Chapter 15: Criminal Law and Procedure

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CHAPTER 15
Criminal Law and Procedure
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A. IDENTIFICATION

§15.1. Introduction. The 1969 SURVEY chapter on criminal law and procedure extensively discussed developments in the area of pretrial identification procedures. During the 1970 SURVEY year, this aspect of criminal procedure generated more litigation than ever before. The Supreme Judicial Court decided 13 cases involving issues related to pretrial identification. In addition, the United States District Court for the District of Massachusetts granted a petition for a writ of habeas corpus filed by a defendant whose conviction was affirmed by the Supreme Judicial Court in 1969. The extensive litigation in this area reflects the absence of well-defined standards for decision due to the newness and complexity of this area, the limited guidance provided by the United States Supreme Court, and various difficulties inherent in Supreme Court doctrine. The present standards, discussed at length in the 1969 SURVEY, are summarized below.

In United States v. Wade, the Supreme Court held that post-indictment lineups are a “critical stage of the prosecution,” and that, consequently, the Sixth Amendment requires that the defendant and his counsel be notified of an impending lineup, and that counsel be present at the lineup, absent an “intelligent waiver.” The Court held that in-court identifications by witnesses who have observed an unconstitutional pretrial lineup are to be excluded unless the prosecution can establish by clear and convincing evidence that the courtroom identifications have an “independent origin,” that is, are based upon observations of the accused other than those which occurred at the unconstitutional pretrial confrontation. The Court applied the standard of Wong Sun v. United States:

... whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

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2 388 U.S. 218 (1967).
The Court stated that application of the *Wong Sun* test to identification evidence requires consideration of the following factors:

... the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any prelineup description and the defendant’s actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, ... the lapse of time between the alleged act and the lineup identification [and] ... those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.4

In *Gilbert v. California,*5 a companion case to *Wade*, the Supreme Court held that testimony regarding a pretrial confrontation violating the Sixth Amendment is per se excluded (without considering whether an independent origin exists), because such testimony is “the direct result of the illegal lineup ‘come at by exploitation of [the primary] illegality.’”6

The Supreme Court has decided identification cases involving application of the due process clause.7 In *Stovall v. Denno,*8 a case involving a pretrial confrontation without counsel occurring prior to the *Wade* decision, the Court held that although no Sixth Amendment right had been violated (because *Wade* does not apply retroactively), nevertheless the defendant was entitled to relief if “in any event the confrontation ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.”9 The Court noted that the validity of a claim that due process of law has been violated depends upon the totality of the circumstances surrounding the confrontation. In *Simmons v. United States,*10 the Court applied a comparable standard to pretrial photographic identifications, holding that convictions based upon courtroom identifications which follow pretrial identifications by photograph are to be set aside only if the photographic identification procedures employed were “so impermissibly suggestive as to give rise to a very substantial likelihood of

5 388 U.S. 263 (1967).
6 Id. at 272-273.
7 In addition to the two cases described below, the Court has decided Biggers v. Tennessee, 390 U.S. 404 (1968), in which the Court affirmed per curiam a decision of the Tennessee Supreme Court, Justice Douglas writing a dissenting opinion; and Foster v. California, 394 U.S. 440 (1969), in which the Court reversed a decision of the Court of Appeal of California, finding that the identification procedures utilized did not meet the due process standard established in *Stovall v. Denno*, 388 U.S. 293 (1967).
8 Ibid.
9 Id. at 301-302.
irreparable misidentification." The Court again noted the need to evaluate questions of this kind in light of the totality of surrounding circumstances.

In summary, the decisions of the Supreme Court to date indicate that two constitutional provisions—the Sixth Amendment and the due process clause—impose constraints upon pretrial identifications. The tools utilized in the application of these constraints are the presence of counsel requirement and the exclusionary rule. Counsel is required, absent an “intelligent waiver,” at post-indictment lineups and all other pretrial confrontations which constitute a “critical stage of the prosecution.” The exclusionary rule is to be applied in a variety of situations. First, identification evidence directly concerning unconstitutional pretrial identifications is excluded per se. This includes pretrial identifications of two types: those which violate the Sixth Amendment (post-Wade corporeal identifications which constitute a “critical stage of the prosecution” and are held without counsel and without valid waiver of counsel) and those which violate the due process clause (any pretrial identification involving the use of procedures so suggestive as to violate due process, considering the totality of the circumstances). The latter presumably includes pretrial identifications subject to the Sixth Amendment, regardless of whether they are conducted in conformity with the Sixth Amendment. Second, in-court identifications are to be excluded when preceded by a pretrial identification violating the Sixth Amendment, unless the prosecution can establish by clear and convincing evidence that the courtroom identification had an “independent origin.”

As yet the Supreme Court has not had occasion to decide whether the independent origin rule applies to in-court identifications which are preceded by pretrial identifications violating the due process clause, but not the Sixth Amendment. It can be argued that the prosecution ought to have the opportunity to establish an independent origin in the case of Sixth Amendment violations, but not in the case of due process violations, because use of the exclusionary rule in the Sixth Amendment context involves application of a sanction designed to enforce the presence of counsel requirement, and may have no relationship to the reliability of the identification. Despite the absence of counsel in a particular case, the identification procedures employed may not have been suggestive in any respect, and consequently the Sixth Amendment violation may have no relationship to the reliability of subsequent courtroom identifications (which may provide essential evidence). In contrast, identifications which follow pretrial identifica-

11 Id. at 384.
12 This would appear to be a necessary implication of Stovall v. Denno, 388 U.S. 293, 302 (1967), even though the Supreme Court did not discuss this issue in United States v. Wade, 388 U.S. 218 (1967), the only decision of the Court to date applying the Sixth Amendment to pretrial identifications.
tions violating the due process clause are suspect by definition, because in every case they were preceded by identifications conducted in an unduly suggestive manner. Hence it can be argued that courtroom identification testimony of witnesses participating in pretrial identifications violating due process should be excluded per se.

To the contrary, it can be argued that despite the due process violation, subsequent in-court identifications may provide reliable and essential evidence, which should not be excluded if the prosecution can establish by clear and convincing evidence its independence from the unconstitutional identification. An extreme example would be the case in which several witnesses (for instance, kidnap victims) have the opportunity to view the offenders for several days under excellent conditions of observation, give detailed and consistent descriptions of the offenders, make identifications in circumstances violating due process, then make definite and consistent identifications of the defendants in the courtroom at trial. It would seem difficult to argue for exclusion of the in-court identifications in such a case, except on the basis that broader application of the exclusionary rule will more effectively deter use of suggestive procedures. Thus, the applicability of the independent origin rule to in-court identification testimony following pretrial identifications violating due process is an issue which requires resolution by the United States Supreme Court.

Another such issue is the question whether the independent origin rule applies to out-of-court identifications preceded by unconstitutional pretrial identifications. It is arguable that the opportunity to establish an independent origin should be afforded only in the cases of subsequent in-court identifications because, in such cases, the identifying witness is always available for immediate cross-examination. To the contrary, it can be argued that properly conducted out-of-court identifications may well be more reliable than in-court identifications, which of necessity are made in the context of highly suggestive circumstances. It is difficult to imagine a more suggestive environment than that of the courtroom during trial for the offense in question. Here again the Supreme Court must provide further guidance.

§15.2. Cooper v. Picard. During the 1969 Survey year, the Supreme Judicial Court decided Commonwealth v. Cooper. The decision was described in the 1969 Survey as follows:

... Cooper involved an armed robbery of a "reasonably well-lighted" store on March 4, 1968. Two witnesses observed the robbers at close range. The robber who was later identified as the defendant Cooper apparently had distinctive facial characteristics -"a pock-marked face and pulled-in cheeks." The following day, one witness looked at five or six boxes of police photographs without identifying anyone, then, with no hesitation, identified a single

photograph of Cooper brought in separately. On March 20, Cooper was arrested for an unrelated crime. At the police station, Cooper was observed through a one-way glass window by first one, then the other witness to the robbery. He was among 12 to 20 men in all manner of dress, including police officers, milling around in a room. Both witnesses identified Cooper. Cooper was later observed alone by the two witnesses together. Cooper was indicted on April 5. At the time of the identification, he was without counsel. He had been advised of his rights under the *Miranda* decision, but not under *Wade*. At trial, both witnesses again identified Cooper.

Before the Supreme Judicial Court, the defendant argued that the identification testimony should have been excluded, relying upon *Wade*. The Court noted that *Cooper* was neither *Wade*, nor *Bumpus*, but rather a case falling between the two. *Wade* involved a lineup after indictment and appointment of counsel; *Bumpus*, a prompt field confrontation between a suspect and a witness; and *Cooper*, a preindictment station house confrontation between witnesses and a suspect in custody on an unrelated charge. Noting that *Wade* was not directly applicable to the facts of *Cooper*, the Court nevertheless concluded that the confrontation was a "critical stage," because it determined whether there would be a prosecution. Consequently, Cooper was entitled to notice and presence of counsel as required by *Wade*.

The Court then applied the independent origin test to the courtroom identification evidence, and concluded that it was properly admitted, noting the following points: wide-ranging cross-examination of the witnesses was permitted at trial and actively participated in by the judge; both witnesses "had more than adequate opportunity to observe the criminals and had ample capacity to remember what they observed"; "one witness had made an unequivocal photographic identification, after failing to identify any photograph contained in five or six boxes of pictures"; there was "no confusion of identity prior to the observation at the station house"; and there was no failure to identify the defendant at any time.2

The Supreme Judicial Court affirmed the Superior Court conviction. Cooper then petitioned for a writ of habeas corpus in the United States District Court for the District of Massachusetts. The district court, after an independent review of the state court record, denied the petition without a hearing, holding that the record established an independent basis for the in-court identification. Cooper then appealed to the United States Court of Appeals for the First Circuit,3 arguing

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3 428 F.2d 1351 (1st Cir. 1970).
that the district court had erred in denying him an evidentiary hearing.
The court of appeals agreed. Noting the standard of *Wong Sun v.
United States* and the factors identified in *United States v. Wade* as
measures of the independence (and hence admissability) of in-court
identifications, the court stressed the particular importance of deter-
mining the degree of suggestiveness inherent in the pretrial confronta-
tion, concluding: "Hence the nature of the police station confronta-
tion must be considered in reaching a conclusion as to independence of
recollection of witnesses subjected to it."  
Chief Judge Wyzanski's district court opinion on remand interpreted
the court of appeals decision as follows:

... What the Court of Appeals, in effect, ruled is that no matter
how satisfied a court is that a witness had adequate opportunity to
observe the alleged criminal act, no matter what identification by
picture prior to a showup has been made by the witness, if the
defendant offers evidence that there has been a showup, the court
must hear evidence with respect to the showup in order to deter-
mine not only whether it was permissible but whether it was so
suggestive that the in-court identification no longer rests upon
observations and identifications which previous to the showup
would have been independent sources of the in-court identifica-
tions.  

After holding an evidentiary hearing, the district court concluded that
the pretrial confrontation had been unconstitutionally suggestive (in
addition to violating the Sixth Amendment), and the in-court identi-
fications had not been clearly and convincingly shown to have an in-
dependent origin. Accordingly, the petition for a writ of habeas corpus
was granted.

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5 388 U.S. 218 (1967).
6 428 F.2d 1351, 1354 (1st Cir. 1970).
8 The court found that: "When viewed Cooper had not shaved for 1 or 2 days,
was without a coat, had an open collar without a tie, and wore slacks. In the
room there were no persons not connected with the police. There were more than
a dozen clean-shaven policemen, most of them in their shirtsleeves but none tieless.
Some wore guns. None of them resembled Cooper or was unkempt. Some were over
30 years of age. In suggestiveness the situation can hardly be differentiated from
a showup of Cooper alone. There was no emergency or other special circumstance
that made it necessary for Cooper to be viewed alone or to be viewed immediately
before a lineup could be arranged." Id. at 861.
9 Detailed exploration of the facts of the robbery led the court to conclude that
the witnesses' opportunities to carefully observe the robbers had been very limited.
More important, the court found several major discrepancies between the descrip-
tion given to the police 15 minutes after the robbery and the actual appearance of
Cooper. The robber had been described as about 5 feet 9 inches tall and 20 to 21
years of age, with blond hair. In contrast, the court found that: "Cooper was on
the night of the robbery 27 years old. He was about 5 feet 10 inches in height. He
§15.3. Supreme Judicial Court decisions. Among the 13 pretrial identification cases decided by the Supreme Judicial Court during the 1970 Survey year, the first six discussed below involved the Sixth Amendment presence of counsel requirement. In five of these cases, the central issue addressed by the Court was the question whether an independent origin for in-court identification testimony had been established. Three cases involved solely due process issues, while two addressed narrower questions related to the admissibility of identification testimony and access to photographs utilized in pretrial identifications. In most of these decisions, little analysis is offered in support of the conclusions of the Court. One decision, Commonwealth v. Connolly, is directly inconsistent with the identification decisions of the United States Supreme Court.

Commonwealth v. Frank involved an armed robbery of a hitchhiker in an automobile at night. The witness (the robbery victim) was seated next to the robber for 10 to 15 minutes during a ride which covered more than five miles. The streets were lighted throughout; some areas were "well-lighted." The trial court found that the witness was above average in intelligence, and had "ample opportunity" to see and to observe the face and general appearance of the robber. Approximately one month after the robbery, the witness went to a courthouse at police request to observe two men apprehended in the commission of a similar robbery. At police request, the witness sat in the lobby for about five minutes and observed 15 to 20 people pass through. The defendant Frank was brought through, handcuffed to a police or custodial officer in plain clothes, and was identified by the witness. He was not represented by counsel, and no notice of the viewing had been given. The trial court held that evidence relating to his pretrial identification was inadmissible under United States v. Wade because of the absence of counsel. The court admitted the subsequent in-court identification, however, finding that it derived from an independent source.

