to risk a more severe sentence in order to exercise that right of appeal.\textsuperscript{87} [Emphasis added.]

The courts now have a viable option for circumventing the constitutional issues which have posed problems in the past. A policy of having the first sentence become a ceiling for future appeals is possible. A more thorough police investigation and presentence report, containing all available factors regarding the crime and the accused, would be stressed. Even if all relevant factors are not discovered, it is submitted that less harm is done to the integrity of the court and to the image of American justice if one who deserves a harsher sentence slips by with more lenient sentence (as do plea-bargainers now) than if one with a valid ground of appeal is afraid to exercise his constitutional rights. Any burden of increase in the number of appeals, unless clearly overwhelming, should be upon the courts, in the interest of more equitable treatment of appellants.

\textsc{Terrence J. Ahearn

\textsuperscript{86} State v. Holmes, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968), in which the court held that "as a matter of law . . . any increase in penalty upon a retrial inevitably discourages a convicted defendant from exercising his legal rights and is contrary to public policy." Id. at 298, 161 N.W.2d at 653.