The Supreme Judicial Court affirmed, with the following observations:

... the main reason for the full inclusion in this opinion of the judge's findings of fact on the motion to suppress are to make it clear that such careful findings supported by the evidence and upholding an in-court identification are not likely to be disturbed by us. Here, an initial confrontation has occurred under circum-

had dark not blond hair. His most conspicuous features were pock marks, sunken cheeks, and a sallow complexion. I am persuaded that, despite their testimony before me, none of those features was mentioned by either Mr. or Mrs. Jacobson when the police asked for a description on the night of the robbery or at any time before March 20, 1968." Id. at 863.

stances likely to fix in the mind of the witness the identity of the person confronted. Upon a subsequent and definite in-court identification of the same person, such in-court identification is not rendered inadmissible by an intervening illegal pre-trial confrontation and identification.\textsuperscript{4}

The Supreme Judicial Court did not explicitly consider the range of factors which \textit{Wade} indicates require consideration when the independent origin test is applied. In addition, its analysis was not in accord with the subsequent court of appeals and district court decisions in \textit{Cooper v. Picard},\textsuperscript{5} which focused on the necessity of careful examination of the degree of suggestiveness inherent in the pretrial identification, regardless of the circumstances of the original observation and subsequent events. The Court did not consider whether the confrontation violated due process, nor whether the independent origin rule applies to cases involving due process violations.

\textit{Commonwealth v. Cefalo}\textsuperscript{6} involved an armed robbery of a store. The witness was working in the cash office. She saw a man standing at the office window, pointing a gun at her. He put a paper bag through the window and said "[F]ill it up or I'll kill you." The witness filled the bag with bills from the cash drawer, returned the bag, and the man departed. The defendant was apprehended the afternoon of the robbery and was identified by the witness later the same afternoon. The identification occurred when the witness, at the request of the police, arrived near the entrance of the police station, "at which time the defendant, handcuffed to two other persons, emerged from the station house and entered a patrol wagon. He later alighted from the patrol wagon near another police station, to which the cruiser in which the witness was a passenger had also been driven."\textsuperscript{7}

The Supreme Judicial Court analyzed the case as follows:

\dots [A]ssuming arguendo the illegality of the in-custody identification by the witness, we are of the belief that her in-court identification of the defendant was independent of the in-custody identification and therefore valid. At the time of the robbery the man who approached the cash office stood about four and a half feet from her. The witness observed the robber for a half minute to a minute. She noticed his clothing, hair and complexion. In the court room she stated that she was "positive" that the defendant was the man who had robbed her although she admitted she was nervous when the robbery occurred. She gave a statement to the Saugus police approximately twenty minutes after the robbery which differed only in insignificant respects from her testimony on

\textsuperscript{7} Id. at 509, 257 N.E.2d at 923.
the stand. In the investigatory phase of the case she was shown a series of pictures and was quite positive that the defendant's picture was not among them. The trial occurred four months after the robbery. In sum, it would appear that her in-court identification of the defendant originated in a series of observations independent of those which she made at the time of her in-custody identification . . . . In our view the Commonwealth has established by clear and convincing evidence that the in-court identification was based upon observation of the suspect other than the in-custody identification, and that the police station identification was harmless beyond a reasonable doubt.8

It is difficult to imagine a more suggestive pretrial viewing than that which occurred in this case. Its only virtue was proximity in time to the robbery incident. Yet again, as in Frank, the Court did not evaluate the degree of suggestiveness inherent in the pretrial confrontation; nor assess its relationship to the in-court identification, as the subsequent Picard decisions require; nor consider whether the independent origin rule applies to cases involving due process violations.

Commonwealth v. Balukonis9 involved an armed bank robbery witnessed by four bank employees, each of whom identified the defendants before trial.10 As in Frank and Cefalo, the Supreme Judicial Court

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8 Ibid.
10 The pretrial indentifications were made in the following circumstances: "On the day of the robbery [Feb. 2, 1968] each of the [witnesses was] shown a large number of photographs, but did not pick out any as resembling the defendants. On the morning of February 8, 1968, each of the women viewed about fifteen to twenty new photographs, from which each selected two photographs of Allen. On the evening of February 8, 1968, the women were shown about fifteen additional photographs at their respective homes and each picked out pictures of Balukonis as the other participant in the robbery.

"On February 13, 1968, Miss Michaud and Mrs. Nowokunski were driven to the District Court of Lawrence to see if they could identify one of the bank robbers. As they were getting out of the car they saw Allen walking in the street. After entering the court house, they again observed Allen in the court house corridor for about fifteen minutes. A number of other people were present in the corridor at that time. The women informed Chief Saball of the Shirley police department, who had accompanied them to Lawrence, that the man they had seen in the street and in the corridor was one of the bank robbers. The women then viewed Allen in a court room where he was a defendant in another criminal proceeding and for the third time identified him to Chief Saball as one of the bank robbers. Neither Allen nor his attorney, who was present, was aware that Allen was being observed for purposes of identification with regard to the robbery of the Shirley Co-Operative Bank. That same day Miss Michaud and Mrs. Nowokunski were taken to the Lawrence police department, and viewed Balukonis through a 'glass' while he was sitting in a room at the detective bureau. Balukonis was the only person in the room dressed in work clothes. On February 15, 1968, Mrs. Will and Mrs. Peterson were taken to State police headquarters in Boston where they viewed Balukonis through a 'window' in a room with only one other individual who they knew was not Balukonis. On February 29, 1968, Mrs. Will and Mrs. Peterson were taken to
found that the in-court identifications had an independent origin, commenting:

We need not determine whether the pretrial identifications were improper, because even if we assume that they were, we are satisfied that the in-court identifications of the defendants "had an independent origin." United States v. Wade, 388 U.S. 218, 242. Each of the witnesses had ample opportunity prior to or during the robbery to observe the defendants. Their testimony warrants the conclusion that their in-court identifications were based on their observations of the defendants on February 2, 1968, the day of the robbery and not as the result of the pre-trial confrontations.11

Again the Court did not discuss the Wade factors in applying the independent origin test; again its discussion was not consistent with Picard; and again the Court did not determine whether the pretrial identifications violated due process, and if so, whether the independent origin rule is applicable.

Commonwealth v. Wilson12 involved a first-degree murder. The victim was shot to death on May 11, 1968, in an area in which the lighting was excellent. Two witnesses (O'Brien and Davis) observed the shooting, and each identified the defendant before trial.

... On Sunday, May 12, 1968, O'Brien, in the presence of defense counsel, observed the defendant at a lineup containing nine men which was conducted at the Quincy police station. Although O'Brien recognized the defendant, he did not identify him at that time. On the following Tuesday O'Brien called the district attorney and subsequently went to his office. O'Brien discussed the case for about an hour with the district attorney and with one Lieutenant John Regan of the State police. During this meeting O'Brien was not shown any photographs of the defendant. The next day two State police officers came to O'Brien's home and told him that they had a picture of the lineup O'Brien had viewed the previous Sunday. Before O'Brien was shown the photograph, he told the officers that the defendant was the "fourth one in on the right as you are looking at the photo." O'Brien then drew a circle around the defendant's picture. At the trial O'Brien was asked the following question: "At the time you saw ... [the defendant] at the Quincy [p]olice [s]tation in the lineup, is there any question in your mind that you were able to recognize the defendant . . . ?"
He replied, "The minute I saw him in the lineup I recognized him." He did not identify the defendant at the time because he "was scared." 13

The defendant was the fourth man from the right in the lineup, immediately adjacent to three policemen known to O'Brien. The Supreme Judicial Court held that, because O'Brien immediately recognized the defendant, the lineup was not so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate due process of law. It is difficult to follow the reasoning of the Court, since presumably the more suggestive a confrontation is, the more likely a witness is to make an immediate identification. Evaluating the suggestiveness of a lineup requires an examination of the character of the lineup rather than the response of the witness to the lineup.

The second pretrial identification involved the witness Davis. On the evening of the murder, Davis told the police he did not think he could identify the murderer because "he did not get a good look at his face." On the following day, Davis was shown a photograph of a lineup, but did not identify the defendant. A few days later, after Davis knew the defendant had been arrested and had seen a television clip showing him being taken into custody, Davis was shown a photograph of the lineup viewed by O'Brien and again did not identify the defendant. Eight days after the murder, Davis was shown two "face view" photographs of the defendant and again made no identification. Five days later, Davis identified the defendant at a probable cause hearing.

The Supreme Judicial Court held that "[e]ven assuming that the identification procedure was improper," Davis's in-court identification of the defendant was properly admitted because it had an independent origin, noting the following:

... Davis testified that he had several opportunities to observe the defendant. He "saw the full view" of the defendant's face, accurately described the defendant's physical appearance, and the clothing the defendant was wearing at the time of the shooting. At the trial Davis was asked the following question in cross-examination: "[I]s it fair to say ... that ... last May 11, 1968, you weren't sure of the identification of ... [the defendant] but that you are today?" Davis replied that this was not so. He stated that he did not identify the pictures of the defendant because he "was very much afraid of repercussions about this ... [for] his family and himself." Although Davis admitted that on the night the shooting took place he told the police he "didn't get a good look" at the defendant's face, he said the reason he told this to the police at that time was because he "was afraid." 14

13 Id. at 237-238, 255 N.E.2d at 747-748.
14 Id. at 239, 255 N.E.2d at 748.
Thus, the Supreme Judicial Court again applied the independent origin rule without discussing the factors specified in *Wade*, and without exploring the suggestiveness and impact of the pretrial identification, as required by *Picard*. Again, despite the apparent suggestiveness of the procedures employed, the Court did not determine whether due process violations had occurred, nor whether the independent origin rule is applicable to such cases.

The defendant also contended that his not being represented by counsel at the photographic identifications was a violation of the Sixth Amendment. The Court held that the absence of counsel was harmless error, noting that the defendant was given broad latitude in cross-examining the witnesses; apparently the Court was relying upon the independence of the in-court identifications, again without regard to the analysis required by *Wade* and *Picard*, and without exploring whether the photographic identifications were a "critical stage" of the prosecution.

In *Commonwealth v. Guillory*, the victim of an attempted rape identified the defendant at a police station ten months after the crime and again at the courtroom trial. The defendant was given the *Miranda* warnings and agreed to the station house viewing. He was placed before a one-way glass, alone, except for a white police officer nearby. The complainant testified that she identified the defendant as she entered the station, prior to the viewing. The Supreme Judicial Court reversed the conviction, finding that the Sixth Amendment required exclusion of both the pretrial and in-court identifications. The Court found there was a "critical need for counsel at the confrontation," which was "decidedly suspect under *Stovall v. Denno*." The Court noted that the *Miranda* warnings do not encompass the information contemplated under *Wade* and, in addition, considered the defendant's waiver of counsel not "without cloud." The Court held that an independent origin for the in-court identification had not been established, noting the existence of various discrepancies in the statements of the victim. The Court did not explicitly consider the factors listed in *Wade* in determining whether an independent origin existed.

*Commonwealth v. Connolly* involved a first-degree murder, in the course of which the identifying witness was shot and wounded. After talking with the witness, the police arrested the defendants and took them to the police station and then to the hospital, where the witness identified them. The defendants were not represented by counsel at

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17 The timing of these events is not specified in the Supreme Judicial Court opinion, except for the statement that the identification occurred "immediately after their arrest" (although a visit to the police station preceded the hospital viewing). The arrest seems to have occurred the same day as the shooting, but this is unclear. The condition of the witness at the time of the identification also is not described, despite its bearing upon the capacity of the witness to make an accurate
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the confrontation. The Supreme Judicial Court analyzed the case as follows:

... The defendants allege a denial of due process and the right to counsel in the admission, subject to their exceptions, of Sylvia Haggar's testimony concerning her identification of the defendants in a hospital room immediately after their arrest without counsel being present. Since no question is presented about the validity of an in-court identification when preceded by a tainted prior identification, United States v. Wade, 388 U.S. 218, and Gilbert v. California, 388 U.S. 263, are inapposite. Rather the question is whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendants were denied due process of law. Stovall v. Denno, Warden, 388 U.S. 293. As in the Stovall case, the identification occurred in a hospital room shortly after arrest. We deem it immaterial whether Sylvia Haggar's wounds were so critical that haste, as in the Stovall case, was essential if any identification at all was to occur, for as we recently held in Commonwealth v. Bumpus, 354 Mass. 494, 501, an identification by a witness to a crime, without the presence of counsel, is admissible in evidence if reasonable in the light of all the circumstances. Here, as in the Bumpus case, it was a reasonable police procedure to confront the two suspects immediately after arrest with the witness implicating them in the crime, to insure that the proper parties had been identified. We are of opinion that the Bumpus case is controlling and that Sylvia Haggar's testimony was rightly admitted.18

This analysis is directly inconsistent with the pretrial identification decisions of the United States Supreme Court. The identification occurred after the Wade and Gilbert decisions. Consequently, the defendants were entitled to counsel at the pretrial viewing, which was clearly a "critical stage of the prosecution." Since the evidence in question related directly to the unconstitutional identification, it should have been excluded per se as required by Gilbert v. California.19 The only possible basis for an exception would be determinations that it was not possible to provide counsel in the circumstances, and that an immediate viewing was imperative because of the condition of the witness.

The defendants may have been entitled to relief on due process as well as Sixth Amendment grounds. The Court correctly stated that

identification and the need to hold the viewing before appointment of counsel. The witness knew the defendants and apparently had sufficient opportunity to observe the murder. The opinion does not directly consider the circumstances or conditions of observations.

Stovall v. Denno\(^{20}\) established the guidelines for such determinations, but then misconstrued that case. Stovall requires exclusion where the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law," considering the totality of the circumstances.\(^{21}\) The determination whether the confrontation was a "reasonable police procedure" is not an equivalent standard if applied as it was in this case. The Court did not evaluate the suggestiveness of the procedures employed, and it considered the element which was central in Stovall—the degree to which an immediate confrontation was imperative—to be "immaterial."

Three 1970 decisions involved only due process issues. Commonwealth v. Kazonis\(^{22}\) did not involve a Sixth Amendment violation because the identification occurred prior to Wade, which does not apply retroactively. The Supreme Judicial Court found, however, that the pretrial identification was so suggestive as to violate due process,\(^{23}\) commenting as follows:

... The present circumstances reveal a confrontation which was highly conducive to misidentification, and which cannot be justified by urgency, efficient police work, or some other relevant factor. Campanale's opportunity to observe the defendant was

\(^{20}\) 388 U.S. 293 (1967).
\(^{21}\) Id. at 302.
\(^{23}\) The circumstances of observation of the crime and the identification were as follows: "Campanale was driving slowly between two cars into the parking lot of the bank when he observed a car parked a few feet away. He saw one man seated in the car, one man standing close to it on the far side from him, and two men standing on the stairs of the bank. During the brief period (about a minute) that Campanale was endeavoring to park his car he observed all four men, and looked at the defendant for about twenty or twenty-five seconds. On January 4, 1966, Campanale was interviewed by the police concerning the robbery. On that date, and later on January 12, he was shown photographs and slides, including pictures of Kazonis and the three other men seen at the bank. Although he did identify two of the men, and one man who was not there, he did not select the photograph of the defendant. At the trial he identified the defendant as the man standing near the car in the parking lot. There was evidence that Campanale had made a prior statement identifying this man as Strazzula, one of the men tried for the robbery, though Campanale at the trial testified that he could not remember having done so.

"On February 15, 1966, almost two months after the robbery, Campanale was taken to the State police headquarters, where he was given a gray jacket to put on and seated near a teletype machine. He was told to 'look around.' Through an opening he noticed two men in a doorway talking to a police officer, one of whom was several inches taller than the other. The former was identified by Campanale as the defendant." In a footnote the Court continued: "It appears that one DeFuria, a State police officer, had telephoned to the defendant's lawyer and asked that the defendant come to police headquarters to be identified. After the viewing of the defendant, described above, by Campanale, Lt. DeFuria told the defendant that the 'people didn't show up.' He then said to the defendant's counsel, 'I'll see you later, Joe. Thanks for coming.'" Id. at 98-99 and n.1, 255 N.E.2d at 334-335 and n.2.
fleeting and subject to the distraction of several other elements entering his field of vision while he steered a car into a parking space. By his own testimony he observed the defendant for about twenty or twenty-five seconds, and at the time was unaware of the just completed robbery. On two occasions he failed to select the defendant's photograph from a group of photographs. On one occasion he identified a man other than the defendant as the man by the car. Since almost two months had elapsed from the date of the crime, and the defendant had voluntarily reported to the State police on the day in question, it is difficult to see why such a highly suggestive confrontation was necessary.24

The Court then determined that the challenged identification did not have an independent origin, reasoning as follows:

... Campanale's opportunity to observe was limited; on two occasions he failed to select photographs of the defendant; on one occasion he identified another man as standing by the car (a position in which he ultimately placed the defendant), and there was an interval of almost two months between the crime and the confrontation. Nor did Campanale assert that he would have been able to identify Kazonis, independently of the prior confrontation. Under the rule set forth in United States v. Wade, 388 U.S. 218, 240, we cannot say that the Commonwealth has established "by clear and convincing evidence" that the in-court identification was not the product of the tainted pre-trial identification.25

The Court did not explicitly consider the Wade factors in applying the independent origin rule, nor did it address the question whether the rule applies to cases in which the pretrial confrontation is defective on due process rather than Sixth Amendment grounds.

Commonwealth v. Salerno26 involved an armed robbery and related crimes. The identifying witness observed the approach and flight of the robbers at approximately 11:40 A.M. She arrived at the Leominster police station at 12:30 or 12:45 P.M., was shown ten to twelve photographs, and selected photographs of the defendants. At approximately 1 P.M., the Fitchburg police, acting independently, apprehended the defendants in Fitchburg. At 1:20 P.M. the witness approached in a Leominster police car as the defendants were standing on the sidewalk among eight to ten persons (including a Fitchburg detective who had been questioning them, a bartender, and patrons of a nearby bar) and immediately identified the defendants. The defendants did not contend that they were entitled to counsel at this identification, but challenged the admissability of the witness's in-court identification on

24 Id. at 100, 255 N.E.2d at 336.
25 Id. at 101, 255 N.E.2d at 336.
the ground that the pretrial confrontation was so unnecessarily sug-
gestive as to violate due process.

The Supreme Judicial Court did not agree, commenting as follows:

It is difficult to conceive of a less contrived or a more reliable out-of-court "confrontation" than the one which here was for-
tuitously produced by the independent observations of an alert
citizen and by effective police surveillance, investigation and com-
munications: An eyewitness to a crime committed two hours
earlier coming upon, at a public street corner, an impromptu
gathering of ten men, most of whom were curious bystanders and
no one of whom was under visible restraint, and singling out two
of them as the persons she had observed at the scene of the crime
and whose pictures in the interim she had picked out from a
display of a dozen photographs.27

The Court, in reaching this correct result, gave undue emphasis to the
element of fortuitousness. This element is further discussed below.

In Commonwealth v. D'Ambra,28 the defendant was arrested 15
minutes after an attempted armed robbery, one-eighth of a mile from the
scene. The pretrial identification occurred at the police station, within
an hour of the robbery attempt. The would-be robber had worn a
mask, but the identifying witness testified that he had recognized his
hair style and clothing. The Court found that the pretrial con-
frontation had occurred by chance. The Supreme Judicial Court rejected the con-
tention that the witness's in-court identification had been tainted by
the pretrial confrontation, commenting as follows:

... [T]he police station confrontation in the instant case is
markedly different from other confrontation-identification cases
where there was a calculated move by the police to bring about
pre-trial observations of a suspect by an eyewitness. ... That an
eyewitness accidentally confronts a suspect erases any problem of
illegality where the police make no attempt to elicit improperly
such an identification.29

The Court did not offer any analysis to support this conclusion. While
it would make little sense to impose a Sixth Amendment presence of
counsel requirement at fortuitous, unanticipated confrontations, it is
difficult to see why examination of such confrontations to determine
consistency with due process is not required. Certainly fortuitous con-
frontations have as great or greater potential for suggestiveness and
consequent impact upon the validity of subsequent in-court identifica-
tions as do planned confrontations (which should be so structured as
to achieve the greatest possible objectivity).30

27 Id. at 93, 255 N.E.2d at 321.
29 Id. at 515, 258 N.E.2d at 76.
30 This question is similar to that of the appropriateness of assessing the intent
In *Commonwealth v. Gibson*, two "evidently reliable and intelligent" witnesses to an armed bank robbery separately identified photographs of the defendant on the day of the robbery and "positively" identified him in the courtroom at trial. The witnesses gave "quite similar" descriptions of the robber before viewing photographs. One witness selected the defendant's picture from over a hundred photographs, the other witness from twenty-five or more photographs. Both had seen the robber on the occasion of a previous robbery about a month before. Citing *Simmons v. United States* and *Wade*, the defendant argued that the trial court had erred in denying him permission to examine the photographs of persons other than the defendant examined by identifying witnesses. The Supreme Judicial Court did not agree, reasoning that "to require segregation of all photographs shown to witnesses in the investigatory stage of all crimes would be to place a heavy if not intolerable burden upon investigatory processes at a time when these processes are already overtaxed."  

In *Commonwealth v. Redmond*, the trial court ordered all evidence related to a pretrial confrontation violating the Sixth Amendment suppressed, but it allowed the witness to identify the defendant in the courtroom at trial. The defendant subsequently testified about the circumstances of the pretrial confrontation. When the witness was recalled in rebuttal, he denied the accuracy of the defendant's testimony and described the pretrial confrontation. The Supreme Judicial Court held that the rebuttal testimony of the witness was properly admitted. The Court noted that the defendant's testimony, if believed, impeached the in-court identification, and it ruled that the testimony of the witness was admissible as a denial of the defendant's statements and as a prior consistent identification.  

of law enforcement officials in the case of planned confrontations. The latter question was discussed in the 1969 Survey as follows: "Another potential criterion, which would be applicable where suggestive elements were present in identification procedures employed, is the intent, or good faith, of the officials involved. Tighter constraints might be imposed where suggestive elements were deliberately introduced, greater tolerance given where no intent to influence the witness was present. One problem with this approach lies in the difficulty of proving intent. In addition, it should be noted that this criterion bears no relationship to reliability. If an assailant were Caucasian, and the lineup were composed entirely of Negroes, with the exception of the person identified, it should make no significant difference that no intent to influence the witness was present. Although unrelated to reliability, an intent criterion could, however, serve the purpose of deterring the use of suggestive procedures. This rationale would support its use only to create a presumption against admissibility when good faith was absent, however, not to create a presumption in favor of admissibility when good faith was present."


35 In addition to the decisions discussed above, the Supreme Judicial Court also decided identification issues in the following two rescript opinions: Common-
§15.4. Introduction. Searches and seizures are regulated by statute,1 by Article 14 of the Declaration of Rights of the Massachusetts Constitution,2 and by the Fourth Amendment to the Constitution of the United States, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Since the decision of the Supreme Court of the United States in Mapp v. Ohio,3 the provisions of the Fourth Amendment have applied to the states through the Fourteenth Amendment.

Evidence obtained as the result of a police search or seizure is admissible in criminal proceedings only when the search or seizure is authorized by a valid search warrant based upon probable cause, or falls within one of a limited number of categories of exceptional circumstances in which a warrantless search or seizure has been held to be not "unreasonable." The most important exception to the warrant requirement is the search incident to a lawful arrest. Chimel v. California4 has limited the scope of such searches to the arrestee's person and the area within his immediate control. The remaining exceptions to the requirement include consensual searches, the limited protective search for weapons authorized by Terry v. Ohio,5 and emergency searches in "hot pursuit" circumstances.6 The discussion of 1970 developments which follows will first consider those cases involving warrantless searches or seizures, then the cases involving issues related to search warrants.

§15.5. Warrantless searches and seizures. During the 1970 Survey year, the United States Supreme Court decided United States v. Van

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1 G.L., c. 276, §§1-8, and many additional specific provisions.
2 Article 14 provides: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with formalities prescribed by the laws."
5 392 U.S. 1 (1968).
Leeuwen, a case involving detention of first class mail. The facts of the case were as follows:

Respondent, at about 1:30 P.M. on Thursday, March 28, 1968, mailed two 12-pound packages at the post office in Mt. Vernon, Washington, a town some 60 miles from the Canadian border. One package was addressed to a post office box in Van Nuys, California, and the other to a post office box in Nashville, Tennessee. Respondent declared they contained coins. . . .

When the postal clerk told a policeman who happened to be present that he was suspicious of the packages, the policeman at once noticed that the return address on the packages was a vacant housing area of a nearby junior college, and that the license plates of respondent's car were British Columbia. The policeman called the Canadian police, who called customs in Seattle. At 3 o'clock that afternoon customs called Van Nuys and learned that the addressee of one package was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime. A customs official in Seattle thereupon filed an affidavit for a search warrant for both packages with a United States commissioner, who issued the search warrant at 4 P.M., and it was executed in Mt. Vernon at 6:30 P.M., 2½ hours later. Thereupon the packages were opened, inspected, resealed, and promptly sent on their way.

Van Leeuwen was convicted of illegally importing gold coins. His conviction was reversed by the court of appeals, which held that the coins were improperly admitted in evidence because a timely warrant had not been obtained.

The United States Supreme Court did not agree. The Court noted that it has long been held that first class mail is not subject to official inspection, except in circumstances and in a manner consistent with the Fourth Amendment. Noting that in this case privacy was not invaded before a search warrant was obtained, the Court concluded that the detention of the packages was not "unreasonable" within the meaning of the Fourth Amendment. The Court analogized the initial detention to the protective search for weapons authorized in Terry v. Ohio, stating that the nature and weight of the packages, the fictitious return address, the British Columbia license plates, and the proximity to the Canadian border justified detention of the

1 397 U.S. 249 (1970). In Van Leeuwen, although a warrant was obtained before the packages involved were searched, the packages were seized without a warrant.

2 Id. at 249-250.

3 392 U.S. 1 (1968).
packages, without a warrant and without probable cause, while an investigation was made. The Court viewed the 29-hour period of detention as reasonable in light of the fact that probable cause was established with respect to one of the packages within one and a half hours, and in light of the necessary delay in completing the investigation due to the time differential between Washington and Tennessee.

Recent decisions of the United States Supreme Court have not shown a general trend toward either greater permissiveness or greater restrictiveness in the area of search and seizure. The decision of the Court in this case, however, considered in the light of the explicit analogy to *Terry v. Ohio*, may indicate a greater receptiveness to efforts to define a continuum of constitutionally valid investigative steps, short of unlimited search, which the police may take in specified circumstances which do not constitute probable cause. It does not appear, however, that the Court intended to establish in *Van Leeuwen* a new category of exception to the search warrant requirement.

During the 1970 Survey year, the United States Court of Appeals for the First Circuit decided *United States v. DeLeo.* The case involved interpretation of *Chimel v. California*, in which the Supreme Court redefined the permissible scope of warrantless searches incident to lawful arrests. In *Chimel*, the Supreme Court reasoned that the proper extent of a search must be defined by the circumstances which render it permissible. Since the justification for a search incident to arrest lies in the need to remove weapons which might be used to resist arrest or to attempt escape, and to seize any evidence that might be concealed or destroyed, the scope of such searches was held to be properly limited to the arrestee's person and the area within his immediate control, namely, that area in which he might gain possession of a weapon or destructible evidence.

In *DeLeo*, the defendant was arrested in a drugstore and searched for weapons. Forty minutes later at FBI headquarters, he was again searched and a bank safe-deposit envelope, signature card, and key were found on his person. Incriminating evidence was subsequently recovered from the safe-deposit box. Citing *Chimel*, the defendant argued that the second search was too remote in time and place from his arrest to be within the scope of search defined by the justification for searches incident to arrest. The court of appeals disagreed, distinguishing *DeLeo* and *Chimel* as follows:

The difference between the situation in *Chimel* and that in the case before us is this: the arrest of a suspect in a particular place—be it his apartment, office, or house—has no such nexus with that place as, without more (i.e., a valid search warrant), would justify searching the premises; but the fact that a suspect, arrested in a public place, has been subjected only to a hasty search for obvious

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4 422 F.2d 487 (1st Cir. 1970).
§15.6 CRIMINAL LAW AND PROCEDURE

weapons has a reasonable nexus with the necessity of conducting a more deliberate search for weapons or evidence just as soon as he is in a place where such a search can be performed with thoroughness and without public embarrassment to him. While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence. Were this not to be so, every person arrested for a serious crime would be subjected to thorough and possibly humiliating search where and when apprehended. 6

Although the defendant's argument is a creative application of the Chimel analysis, Chimel did not directly concern the proximity of searches of the person to the arrest supporting the search. Moreover, the justifications supporting searches incident to arrest apply with nearly equal weight to searches of the person shortly after arrest at the first place of detention; and, as the court noted, to require intensive searches in all cases at the moment and place of arrest would not likely serve the interests of either defendants or the public. 7

§15.6. Search warrants. Four cases decided during the 1970 Survey year involved questions relating to the sufficiency of affidavits supporting search warrants. Two of these cases were decided by the Supreme Judicial Court, 1 one by the United States District Court for the District of Massachusetts, 2 and one by the United States Court of Appeals for the First Circuit. 3 The central issue in both federal court decisions addressed the sufficiency of affidavits relying upon informant hearsay. Standards for decision in such cases were established by the United States Supreme Court in Jones v. United States 4 and Aguilar v. Texas, 5 and recently restated in Spinelli v United States. 6 These cases held that hearsay may provide the basis for the issuance of a

6 422 F.2d 487, 493 (1st Cir. 1970).

3 Saville v. O'Brien, 420 F.2d 347 (1st Cir. 1970).
search warrant but, in order that the judgment of an independent
magistrate may determine whether information possessed by the police
is sufficient to justify an invasion of privacy, the magistrate must be
informed of sufficient "underlying circumstances" to demonstrate the
credibility of the informant whose statements are to be relied upon,
or the reliability of the information he has provided.

In Von Utter v. Tulloch, the United States District Court for the
District of Massachusetts granted a petition for a writ of habeas
corpus filed by a defendant whose conviction was affirmed by the
Supreme Judicial Court in 1969. The Massachusetts decision was
described in the 1969 Survey as follows:

... [S]tatements of an unnamed informant were relied upon in
the affidavit. ...

The informant had predicted the defendant's arrival in town in
possession of drugs. The affidavit did not state that this prediction
was based upon the informant's personal knowledge. The Court
found the following circumstances, set out in the affidavit, to be
sufficient to support the validity of the warrant: the informant
admitted to the use of drugs, had a "user's" knowledge of narc-
ocics," and was known to the affiant to associate "with convicted
narcotic users"; the applicant had received information from a
named police officer who had information regarding dates of
parties and names of persons in attendance, consistent with the
informant's information; the information given was specific (de-
scribing the drugs, date of arrival and automobile); and the con-
nection of the defendant with convicted drug users and the
description of the automobile was confirmed by named Connecti-
cut State Police narcotics agents, as well as unnamed Massachusetts
State Police narcotics agents.

As to the information contained in the affidavit, the district court
found the specific information provided by the informant regarding
the drugs, date of arrival, and automobile to be essential to a finding
of probable cause. The court stated that the affidavit provided no
factual basis for a determination that this information was reliable
or that the informant was credible. The court reasoned as follows:

... [The informant] may have been told by Von Utter himself
to expect him with narcotics at a specified time and place, or as
Spinelli points out, he might have been merely passing on a
casual rumor circulating in the underworld. Nothing in the af-
davit indicates on what facts the informant's statement was based.

Moreover, the affidavit does not set forth any factual basis to
support a finding that the informer's tip was reliable. The state-

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http://lawdigitalcommons.bc.edu/asml/vol1970/iss1/18
ments that the informant was a drug user, an associate of drug addicts and familiar with their activities, shows, of course, that he was in a position where it was possible for him to acquire information about Von Utter's future activities. There is, however, nothing to indicate that the information he passes on is trustworthy. There is no statement that he has in the past given information which investigation showed to be true. There is an assertion that the affiant believes him to be reliable. This is not enough. 10

The district court concluded that the requirements of Jones, Aguilar and Spinelli had not been met, because sufficient "underlying circumstances" had not been set forth to enable a "neutral and detached magistrate" to conclude that the information was reliable. Consequently the petition for habeas corpus was granted.

C. JURY TRIAL AND JURORS

§ 15.7. Selection of jurors in capital cases. Eleven cases decided by the Supreme Judicial Court during the 1970 survey year involved issues related to jury trial and jurors. Of these cases, six addressed questions related to the selection of jurors in capital cases. The questions considered in these cases involved interpretation of Massachusetts statutory and case law in light of the decision of the United States Supreme Court in Witherspoon v. Illinois. 1 In Witherspoon, the defendant was found guilty of murder and sentenced to death by a jury selected in a manner consistent with the following statutory provision:

In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious

10 304 F. Supp. 1055, 1057 (D. Mass. 1969). In addition to the informant's association with drugs and drug users, the affidavit specified the following as corroboration of the reliability of the informant of the information he provided:

"2. Information received by me from Detective Robert Silva, who has information from a reliable informant as to dates of parties and names of persons in attendance to conform with the same type of information received from my confidential informant.

"5. All of the information received by me from my confidential informant has been confirmed by Narcotic Agents of the Massachusetts State Police and Connecticut State Police regarding the reputation of John Joseph Von Utter and the cars [sic] owner and description, color [and] registration number." Id. at 1056-1057.

The court may have considered paragraph 2 insufficient because the corroborating information was provided by an informant whose reliability was not demonstrated. Paragraph 5 appears to corroborate only the defendant's reputation and information regarding his automobile, not the activity described by the informant, nor any other criminal activity.

scruples against capital punishment, or that he is opposed to the same.²

At trial, under the authority of this statute, the prosecution successfully challenged 47 veniremen, nearly half of the venire of prospective jurors, on the ground that they opposed capital punishment. The jury which was then selected from the remaining veniremen was charged with determining both the defendant's guilt or innocence and whether his sentence should be imprisonment or death. With respect to the jury's sentencing function, the Supreme Court concluded that the jury selection procedure employed had violated the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments, and held that:

...[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. [The Court continued in a footnote:] ... The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. ... We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case.³

Massachusetts law provides that: "A person whose opinions are such as to preclude him from finding a defendant guilty of a crime

punishable with death shall not serve as a juror on the trial of an indictment for such crime."\(^4\) The *Witherspoon* decision clearly did not affect the facial constitutionality of this statutory provision, which is much narrower in scope than the statute considered in that case.\(^5\) Massachusetts law requires the examination under oath of prospective jurors upon the motion of either party and, if the court finds that a juror "does not stand indifferent in the case," requires selection of another juror in his place.\(^6\) The General Laws provide for a mandatory death penalty in the case of convictions of first-degree murder, unless the jury recommends that the penalty not be imposed.\(^7\) Thus, in first-degree murder cases, the jury has a sentencing function in addition to its responsibility for determining guilt or innocence. Because of this provision, it has been the practice in Massachusetts to ask jurors in capital cases whether they hold any opinion which would preclude them from recommending life imprisonment for a defendant found guilty of first-degree murder. This practice has prevailed since the Supreme Judicial Court indicated in *Commonwealth v. Ladetto*\(^8\) that such an inquiry would be a "wise exercise of discretion."

During the 1970 Survey year, the Supreme Judicial Court decided *Ladetto v. Commonwealth*,\(^9\) in which the Court was asked to reconsider its decision in *Commonwealth v. Ladetto* in light of *Witherspoon*. The defendant argued that in *Commonwealth v. Ladetto* the Court failed to recognize two constitutional errors. First, he contended that the trial court had erred in its dismissal of three prospective jurors by going beyond the scope of G.L., c. 278, §3, and excusing jurors whose reservations about capital punishment were not such as to prevent them from making an impartial determination of guilt. Upon reconsidering the actions of the trial court, the Supreme Judicial Court did not agree, again finding no error. In the case of one of the prospective jurors, this conclusion is difficult to reconcile with *Witherspoon*. The colloquy on voir dire was as follows:

**VENIRE STAPLETON.** Q. "Have you any opinion which would prevent you from finding the defendant guilty of an offense punishable by death"? A. "Well sir, since His Excellency the Governor has made an issue of that, it's caused a little doubt in my mind as to whether it should be so, whether the law should be changed or not." Q. "Well, is your state of mind — " A. "It isn't settled, Your Honor. I haven't quite — I can't say that it is settled.

\(^4\) G.L., c. 278, §3.
\(^5\) The Court specifically stated that *Witherspoon* did not involve "the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. 510, 513 (1968).
\(^6\) G.L., c. 234, §28.
\(^7\) G.L., c. 265, §2.
I've discussed it with or thought of it a good many times and I haven't really come to any decision on it as to whether I think it should or should not be changed." Q. "So at the present time you cannot say that you have an opinion one way or the other"? A. "That's right." Q. "Isn't that true"? A. "That's right." THE COURT. "This juror in my opinion is not indifferent and may be excused."10

This exchange demonstrates uncertainty only with regard to the propriety or morality of capital punishment. It does not address the ability of this prospective juror to make an impartial determination of guilt. Under Witherspoon, even definite opposition to capital punishment is not a constitutionally valid basis for excluding jurors for cause, unless it can be shown that the juror cannot make an impartial determination of guilt or innocence. Thus, the dismissal of this venireman would appear to be an adequate ground for reversal, unless the error was harmless beyond a reasonable doubt.11

The defendant's second contention was that the trial court was constitutionally in error in refusing to ask prospective jurors the following question: "Have you any opinion that would preclude or prevent you from recommending life imprisonment for a defendant found guilty of murder in the first degree?" The Supreme Judicial Court again held, as it had in Commonwealth v. Ladetto, that although asking this question would have been a "wise exercise of discretion," failure to do so was not constitutional error. This conclusion, in support of which the Court offered no analysis, is consistent with Witherspoon. Witherspoon invalidates death sentences imposed by juries "organized to return a verdict of death," that is, it prohibits unbalancing the presumed impartiality of juries selected from the community at large. It does not require affirmative action to insure impartiality. The manner in which the Supreme Court treated statutes like Chapter 278, Section 3, also supports Ladetto on this point. Such statutes have the same effect as would the question proposed by the defendant; they require exclusion of prospective jurors whose views regarding capital punishment are so strongly held as to preclude an impartial determination based upon the facts presented at trial.12

The defendant argued that Witherspoon indicates that the Constitution mandates that the proposed question be asked, in order to insure an impartial determination. Witherspoon, however, merely permits but does not require, the analogous statutory provision. The same is true of the Court's statement in Witherspoon that:

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10 Id. at 1456 n.1, 254 N.E.2d at 416 n.1.
11 Chapman v. California, 386 U.S. 18 (1967). The error may have been harmless because the Commonwealth exercised only 9 of the 42 peremptory challenges to which it was entitled.
12 In the case of the statute, the determination involved is that of guilt or innocence; in the case of the defendant's proposed question, it is that of whether to recommend life imprisonment.
... nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.  

Thus, the decision merely permits the exclusion of jurors who would automatically vote against the death penalty, while the defendant in Ladetto argued that it requires the exclusion of jurors who (analogously) would automatically vote for the death penalty. Logic does not support the defendant’s argument. As a final point, it should be noted that, if Massachusetts were to exclude all prospective jurors who would automatically vote for capital punishment (as the defendant in Ladetto proposed), then logic would require the exclusion as well of all those who would automatically vote against capital punishment, not solely those who are unable to make an impartial determination of guilt or innocence.

In addition to Ladetto, the following five 1970 Supreme Court decisions involved questions related to the selection of jurors in capital cases: Commonwealth v. Connolly, Commonwealth v. Mangum, Commonwealth v. Flowers, Commonwealth v. French, and Commonwealth v. Robertson. Like Ladetto, each of these decisions addressed the question of whether the trial court had properly applied Chapter 278, Section 3, by excluding only those veniremen whose opposition to the death penalty would have affected their ability to make an impartial determination of guilt or innocence. In each case the Supreme Judicial Court concluded that the trial court had applied the statute properly. In several of the cases, as in Ladetto, some of the responses to the questions of the trial judge on voir dire were ambiguous. Mangum specifically held that in such cases:

... The impartiality or indifference of a prospective juror under interrogation is an attribute which must appear affirmatively. If the juror is unable or unwilling to say whether he could or could not judge the case on its merits, he should not be allowed to serve.

In both Connolly and Mangum, the defendants were not sentenced to death and, consequently, neither case fell within the constitutional rule of Witherspoon. In Mangum, the Supreme Judicial Court found

that the requirements of Witherspoon had been met in any case, because the trial court had properly applied Section 3 of Chapter 278. In Connolly, however, three veniremen were excused without any attempt to relate their opinions against capital punishment to either guilt determination or sentencing. The defendant argued that excluding these jurors denied him the right to an impartial jury drawn from a cross section of the community, as guaranteed by the Sixth and Fourteenth Amendments. He contended that the exclusions denied him equal protection, and, by creating a conviction-prone jury incapable of rendering a fair verdict, also violated due process. The Supreme Judicial Court rejected the due process argument, relying upon Witherspoon, Bumper v. North Carolina, and Commonwealth v. Sullivan, and concluding that "there was not sufficient evidence to show that juries culled of those opposed to death penalty were more likely to convict." The Court reiterated, however, its statement in Sullivan that the "wise and proper course is to determine from further questions whether a belief against capital punishment would interfere with a determination of guilt of the defendant." The Court also rejected the equal protection argument, reasoning that it was essentially identical to the due process ground.

§15.8. Other questions related to juries. Six cases decided by the Supreme Judicial Court during the 1970 Survey year involved jury-related issues in addition to those discussed above. In Commonwealth v. Brady, the defendant argued that he was entitled to a jury trial to resolve an issue of fact (whether an unauthorized person was present in the grand jury room during the proceedings which resulted in this indictment) raised by a pretrial motion to dismiss the indictments against him. The Court rejected this contention, concluding that the requirements of due process, Mass. Const. art. 12, and G.L., c. 278, §2, guarantee jury trial to a defendant "only on the issues of fact which determine his guilt or innocence," and that the right does not extend to pretrial matters. In Commonwealth v. Smith, in contrast to Brady, the defendant argued that the trial court had erred in denying his attempted waiver of trial by jury. The Supreme Judicial Court upheld the action of the trial court, noting that the defendant, who was convicted of first-degree murder, was not entitled to waive jury trial under G.L., c. 263, §6, which provides that: "Any defendant in

24 Ibid.

2 This section of the General Laws provides that: "Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury . . . unless the person indicted or complained against elects to be tried by the court as provided by law."
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the superior court in a criminal case other than a capital case . . . may . . . waive his right to trial by jury . . . . The Court quoted with approval Commonwealth v. Millen as follows:

... Our law provides for no form of trial in a capital case, whether the defendants choose to waive their constitutional right to jury trial or not, except trial by jury. G.L. (Ter. Ed.) c. 263, §6. St. 1933, c. 246. Obviously that ancient and valued mode of trial cannot be said to lie outside the scope of due process of law. . . .

It is no sound constitutional objection to our statute, that it gives to defendants in noncapital criminal cases, with some exceptions, a right to trial without jury, while requiring capital cases to be tried by jury. The constitutional guaranty of the equal protection of the laws does not prevent reasonable classification, and differences in practice resulting from such classification. . . . The statute in question makes only a reasonable classification in providing that a man’s life shall not depend upon findings of fact made by one man.5

In Smith the defendant also argued that the trial court had erred in refusing to ask prospective jurors the following question:

If the evidence warrants a finding that the defendant is guilty of murder and the evidence further warrants a finding that the defendant had a mental disease at the time of the alleged crime, and as a result of this mental disease, he did not have substantial capacity to conform his conduct to the requirements of law, have you any opinions that would prevent you from finding the defendant not guilty by reason of insanity?6

The Supreme Judicial Court did not agree, stating that it “has long been held that the trial judge has discretion in deciding whether prospective jurors should be asked any questions in addition to those prescribed by statute (G.L. c. 234, §28, and c. 278, §3).”7

In three additional cases decided during the 1970 Survey year, the defendants argued that prospective jurors had been improperly excused. In Commonwealth v. Martin,8 a capital case, the trial judge excused six veniremen without examination, finding as a fact from the nature of their criminal records that they were unsuitable to sit on the case. The defendant contended that this action deprived him of a jury that was a fair and representative cross section of the com-

4 Under Massachusetts law, the jury determines the degree of murder of which the defendant is guilty. G.L., c. 265, §1.
7 Id. at 416, 258 N.E.2d at 18.
The Supreme Judicial Court rejected this contention, reasoning as follows:

... Although a record of conviction of a crime does not necessarily disqualify one from serving as a juror (Commonwealth v. Wong Chung, 186 Mass. 231, 234), and although the initial responsibility for determining that jurors are "of good moral character" rests on local officials under G.L. c. 234, §4, it can hardly be said that persons so chosen with records of conviction must be seated in a capital case, subject only to challenge on voir dire, in order to provide a panel which is "truly representative of the community." Much must be left to the discretion of the presiding judge including the desirability of avoiding subsequent motions for mistrials, or embarrassment to jurors who are essentially "of good moral character." Commonwealth v. Wong Chung, supra, at 234.10

In Commonwealth v. Talbert,11 two Negro jurors were excused for cause and two others were peremptorily challenged by the prosecuting attorney. All of the 12 jurors and 4 alternates who were selected were white. The defendant argued that the exercise of the two peremptory challenges denied him due process of law. The Court rejected this contention, quoting Swain v. Alabama as follows:

... The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome... by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.12

D. STUDENT COMMENTS

§15.9. Narcotics conviction: Defense of entrapment: Commonwealth v. John G. Harvard.1 Defendant John G. Harvard was tried and convicted on three indictments, two of which charged a sale, and one a possession, of marijuana, before the Superior Court for the County of Worcester. Evidence of the following facts was adduced at trial: In April, 1968, acting upon residents' complaints of narcotic drug use and dealing in Webster, Massachusetts, the state police


ordered an investigation in the Webster area by Officer Martin, an undercover agent. In the course of his investigation, Officer Martin telephoned defendant on April 24, 1968, and requested that Harvard procure marijuana for sale to him. Defendant’s response was negative, apparently because the supply was “scarce.” Martin repeated the request by telephone almost daily between April 24 and May 17, 1968. On the latter date, defendant assented; Harvard and a man named Gawle introduced Officer Martin to Zacharo, whose car was parked parallel to, and three or four feet from, the agent’s car. Gawle and Harvard, while the defendant stood between the two cars, persuaded Zacharo to sell a plastic bag of marijuana to Martin. The bag was handed from Zacharo to Harvard to Martin; thereupon Martin passed $15 to Harvard, who relayed the money to Zacharo. The prosecution introduced no evidence to the effect that Harvard retained any portion of the proceeds of the sale.

The sale forming the basis of the second indictment occurred on June 5, 1968, when Martin again approached Harvard in search of marijuana. Defendant introduced Martin to “a new connection” named Castro, who agreed to a sale; Martin and Castro, without Harvard, then left the scene in the agent’s car to obtain the marijuana. Shortly thereafter, Martin returned with a bag containing marijuana for which he paid Castro $20. Defendant remarked: “I’ve had some of that, it’s real good.” Again, no evidence was introduced to indicate that Harvard shared in the proceeds of the sale.

The remainder of the evidence established: first, that Martin at no time witnessed the purchase or sale of any drug by defendant; second, that defendant, in the presence of Martin, was once asked by another party for some “grass,”2 that Harvard replied he had none, that the other party then offered defendant some “speed,”3 and that Harvard proceeded to sniff a proffered portion; third, that, prior to the May 17 transaction, defendant, again in the presence of Martin, spoke with two other persons concerning the purchase by Harvard of $400 worth of LSD4 from a Northampton dealer (though no evidence of consummation was introduced); and fourth, that defendant arranged for Gawle to sell Martin a quantity of opium for $10. The substance, upon later analysis, proved to be nonnarcotic.

At the close of the evidence, defendant moved for directed verdicts on each indictment, basing such motions on two contentions: first, that the evidence would not warrant conviction on the alleged offenses both of sale on May 17 and June 5 and of possession arising from the May 17 transaction; second, that defendant was, as a matter of law, entrapped5 by Officer Martin. These motions were denied. On appeal

2 Grass is a common term for cannabis or marijuana.
3 Speed is a common term for methamphetamine, a stimulant.
4 LSD, or lysergic acid diethylamide, is a hallucinogenic drug.
5 A classic description of the defense was enunciated by Justice Roberts in the signal Supreme Court case on entrapment, Sorrells v. United States, 287 U.S. 435, 454
to the Supreme Judicial Court, defendant assigned as error the lower court's refusal to direct a verdict of acquittal on all indictments and five evidentiary rulings. Judgments on the indictments charging sale of marijuana were reversed and the verdicts set aside; the judgment on the indictment charging possession of marijuana was affirmed. On the specific issue of entrapment, the Supreme Judicial Court HELD: the evidence did not establish that defendant was entrapped as a matter of law, and the trial court correctly submitted the question to the jury with instructions to which defendant did not object.

That issue, the unsuccessful defense of entrapment in Commonwealth v. Harvard, is the fulcrum of this comment. The Court's reversal of Harvard's sales convictions leaves little room for controversy; though the record showed that Harvard facilitated an illegal sale of marijuana, it failed to show that defendant's activities satisfied the common law standards of financial stake in the transaction and/or employment by either seller or buyer to promote sales. The Court rightly deemed the Commonwealth's prosecution, as it related to sale, inappropriate; more apt would have been the prosecution of Harvard as an accessory. The Court's disposition of the possession charge presents questions of considerably more depth. Defendant's "control and power to do with [the marijuana] what he willed" and the effect of the "duration of time elapsing after one has an object under his control" appear to be the prime factors weighed in the Court's adjudication of the possession issue. Finding support in other jurisdictions, the Court held mere fleeting, momentary contact with the plastic bag containing marijuana sufficient to constitute possession as proscribed by statute.6

It is the status of the entrapment defense in Massachusetts, however, upon which the Court's somewhat abbreviated discussion in Harvard will likely exert the greatest influence. In Commonwealth v. DeLacey,7 the "only decision of this court where the subject of entrapment has been discussed,"8 defendant, manager of a Cambridge bookshop, allegedly sold a volume which he conceded not to have been fit for publication or circulation — in the words of the trial judge, "obscene, indecent, and impure"9 — and raised the defense of entrapment by an investigator for the Watch and Ward Society, a private association. The investigator asked the defendant to procure the book for sale to him, since it was not then held in stock. Assuming, without decision, that the doctrine of entrapment is not necessarily limited to induce-

7 271 Mass. 327, 171 N.E. 455 (1930).
ment by police officers or their agents, the Court held it inapplicable to the facts presented at trial. The Court cited *Butts v. United States*\(^{10}\) for the proposition that

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\ldots \text{in cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunities for or to aid in the commission of a crime, in order to successfully prosecute him therefor, constitutes no defense to such a prosecution.}^{11}\]

As DeLacey had previously procured and sold five copies of the proscribed book to five other individuals, the trial court was warranted in finding that defendant had the intention to commit the crime without the “false allurements” of the Watch and Ward agent.

In an effort to extrapulate a logical test of entrapment from the dicta in *DeLacey*, it is helpful to note that the focus centered more upon defendant’s predisposition to make the illegal sale than the conduct of the private agent. Unfortunately, since the reference to entrapment is oblique, and specifically tailored to the facts in *DeLacey*, the analysis sheds little light upon the pivotal issue of the extent, if any, to which the doctrine of entrapment would be recognized as a defense in Massachusetts. Yet *DeLacey* was for years the most recent and illuminating statement on entrapment advanced by the Supreme Judicial Court. Understandably, for needed guidance in deciding *Commonwealth v. Harvard*, the Court chose to consult leading federal and state cases squarely presenting the question of entrapment.

Citing the two most illustrative entrapment cases handed down by the United States Supreme Court, *Sorrells v. United States*\(^{12}\) and *Sherman v. United States*,\(^{13}\) and a leading California decision, *People v. Benford*,\(^{14}\) the Harvard Court noted that the doctrine, while not developing appreciably in Massachusetts after 1930, has indeed become well-established elsewhere. The time has come, said the Court, when “we should recognize the doctrine as part of our law.”\(^{15}\) Aware of the divergence of judicial opinion on the rationale and proper focus of the doctrine, strikingly exemplified in both the *Sorrells* and *Sherman* decisions, the Court adverted to Professor Perkins’ time-honored statement of the general principle underlying entrapment:

> **Entrapment, so-called,** is a relatively simple and very desirable concept which was unfortunately misnamed with some resulting confusion. It is socially desirable for criminals to be apprehended and brought to justice and there is nothing whatever wrong or

\(^{10}\) 273 F. 35 (8th Cir. 1921).

\(^{11}\) Id. at 37.

\(^{12}\) 287 U.S. 435 (1932).


\(^{14}\) 53 Cal. 2d 1, 345 P.2d 928 (1959).

out of place in setting traps to catch those bent on crime; what the state cannot tolerate is having its officers, who are charged with the duty of enforcing the law, instigate crime by implanting criminal ideas in innocent minds and thereby bringing about offenses that otherwise would never have been perpetrated.  

After invoking the admonition of Chief Justice Warren in *Sherman* that “a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal,” the Court emphasized the need for police undercover work, especially in those areas of criminal conduct, such as dealing in narcotics, wherein the offense is committed secretly and consensually. Without deceptive investigatory practices, few violations of the law would be discovered. Thus, “artifice and strategem may be employed to bring to book those engaged in crime.”

Though no evidence was presented at trial to support a finding that Officer Martin had probable cause for approaching the accused and repeatedly soliciting the illegal sale of marijuana, the Court found more significant a statement extracted from the opinion of the Court of Appeals for the First Circuit in *Waker v. United States*, in fact a reaffirmation of a prior holding in *Whiting v. United States*:

... where the inducement exercised was not “shocking or offensive” per se the only issue is whether the defendant was sufficiently predisposed, so that while the particular offense was brought about by the government agent, the defendant’s criminality, or “corruption,” was not.

Assuming this to be a fair statement of the federal law of entrapment in Massachusetts, the Court in *Harvard* applied the “shocking or offensive” test of the alleged entrapper's conduct to the actions of Officer Martin. Measured by such a standard, the policemam's conduct was not, in itself, sufficiently shocking or offensive, as a matter of law, to vitiate the prosecution for sale and possession of marijuana. Nor could it be stated as a matter of law that Martin's inducement, however persistent, “corrupted” the accused, for evidence of the defendant’s “predisposition to become involved in the drug traffic” was introduced. On the basis of that evidence, the issue of whether Martin's conduct induced an innocent person to commit an offense he would not otherwise have committed was properly submitted to the jury for determination. Finally, in dismissing defendant's contention that he was entrapped as a matter of law, the Court turned once again to language in the *Waker* decision to counter the fact, stressed in appel-

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19 344 F.2d 795 (1st Cir. 1965).
20 321 F.2d 72 (1st Cir. 1963).
21 344 F.2d 795, 796 (1st Cir. 1965).
lant's brief, that Martin, prior to the May 17 transaction, importuned Harvard on numerous occasions only to meet with negative responses:

Although the . . . defendant had to be "played with" a bit, the jury was warranted in concluding, to continue in the vernacular, that he was willing to take the bait.

Thus, although the agent provocateur acted without probable cause when, during the course of his investigation, he continually requested defendant’s assistance in obtaining marijuana, both by telephone and almost daily personal conversation, and despite the officer's testimony on cross-examination that he never observed defendant buy or sell a narcotic drug, the Court held that the agent's behavior was not shocking to the conscience nor was there insufficient evidence to warrant the jury's finding that the accused was predisposed to commit the offense, regardless of Officer Martin's prodding. The entrapment defense, upon which the jury was instructed, and which defendant contended was established as a matter of law, failed to avert conviction for unlawful possession of marijuana.

It is clear from the language of the opinion that the Supreme Judicial Court was well aware of the valuable opportunity presented by this case for a definitive pronouncement on the status, and extent of recognition, of the doctrine of entrapment in Massachusetts. It seems equally clear that Commonwealth v. Harvard falls far short of that statement. Predictably, the Court expressed its cognizance of the central and continuing controversy which has characterized the entrapment defense since the Supreme Court's 1932 decision in Sorrells. Essentially the same controversy split the majority and concurring opinions in Sherman 26 years later. At issue has been the legal justification and theoretical rationale of the doctrine. Whether the trier of fact should consider both the predisposition of the accused to commit the offense charged and the persuasive activities of the police or direct attention exclusively to the conduct of the particular law enforcement agency, through its confidential informant, special employee, police spy, stool pigeon, or undercover agent, is the gravamen of the debate. The first approach, variously termed the "origin of intent" or "subjective" test, allows the defense only if the criminal act was the "product of the creative activity" of the entrapper; the

23 Brief for Defendant at 8: "At best the defendant revealed a latent weakness to help a friend's constant pleadings and requests to commit a crime which to all appearances had never before manifested itself."
24 344 F.2d 795, 797 (1st Cir. 1965).
25 No exceptions were taken to the charge.
26 Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091 (1951): "Notwithstanding such euphemistic characterizations as 'confidential informant' and 'special employee,' the informant, the police spy, the stool pigeon, and the agent provocateur have been generally regarded with aversion and nauseous disdain."
second, or so-called objective test, looks not to any degree of defendant's culpability but solely to standards of proper use of governmental power and their specific application to police investigatory activity. Under the subjective test, in order to determine whether the criminal act was the product of the creative activity of the police, theoretically separable inquiries into defendant's predisposition and the nature of inducement are conjunctively conducted. The objective test insists upon scrutiny of only the inducement, regardless of defendant's inferable inclination to commit the alleged offense. Only comparative exposition of the Sorrells and Sherman decisions serves to clarify the source and direction of these two most significant strains of judicial thought on entrapment.

In Sorrells, the sanction of the National Prohibition Act was held inapplicable to a sale of whiskey instigated by a prohibition agent. According to the majority opinion of Chief Justice Hughes, the evidence was sufficient to warrant a finding that

the act for which the defendant was prosecuted was instigated by a prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation ... 28

In these circumstances, though certainly the letter of the statute was violated by defendant's sale of whiskey to the prohibition agent, application of the act would be "foreign to its purpose; ... such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts."29 Where literal application of the statute would yield extreme or absurd results, the court is justified in asking whether the particular offense can fairly be deemed to fall within the legislative intendment. Invoking this established principle of statutory construction, the majority in Sorrells readily concluded that defendant was not guilty of violating the act, notwithstanding uncontroverted proof of the sale. Conversely, the Court was unable to conclude

that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent to lure them into its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.30

28 287 U.S. 435, 441 (1932).
29 Id. at 446.
30 Id. at 448.
Implicit in such reasoning is judicial consideration of both defendant’s predisposition—“persons otherwise innocent”—and the processes used by government agents to instigate commission of the criminal offense.

Though concurring in the broad result, a legitimation of the entrapment defense, Justice Roberts balked at such statutory construction, felt it “strained and unwarranted,” tantamount to judicial amendment. Rather than adjudge the entrapped defendant not guilty by reason of a government agent’s impermissible conduct, Justice Roberts preferred a recognition that the entrapment defense rests upon a “fundamental rule of public policy,” which is the province of the court to protect its own function, preserve the “purity of its own temple,” and “protect itself and the government from such prostitution of the criminal law.” Whenever proof of entrapment is adduced, the court must stop the prosecution, quash the indictment and free the accused. Unlike the majority, those who concurred would not leave the ultimate determination of the entrapment issue to the jury. It is for the court to refuse the use of its own processes to consummate a wrong.

Moreover, Justice Roberts’ disagreement with the majority on the interlaced issues of doctrinal basis, of respective roles of judge and jury, and of appropriate factual test entails the essential corollary that evidence of an accused’s criminal reputation or prior offenses is, or ought to be, without probative worth. Availability of such evidence will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. . . . To say that such conduct by an official of the government is condoned and rendered innocuous by defendant’s criminal reputation is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction.

Justice Roberts firmly rejected the process of balancing equities as between the law enforcement agency and the accused “when there are in truth no equities belonging to the latter.” What the concurring opinion termed an “overruling principle of public policy” — that the courts remain closed to prosecutions of defendants whose crimes were instigated by agents of the government — precludes any balancing formula in which both prior reputation and official conduct are variables.

In Sherman, an even sharper line of division was drawn. The majority, speaking through Chief Justice Warren, found entrapment to have been established by the undisputed testimony of government witnesses as a matter of law, and accordingly reversed petitioner’s

31 Id. at 456.
32 Id. at 457.
33 Id. at 459.
34 Ibid.
conviction on a charge of illegally selling narcotics. The facts in Sherman fairly demanded dismissal of the indictment, but the theoretical basis of the successful defense of entrapment once again split the Court. Certainly the methods used to influence defendant, a former drug addict then under a physician's treatment, were sufficiently reprehensible to bear heavily upon the Court's decision.

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. . . . Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.35

On the basis of that excerpt alone, it is plain that the majority in Sherman, as in Sorrells, is directing attention to both the predisposition of the accused — an "innocent party" who was "attempting to avoid narcotics" — and the techniques employed to produce an illegal drug sale. In seeking to strike a fair balance between competing "equities," the majority parted company with those who concurred in the separate opinion of Justice Frankfurter. Responding to the majority's assertion that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violation,"36 Justice Frankfurter suggested that "courts refuse to convict an entrapped defendant . . . because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about the conviction cannot be countenanced."37 The majority's allusion to the purview of congressional intentions "is surely a fiction."38 Whatever the scope of the legislative proscription, the basis of courts' refusal to convict entrapped defendants is an inescapable duty

to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them.39

Justice Frankfurter found it "unrevealing" and "irrelevant" to ask whether the intention to act illegally originated with the accused or the government agent. Likewise, whether the criminal conduct was the "product of the creative activity" of public officials, the famous inquiry framed by Chief Justice Warren, is immaterial. Only the propriety of police conduct — whether governmental behavior falls below standards "to which common feelings respond" — is pertinent to an

36 Id. at 372.
37 Id. at 379-380.
38 Id. at 379.
39 Id. at 380.
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The adjudication of the entrapment issue. Citing Justice Roberts' opinion in Sorrells, Justice Frankfurter reiterated the belief that such an adjudication is properly left to the court, not to the jury, for "[o]nly the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands."40

What the wise administration of criminal justice demands in Massachusetts is not rendered altogether clear by a close reading of Commonwealth v. Harvard. The Supreme Judicial Court passes no judgment upon the above-outlined controversy and makes only fleeting reference to the analytical problems raised by the entrapment defense. One might reasonably infer, however, from the Court's statement of facts in Harvard that, in addition to the conduct of Officer Martin's investigation, defendant's culpability (as evinced by his personal associations, conversations, and intimations of prior acquaintance with marijuana) was highly relevant to the eventual determination of the entrapment question. Consistent with this view is the Court's reference to a necessary distinction between the "unwary innocent" and "unwary criminal,"41 borrowing from the language of the majority opinion in Sherman.

It is tellingly significant that, in an effort to support a finding in Harvard that entrapment was not established as a matter of law with a reasonably coherent and usable test, the Supreme Judicial Court turned not to either the majority or minority views of Sorrells or Sherman but to a more recent statement of the United States Court of Appeals for the First Circuit in Whaker v. United States, namely, the "shocking or offensive per se" test.42 Resort to this formulation proceeds upon an initial determination that the government agent's tactics of inducement were not so objectionable as to vitiate the prosecution. The unavoidable implication is that, once the court determines police conduct to be shocking or offensive per se, the prosecution fails and no further inquiry is necessary. Assuming, arguendo, that police conduct meets Justice Frankfurter's standards of proper use of governmental power, then the inquiry devolves upon whether the defendant was "sufficiently predisposed, so that while the particular offense was brought about by the government agent, the defendant's criminality, or 'corruption,' was not." A two-tiered analysis unfolds, the first aspect of which reflects the "police conduct" perspective of the minority opinions of Sorrells and Sherman, and the second of which essentially reproduces the conjunctive "origin of intent" approach articulated by the Sherman majority. Only when the official

40 Id. at 385.
42 As this test was first articulated by the First Circuit Court of Appeals in Whiting v. United States, 321 F.2d 72 (1st Cir. 1963), and reaffirmed in Waker v. United States, 344 F.2d 795 (1st Cir. 1965), it will hereinafter be referred to as the Whiting test.
process of persuasion is acceptable\(^{43}\) to the jurisprudential conscience does the defendant's predisposition, innocent or "corrupt," become material.

The *Whiting* touchstone, at first glance, offers a degree of comfort not afforded by the Supreme Court's divisive treatment of the entrapment defense in *Sorrells* and *Sherman*. Its primary appeal is a theoretical allegiance to both the "subjective" and "objective" views of entrapment. While Justice Roberts' intense concern for the "purity of the courts" is, to some extent, placated, so too the individual defendant's inclination or predisposition toward crime may be considered. Thus, defendants with long and demonstrable histories of disdain for the law are hard put to realistically raise the entrapment defense when conduct of the police, considered alone, falls within permissible bounds. The impact upon jurors of evidence of criminal reputation, about which Justice Frankfurter worried in *Sherman*, will likely prove appreciably, if not decisively, prejudicial.\(^{44}\) As to whether lack of probable cause to suspect any given party of narcotics use or dealing establishes shocking or offensive police practice, the *Whiting* court stated:

> In the light of . . . our belief that a defendant should not be convicted in any event where the government fails to show at trial that he was not corrupted by the inducement, we hold that it is not per se offensive conduct for the government to initiate inducement without a showing of probable cause.\(^{45}\)

Whatever the possible constitutional objections against inducing persons to commit crimes without prior good reason to suspect guilt, and apart from the general question of whether the due process guarantee subsumes a right to freedom from entrapment, the *Harvard* Court seems clearly to adopt the *Whiting* formulation. In a footnote

\(^{43}\) "Acceptable" police conduct, it should be stressed, in no way connotes judicial approval or support of the techniques employed, only that such techniques are not considered shocking or offensive per se.

\(^{44}\) *Sherman v. United States*, 355 U.S. 369, 384 (1958): "The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged."


As to how such evidence overcomes the inadmissible hearsay hurdle, see *Heath v. United States*, 169 F.2d 1007, 1010 (10th Cir. 1948).

\(^{45}\) 321 F.2d 72, 77 (1st Cir. 1963).
to the *Whiting* decision, the First Circuit Court of Appeals voiced its objection to the view of the American Law Institute's Model Penal Code\(^{46}\) on entrapment. The Code's sole concern with the propriety of government conduct, "to the exclusion of whether, subjectively, . . . the defendant was in fact corrupted," is "too harsh upon the police in certain circumstances, and too harsh upon the defendant in others."\(^{47}\) A close reading of Section 2.13 of the Model Penal Code (Proposed Draft 1962) suggests that the court's first concern is unfairness to the police, for it is less conceivable that the *Whiting* test, which chastises police for only the grossest misconduct, is more sympathetic to defendants than is the Code, which condemns methods of inducement which "create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." It is submitted that common police practice is more susceptible to judicial censure under the Code test than under the *Whiting* formulation.

The initial appeal of a standard such as that espoused in *Whiting*, incorporating the concerns of both the majority and concurring opinions in *Sorrells* and *Sherman*, is tarnished by the realization that the basic confusion with which the entrapment doctrine is replete remains unchecked. The forced marriage of the subjective "origin of intent" and objective "police conduct - judicial integrity" theories fails to recognize the uncompromising rationale of the latter. The only legal justification for the entrapment defense is the duty of the courts to set and preserve standards of law enforcement; the guilty defendant is no less culpable because of his entrapment. Such an exclusive view, deliberately oblivious to evidence on the issue of defendant's state of mind or criminal intent, can hardly be reconciled with a theory so heavily reliant upon the accused's predisposition and, accordingly, so receptive to direct testimony and hearsay on that issue. The admixture of conflicting theories attempted in *Whiting* renders the whole no more, and probably less, workable than its component parts.

An interesting anomaly in the *Harvard* decision is its reference to a leading California entrapment case, *People v. Benford*.\(^ {48}\) In a prosecution for "unlawfully selling, furnishing, and giving away mari-


"A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

"(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

"(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."

For limitations of defense, see id. §2.10, Comment 7 at 23-24 (Tent. Draft No. 9, 1959).

\(^{47}\) 321 F.2d 72, 77 n.12 (1st Cir. 1963).

\(^{48}\) 53 Cal. 2d 1, 345 P.2d 928 (1959).
juana,” the Supreme Court of California adopted the reasoning of the concurring justices in Sorrells and Sherman. Evidence that defendant previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible on the issue of entrapment.49

The basis for the exclusion of such evidence has its origins in the spirit which moved Justice Holmes to dissent in Olmstead v. United States:50 “We have to choose, and for my part I think it a less evil that some criminals should escape than that Government should play an ignoble part.”51 The Supreme Court of California similarly disputes the prevalent view that entrapment presents an issue of fact to be resolved by the jury. In Benford the entrapment defense either raises a preliminary question of fact pertaining to the admissibility of certain evidence or poses a pure question of law; in either case, the determination is one for the judge for the precise reasons outlined by Justice Roberts in Sorrells.52

Nevertheless, Benford, which broke with “common California formulations”53 concentrating upon whether intent to commit the crime originated in the mind of the defendant or of the entrapping officer, was cited by the Supreme Judicial Court for the simple proposition that the doctrine of entrapment is recognized in most state courts. The Court then proceeded to administer a wholly different test of entrapment, the hybrid announced in Whiting. Whether this indicates a commonplace reluctance to join forces with either side in the Sorrells and Sherman dispute, or solely an effort to resolve major differences and apply a more generally satisfying test, the result is plain: no new measure of coherence has been added to the entrapment morass by the Harvard decision, and current judicial ambivalence is likely to persist unless and until the Supreme Court once again addresses the problem.

Richard J. Innis

49 Id. at 11.
50 277 U.S. 438 (1928).
51 Id. at 470.
52 Commentators, in urging that the best basis upon which to mount the entrapment defense is that which underlies the due process exclusionary rule in Mapp v. Ohio, 367 U.S. 643 (1961), analogize not only to the areas of search and seizure, and coerced confession, but to the equitable doctrine of “clean hands.” Note, Entrapment in the Federal Courts, 1 U.S.F.L. Rev. 177, 185 (1966).
53 53 Cal. 2d 1, 10, 345 P.2d 928, 934 (1959).
§15.10. Due process: Restricted use of inculpatory admission of codefendant. Despite the recent substantial gains in criminal procedure, especially in the area of a defendant's due process rights, in cases involving joint trials there has been a recurrent problem concerning the implication of a defendant through a codefendant's inculpatory admissions. The problem arises when a codefendant's admission implicates the defendant, and when, through refusal to testify or for some other reason, the defendant is unable to confront and cross-examine his codefendant. Until Bruton v. United States a long line of cases had held that this situation was allowable as long as sufficient limiting instructions were given to the jury. The object of this comment is to discuss the scope and implications of the Bruton decision, especially as it has been applied in the Commonwealth.

Three recent Massachusetts cases have been concerned with the Bruton doctrine and will serve as an appropriate starting point for this discussion. In Commonwealth v. Scott three codefendants were indicted for robbery and a murder incident thereto. On the third day of the trial, one of the codefendants pleaded guilty to second-degree murder and robbery, and subsequently the jury found the remaining two defendants guilty of robbery but not guilty of the murder. Meyers, one of the two remaining defendants, appealed, arguing that on the basis of Bruton he should have been given a separate trial since his codefendant's inculpatory statement had incriminated him as well. Conceding the fact that Bruton was given retroactive application in state and federal courts by Roberts v. Russell, the Supreme Judicial Court nevertheless HELD: Bruton did not bear directly on this case because the codefendant's inculpatory statement was no more damaging to the defendant than his own statement, and so was harmless error if, indeed, it was error.

... Neither statement mentioned the other defendant by name. Meyers himself had given a statement indicating his involvement in the events surrounding the crime. . . .

By reason of his own admission of the essential facts of each statement, no practical risk was created that the jury would improperly use against one defendant statements of another defendant.5

§15.10. 1 391 U.S. 123 (1968).
2 There have been a few other cases dealing, at least in part, with this problem, but these three best serve to define the scope of Bruton. See, e.g., Commonwealth v. French, 1970 Mass. Adv. Sh. 619, 259 N.E.2d 195.
4 392 U.S. 293 (1968). But see Dutton v. Evans, 400 U.S. 74 (1970), where Justice Stewart, speaking for the majority, held that the confrontation right did not necessarily apply to individual state variations of the hearsay exceptions and said: "There was not before us in Bruton 'any recognized exception to the hearsay rule,' and the Court was careful to emphasize that 'we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.'"
In the second case, Commonwealth v. Sarro, a person named Smith was arrested for the larceny of an automobile. They were tried jointly, and at the trial the arresting officer was allowed to testify, over objection, that "he had asked Smith why they were stealing cars, and Smith had replied, 'We are stealing them for parts.'" The Supreme Judicial Court held that the admission of this inculpatory statement was reversible error under Bruton since

... [here] Smith's statement supplied an essential element of the crime of larceny, intent to deprive the owner permanently of his property. It is all but impossible that the jury applied the evidence of intent, inferable from Smith's statement, to Smith but not to the defendant.

Finally, in Commonwealth v. Carita, four codefendants, Carita, Fondanova, Lynch and Wise, were convicted of first-degree murder and armed robbery. All appealed on the theory that they had been denied their right to separate trials to which they believed themselves entitled because of the possibility of prejudicial statements by their codefendants being admitted into evidence. Each felt that in attempting to refute his codefendant's statements, defendant would be unable to call his codefendant to the stand because of codefendant's invocation of the Fifth Amendment privilege against self-incrimination. There were two admissions subject to attack along these lines. Concerning the first, attributed to Lynch, the Supreme Judicial Court held that "[h]ere, references were to 'we,' 'they,' and 'them,' without further identification. These are not sufficient to bring the effect of the witnesses' testimony within the Bruton doctrine and we decline to so expand it." Concerning the second statement, attributed to Fondanova, the Court held that its admission into evidence was reversible error since it directly related to Carita's participation in the crime; that is, Fondanova had stated that Carita had shot the deceased.

In order to determine whether these Massachusetts cases conform to the Bruton doctrine, it is necessary to consider Bruton and the cases leading up to it in detail. In Bruton, the United States District Court for the Eastern District of Missouri allowed a postal inspector to testify that Bruton's codefendant, Evans, had orally confessed that he and Bruton had committed an armed robbery. Evans' conviction was set aside by the United States Court of Appeals for the Eighth Circuit, on the basis of Miranda v. Arizona, and on retrial he was acquitted. Bruton's conviction was upheld by the court of appeals on the basis

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7 Id. at 248 N.E.2d 287.
8 Id. at 248 N.E.2d 288.
10 Id. at 249 N.E.2d at 9.
11 Ibid.
that the jury had been instructed not to use Evans' confession against Bruton. This result was reached despite the fact that the state prosecutor admitted that all other evidence against Bruton was very weak; in fact, the prosecutor argued for Bruton as amicus curiae before the United States Supreme Court. In reversing the conviction, the Supreme Court held that

because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse.13

In Delli Paoli v. United States,14 the Supreme Court had affirmed the validity of the prevailing practice which assumed that the trial judge's instructions to the jury could cure the defects inherent in the admission of an inculpatory statement by a codefendant. Here, five codefendants had been convicted of conspiracy, one of them on the basis of his written confession. The remaining defendants appealed, arguing that this confession unduly prejudiced them, despite the fact that its admission was strictly limited to use against its maker. The Supreme Court, in a 5 to 4 decision, found that the instructions were sufficiently clear and that it was reasonably possible for a jury to follow them, and then went on to say:

There may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them. As a practical matter, the choice here was between separate trials and a joint trial in which the confession would be admitted under appropriate instructions. Such a choice turns on the circumstances of the particular case and lies largely within the discretion of the trial judge. Accordingly, we conclude that leaving petitioner's case to the jury under the instructions here given was not reversible error and the judgment of the Court of Appeals is affirmed.15

There was a very strong dissenting opinion by Justice Frankfurter to the effect that the majority opinion would probably be correct if there were merely harmless error, but certainly not where, as here, the inadmissible evidence greatly prejudices the defendant.16

15 Id. at 243.
16 "It may well be that where such a declaration only glancingly, as it were, affects a co-defendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to a
Although *Delli Paoli* had affirmed the validity of cautionary instructions in such situations, many courts still considered it impossible for a jury to effectively disregard prejudicial statements. These views were best expressed in Justice Jackson's concurring opinion in *Krulewitch v. United States*:

... The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.

A codefendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, codefendants can be prodded into accusing or contradicting each other, they convict each other.**17**

Prior to *Delli Paoli*, the issue of a jury’s ability to ignore prejudicial evidence and to follow limiting instructions was relatively settled. In *Blumenthal v. United States* Justice Rutledge dismissed such a challenge with the statement: “But we cannot say its [the trial court’s] unambiguous direction [to disregard the admission] was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.”**18** This view was, of course, even more evident where there was near certainty that the error, if present, was harmless. “In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one.”**19**

This view of the issue, affirmed by a divided Supreme Court in *Delli Paoli*, remained impervious to any attack based on the assumption that a jury could not follow instructions until 1964 when, in *Jackson v. Denno*, the Supreme Court considered the jury’s ability to disregard an involuntary confession. Under New York law, when the voluntariness of a confession was challenged, that question went to the jury, which — if it found the confession to be involuntary — had to disregard the confession entirely in its determination of guilt. The Supreme Court reversed the defendant’s conviction on the theory that this procedure violated the due process clause of the Fourteenth

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**18** 332 U.S. 539, 553 (1947).
Amendment. Justice White, in commenting on the function of the jury under this procedure, said:

... That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect.21

Although this case does not involve admission of a codefendant's confession, it does appear to be the first to find some constitutional basis for overturning Delli Paoli on the infallibility of limiting instructions to a jury. Justice White's objections to this were underscored by Judge Traynor in People v. Aranda,22 the fact situation of which closely paralleled that of Bruton:

Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.23

This line of reasoning, however, was not adopted elsewhere, and the next move toward Bruton was probably Pointer v. Texas.24 Here the defendant had no counsel at a preliminary hearing and so was unable to cross-examine. When the witness was unavailable later at the trial, his testimony from the preliminary hearing was nevertheless admitted. Justice Black, speaking for the Court, held "that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."25 This decision created a new constitutional approach for challenging Delli Paoli. In Douglas v. Alabama,26 the approaches of Jackson (the jury's inability to disregard prejudicial evidence) and of Pointer (the defendant's right of confrontation) were merged into a single standard. In this case, Loyd, a codefendant, was tried and convicted in a separate trial and was then called upon to testify at Douglas's trial. Loyd, planning to appeal,

21 Id. at 382.
22 63 Cal. 2d 518, 407 P.2d 265 (1965)
23 Id. at 528-529, 407 P.2d at 271.
25 Id. at 403.
refused to answer any questions, whereupon the Solicitor, under the guise of cross-examination, read Loyd's entire alleged confession which also implicated Douglas. Douglas objected on the basis of his inability to cross-examine, and the Supreme Court agreed.

In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . The Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him.27

This decision is the direct precursor to Bruton, the only difference being that in Douglas the inability to cross-examine was due to the co-defendant's use of the Fifth Amendment privilege, whereas in Bruton, it was due strictly to the introduction of hearsay evidence. Probably for this reason, in Bruton, primary emphasis was placed upon the fact that because the inculpatory statements of the codefendant were not subjected to cross-examination, their use would violate the defendant's right of confrontation regardless of limiting instructions to the jury. In Douglas, the fact that the defendant could not cross-examine the witness who allegedly made the inculpatory statement was deemed also to be a denial of this right and prejudicial to the jury. Regardless of the factual distinction, it seems that both cases are expressions of the same policy. Both require a deprivation of the Sixth Amendment right to confrontation and also the likelihood of resultant prejudice to the jury before a conviction will be reversed. In a sense then, Bruton very nearly leaves matters where they have always been: at the discretion of the trial judge. The only difference now is that if the elements of Bruton are present the judge must decide whether the questionable statement will unduly prejudice the jury, bearing in mind that a limiting instruction may no longer be sufficient to erase harmful effects.

In applying this analysis of Bruton to the three Massachusetts cases previously discussed, it seems that they generally comply with the Bruton result though perhaps not with its reasoning. In Commonwealth v. Scott the conviction was affirmed on the basis of harmless error, with scant reference to the fact that Bruton was not applicable since there was no question of a denial of the confrontation right. In Commonwealth v. Sarro the conviction was reversed on the grounds that the codefendant's statement was prejudicial to the defendant and

27 Id. at 419.
that cautionary instructions to the jury no longer suffice to erase this prejudice. This result also seems to be in harmony with the Bruton holding, assuming that the defendant did not have an opportunity to cross-examine his codefendant about the hearsay statement attributed to him. Once again, no mention is made of this in the opinion. Commonwealth v. Carita is perhaps the most illustrative of the three cases in defining the limits of the Bruton doctrine. In this case, one of the elements essential to the Bruton doctrine — the inability to cross-examine — was present throughout, while the second element — prejudicial harm — was present in one statement and not in another. In this situation, the Supreme Judicial Court held that the first statement, even though hearsay as to the defendant, was not so prejudicial as to bring it within the Bruton doctrine. The second statement was both closed to cross-examination and so substantially prejudicial that the Court, invoking Bruton, had no problem in finding reversible error.

The question now is, if the trial judge does look at the extra-judicial statement of a codefendant and decides that it may unduly prejudice the defendant, what does he do? In certain cases, such as Bruton and Aranda, where the statement is patently inadmissible, the solution is fairly clear:

... At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the non-confessing defendant can no longer be justified by the need for introducing the confession against the one who made it.  

In other cases, however, where the extrajudicial statement is admissible against the codefendant, the solution is not so easy. There seem to be five alternatives: (1) limiting instructions; (2) admission of the statement with the codefendant referred to as "Mr. X"; (3) admission of the statement with deletion of all reference whatsoever to the codefendant; (4) exclusion of the entire statement; (5) separate trials.

The first alternative is, of course, eliminated by Bruton in any case where the statement may harm the defendant.

The second alternative procedure was used in Scott, and although the conviction was affirmed, it was affirmed primarily because the inculpatory statement was found to be harmless rather than because the use of "Mr. X" protected the defendant. The obvious danger of this approach is seen in the opinion where the Court notes, "Scott says that he and 'Mr. X' (obviously Meyers) . . . ." If it is true that a jury is

unable to completely follow cautionary instructions, then it seems almost ludicrous to assume that they will not know, or at least infer, that “Mr. X” is really the codefendant. And if they know this, then the use of “Mr. X” serves absolutely no purpose and may even serve to create greater prejudice. One possible solution to this is the use of a real name, but not that of anyone connected with the trial, in place of that of the codefendant. This practice might convince the jury that the codefendant was not being referred to in the statement, but on the other hand it might also convince them that the codefendant was not involved at all.

The third alternative would seem to be a somewhat practical solution, provided that it is possible to delete all references to the codefendant. This, however, may not be such an easy goal to achieve. For example, in Carita, “The Commonwealth notes in its brief that the answer of the witness Joyce O’Brien implicating Carita as the person who shot the victim took it by complete surprise.” Also, there is the question of whether the use of “we,” “they,” etc., is to be permitted; or, must an effective deletion also exclude any such reference? Another problem that might arise would be that if the deletion were indeed effective, it might unduly prejudice the maker of the statement in that the jury might think him solely responsible.

The fourth alternative, exclusion of the implicating statement, is probably the most effective way of completely protecting the defendant. Unfortunately, however, this would also completely frustrate the prosecution’s case against the maker of the statement. Confessions are still one of the prosecution’s most valuable tools, and total exclusion in joint trials might lead the police to find other, perhaps less desirable, methods of obtaining convictions. Furthermore, there is the genuine public interest in having those responsible for crimes convicted. It is submitted that this interest should not be totally subordinated to the procedural rights of the defendant.

The fifth alternative, separate trials for codefendants, would eliminate most of the problems just discussed, since there would no longer be any danger of not being able to use admissions or statements which might be prejudicial to a codefendant. It does, however, create the problem of added cost, and more importantly, the problem of retaining witnesses for numerous trials, a situation which might conceivably lead back to confrontation problems. For example, it is entirely possible that the last of a long list of codefendants might find an important

34 An admittedly incomplete survey in California showed that in large cities (250,000–500,000), of 262 people actually charged, 198, or 75.6 percent, gave confessions or admissions. In small cities (100,000–250,000), of 48 people charged, 43, or 89.6 percent, gave confessions or admissions. Barrett, Police Practices and the Law — from Arrest to Release or Charge, 50 Cal. L. Rev. 11, 43-44 (1962).
witness no longer available to him. The problem of increased cost is summarily and justifiably dismissed by Judge Lehman in People v. Fisher: "We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principals of constitutional liberty. That price is too high." Nevertheless, some of the other problems remain.

The problems of severance were also addressed in the Federal Rules of Criminal Procedure; and notes by the Advisory Committee on Rules for Criminal Procedure made it quite clear that the decision to hold separate trials rests entirely within the trial judge's discretion.

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the notion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials.

This amendment and note, of course, were written before the Bruton decision. However, Caton v. United States, decided after Bruton, indicates that even now the doctrine of Bruton does not necessarily require severance in every joint trial. "The defendant argues that Bruton v. United States requires severance in any case where evidence of substantial importance is admissible against one defendant but not against another. The holding in Bruton is not that broad." On the whole then, it would seem that perhaps severance — where, at the discretion of the trial judge, harmful prejudice to the defendant would otherwise result — is the most feasible of the alternatives.

H. SAGE WALCOTT

§15.11. Jury instructions: Lesser included offenses: Commonwealth v. Myers. During the 1970 year, the Supreme Judicial Court discussed for the first time the question of whether the trial court is required to instruct the jury on the lesser included offense of assault and battery at the conclusion of a trial for unlawful homicide. In Myers, the defendant was charged with murder in the first degree. The

35 249 N.Y. 419, 422, 164 N.E. 336, 341 (1928).
36 "If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." Fed. R. Crim. P. 14.
38 407 F.2d 367, 372 (8th Cir. 1969).
Commonwealth moved for trial on so much of the indictment as charged murder in the second degree. According to the testimony of an eyewitness, the defendant stabbed the victim twice in the chest. Although the victim did not die until two weeks later, uncontradicted testimony established that death was a direct result of the stab wounds.

The trial judge instructed the jury that there were two possible verdicts: (1) guilty of murder in the second degree or (2) not guilty. The jury found the defendant guilty of murder in the second degree. On appeal, the defendant assigned a number of errors. Among them was the judge's refusal to charge, as requested by the defendant, that the jury could find the defendant guilty of the lesser included offense of assault and battery, rather than solely of murder in the second degree. The Supreme Judicial Court affirmed the conviction and HELD: the defendant was not entitled to an instruction on assault and battery because the defendant introduced no evidence raising a reasonable doubt that anything other than his act caused the victim's death. In reaching this decision, the Court announced that it was adopting the view of the Supreme Court of Ohio as expressed in three cases which are discussed below. Under the Ohio rule, the trial court is required to instruct the jury on the lesser included offense of assault and battery under an indictment for unlawful homicide if, but only if, the evidence raises a reasonable doubt that the acts of the defendant did not cause the victim's death. In Myers, the Court found that the defendant had not introduced evidence raising a reasonable doubt that anything other than his acts had caused the victim's death. Uncontradicted testimony established that death was a direct result of the stab wounds. One witness testified that the defendant took a knife from his side and stabbed the decedent twice in the chest. Another witness, whose view was partially blocked, testified that although she saw no knife, she did see the defendant's clenched right fist against the victim's chest. No evidence supported an inference that an assault and battery rather than a fatal stabbing had occurred. In light of such evidence, the Court could find no basis for offering the jury the option of returning a verdict for assault and battery.

This comment aims to describe and analyze the rationale underlying the Court's decision in Myers, endeavoring to determine why the Court found the Ohio view appealing and why it was adopted in this case. In addition, the case's impact on trial tactics will be discussed, especially in relation to the potential use of the newly adopted Massachusetts rule to aid the defendant. Consideration will also be given to some possible procedural difficulties which may arise upon the application of the Myers rule. First, however, by way of introduction and in order to clarify the conceptual framework within which the Myers rule may be applied, some expository material will be presented on the nature of jury instructions and the concept of lesser included offenses.

At the conclusion of a jury trial, after both sides have presented
and summarized their evidence, it is the duty of the trial judge to instruct the jury about the issues of fact and the applicable law. At some time earlier in the trial proceedings, counsel for each party will usually submit written requests for instructions. The court uses these requests as a guide, but the formulation of the charge itself is a duty that must be performed by the judge alone. Any objection to the charge given, or to omissions therefrom, must be made before the jury retires and must state distinctly the matter to which objection is made and the ground therefor. If the instructions given sufficiently state the issues of fact and the applicable law, no error would be committed despite the fact that other refused instructions may also contain proper statements of the law. In other words, the judge merely has to present an adequate version of the applicable law, not necessarily the best.2

Presenting a jury with an instruction that is simple, concise, and at the same time all-inclusive, can be a difficult task, however. The court must first determine precisely what are the issues of fact with which the jury must deal. This determination can be especially difficult in criminal cases where, unlike civil suits, there is no rule attempting to restrict the evidence to issues raised at the pleading stage. The indictment in a criminal prosecution delimits the offenses for which a defendant may be tried: in this respect, therefore, it determines the evidence which may be adduced, the punishment which may be ordered, and more in point here, the substantive law upon which the jury may rely in deciding guilt. Since the appropriate law is determined by the indictment, it follows that the judge's charge to the jury, which is in effect an exposition of this law, is also presaged by the indictment. The defendant, however, is not limited to a simple plea of not guilty. He may interpose any pertinent defense supportable by the evidence, relying upon the evidence of the state, or upon the evidence that he himself may tender to support his defense, or both. Thus, in order to fully determine the questions of fact which the jury must resolve, the judge in a criminal case must look to all of the evidence presented, as well as to the formal charge.

Such scrutiny of the evidence to determine exactly what issues should be submitted to the jury becomes particularly important in criminal prosecutions where the judge must decide whether to instruct on the subject of lesser included offenses. Courts have adopted varying views on what circumstances require such an instruction. As mentioned above, the Supreme Judicial Court discussed this question for the first time in Myers. Before fully examining the Court's view in Myers, however, it is useful to briefly survey the issues which courts must generally resolve when considering questions pertaining to the concept of lesser included offenses.

The first issue to which a court usually directs its attention when

2 For a general discussion on the subject of jury instructions, see Mottla, Civil Practice, 9 Mass. Practice Series §§861-880, 891-917 (1962).
considering this alternative charge is the question of what, if any, are the lesser offenses included in the crime charged. Courts generally hold that, in order to warrant the conviction of a person for a lesser offense under a charge of a greater one, the lesser offense must either be necessarily included in the greater, or the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser offense. Thus, in a situation such as Myers, the trial court, at the outset of its discussion concerning lesser included offenses, is faced with the threshold question of whether an assault and battery is a lesser included offense of which a defendant may be convicted under an indictment for murder. In Myers, the Court discovered that even this initial question had not been previously decided. However, the Court noted that the case of Commonwealth v. Vanetzian impliedly recognized that assault and battery is a lesser included offense to murder. The Court also noted that under G.L., c. 278, §12, it would appear that conviction for assault and battery as the lesser offense is authorized.

After a determination of what lesser offenses are included under the charge brought, a second determination must be made as to whether, under the circumstances of and considering the evidence in the particular case, a jury is warranted in bringing in a verdict of guilty for an offense less than that charged. This second consideration

5 350 Mass. 491, 215 N.E.2d 658 (1966). The defendant was charged with murder in the first degree. Although the deceased had not died until about six months after the shooting, the uncontradicted testimony was that he died from a severe infection due to the gunshot wound. Prior to the victim's death, the defendant had pleaded guilty to and been sentenced under an indictment for assault and battery by means of a dangerous weapon.

Because of this prior conviction, the defendant entered a plea autrefois conviction to the indictment for murder. The plea was denied. At the close of the evidence, motions were made for directed verdicts on all the possible crimes for which the defendant could have been convicted under the indictment (ranging from a simple assault and battery to first-degree murder). The judge granted the motions with the exception of those relating to first- and second-degree murder.

On appeal, the Supreme Judicial Court held that there was no merit in the defendant's argument that the second trial put him in jeopardy of a second conviction for the crime of assault and battery, because the judge's direction of verdicts for the defendant "on all the offenses embraced in the indictment other than murder" adequately foreclosed this possibility. In so holding, the Court impliedly agreed that assault and battery is a lesser included offense under an indictment for murder.

7 Ibid. G.L., c. 278, §12 reads: "If a person indicted for a felony is acquitted by the verdict of part of the crime charged, and is convicted of the residue, such verdict may be received and recorded by the court, and thereupon the defendant shall be adjudged guilty of the crime, if any, which appears to the court to be substantially charged by the residue of the indictment, and shall be sentenced and punished accordingly."
underlies the Court's discussion in Myers as to what circumstances require that the judge inform the jury that it may return a verdict of assault and battery.

It is in the light of these general observations that the decision in Myers will now be examined. The basis for the rule adopted by Massachusetts can be found in a series of three Ohio cases. The most recent of these three decisions involving the rule on instructing as to lesser included offenses is State v. Cochrane.8 There, the defendant was indicted for murder in the first degree. Defendant testified that he struck the victim on the jaw with his fist in response to the victim's hitting him on the side of the face. The testimony for the state was that the defendant stepped up behind the victim as he was seated at a bar and struck him on the back of the neck; this blow caused the victim to fall and hit his head, and fatal injuries resulted. The defendant was convicted of murder in the second degree. On appeal, the defendant claimed that, among other alleged errors, the trial judge had erred in refusing to charge the jury upon the lesser included offense of assault and battery. The Supreme Court of Ohio held that the refusal to so charge was prejudicial to the defendant and reversed.9

The determinative factor in the decision was that the precise cause of death was a factual issue upon which contradictory evidence had been presented; thus, it was a jury issue. Since the jury was free to believe the defendant's version of the facts rather than the prosecution's explanation, the jury might have found that the elements needed for a murder conviction had not been proven. However, even if they believed the defendant's version of the facts, the elements of assault and battery might have been present. Therefore, the jury should have been given the opportunity to find either murder in the first or second degree, or assault and battery.

In deciding Cochrane, the Supreme Court of Ohio relied10 upon its holding in Marts v. State.11 This 1875 case is the early authority for the rule that an instruction on lesser included offenses can be given only if there exists a fact question as to the causal connection between the act of the defendant and the death of the victim.12 The defendant in Marts was charged with murder. There was evidence tending to show that the death of the victim was caused by a stone thrown from the hand of the defendant. There was also evidence that the deceased, at the time the stone was thrown, was armed with a pistol, that he was in the act of drawing it, and that he was threatening the defendant. Defendant asked the trial court to instruct the jury that, if in their opinion the evidence warranted it, they might bring in a verdict for simple assault and battery only. The trial court refused to give this

8 151 Ohio St. 128, 84 N.E.2d 742 (1949).
9 Id. at 131, 135, 84 N.E.2d at 744, 746.
10 Id. at 131, 84 N.E.2d at 744.
11 26 Ohio St. 162 (1875).
12 Id. at 169.
instruction; it charged the jury that if they failed to find the defendant guilty of murder or manslaughter, they should return a verdict of not guilty of any crime. The defendant was convicted for manslaughter. On appeal, the Supreme Court of Ohio held that the trial judge should have instructed as requested on the lesser offense of assault and battery. The court rested its decision upon the fact that, in light of the evidence, the jury might have found that the death of the victim resulted from some cause other than the unlawful act of the defendant. Unfortunately, the Marts court did not discuss its reasoning at length.

The 1924 case of State v. Champion, on the other hand, provides a more thorough analysis of the Ohio rule regarding instructions on lesser included offenses. In this case, a fatal shooting occurred; the defendant was indicted and tried for murder in the first degree. At the trial, the defendant's own testimony that she did not intend to fire the fatal shot was found to be inconsistent with her earlier statements that she acted in self-defense. At the close of the evidence, the trial judge refused to charge on assault or assault and battery. On appeal, the Supreme Court of Ohio upheld the trial judge's decision. The court ruled that such a charge on the lesser offenses would have been improper since, in the light of the evidence, it was clear that the violent act complained of by the prosecution was the cause of the victim's death.

After holding thus, the Champion court added an interesting clarification which is indicative of some of the policy reasons which quite probably underlie both the Ohio rule and the newly adopted Massachusetts rule. The court stated that if it is clear that the force used by the defendant did cause the death of the deceased, it would be a "mockery of justice" for the court to charge or the jury to find as to the minor offenses. To do so would simply furnish an "additional loophole in the law, another legal labyrinth through which atrocious crimes would be converted into police court offenses." It appears, therefore, that when considering the question of instructions on lesser included offenses, the Ohio court fears that in some cases such an instruction would furnish the jury with an inducement to arbitrarily disregard the evidence. A jury sympathetic to the defendant, but convinced he is guilty of some misdeed, might use the charge on lesser offenses as an escape from their onerous duty of convicting the defendant of the greater crime. Examination of another specific fact situation may more clearly illustrate this possibility.

The defendant in an Arizona case was charged with manslaughter.

13 Ibid.
14 109 Ohio St. 281, 142 N.E. 141 (1924).
15 Id. at 287, 142 N.E. at 143.
16 Ibid.
17 Ibid.
The defendant testified that he struck the deceased on the chin with
his fist because he was angry with the deceased for having insulted his
lady friend. The deceased fell backwards, striking the back of his head
on the pavement. A physician at the scene diagnosed the victim's
injury as a cerebral hemorrhage. The victim was then removed to a
nearby hospital. Later that night, he left the hospital without permis-
sion and went to his father's home. He died about one week later. At
the trial, the evidence presented was conclusive that the deceased's
death was due to traumatic injury to the back of the brain. The
trial court ruled that the action of deceased in leaving the hospital was
not a factor to be considered by the jury. The defendant was found
guilty of manslaughter.

On appeal, the defendant claimed as error the trial court's refusal to instruct the jury that the defendant might be
found guilty of assault and battery. The appellate court held, however,
that since the circumstances did not justify or excuse the assault, the
court was not required to instruct on the lesser offense.

As was seen earlier, the Ohio court in Champion expressed a fear
that a sympathetic jury might misuse an instruction on lesser included
offenses. The Arizona case above was proposed as an illustration of the
possibility of such jury conduct; a number of factors in that case can
be examined in this light. While there is no definitive list of factors
that generate sympathy for a defendant, it seems possible that the
jury in the Arizona case, if given the opportunity, would have im-
properly found the defendant guilty of mere assault and battery. The
dispute was of a petty and commonplace nature, and the defendant
testified that he had no intention of injuring the deceased when he
struck him. It is likely that the mythology of Western manliness
would justify in many jurors' minds the chivalrous protection of a
woman's honor by a bit of physical violence. In the same vein, com-
munity mores might consider untoward results of a generally well-
deserved punch just bad fortune, for which a heavy penalty would be
inappropriate despite the law. In light of these factors, it is conceivable
that the sympathy of the jury might have been with the defendant. If
so, the jury, although convinced that the defendant was guilty of some
misdeed, could have used the charge on assault and battery as a
more palatable alternative to convicting the defendant for manslaughter.

In reality, however, if the jury had rendered such a verdict, it
would actually have been engaged in commuting the punishment for
the offense committed and directing a verdict different from that
prescribed by law. From the analysis in Champion, it would seem that
the Ohio rule, like the Arizona decision above, is also designed to de-
limit the bounds of the jury's discretion, so as to reduce the possibility
of its abusing that discretion.

19 Id. at 208, 125 P.2d at 444.
20 Ibid.
21 Ibid.
22 Id. at 204, 125 P.2d at 443.
As seen above, under the Ohio rule, an instruction on lesser included offenses is proper only if, according to the evidence, the actual cause of death is at issue. On the other hand, the trial court may refuse to instruct on lesser offenses if the only finding that the facts will admit is that the act complained of caused the death. Some of the possible policy reasons underlying this Ohio rule have also been examined. As noted in Champion, the court feared that permitting an instruction on lesser offenses, when it is not warranted by the evidence, would allow the jury to become a "pardoning board" and would provide it with the opportunity to arbitrarily disregard the evidence. This, then, is the Ohio rule that the Supreme Judicial Court adopted in Commonwealth v. Myers. At the same time, however, the Court noted the existence of an opposing view as enunciated by the Supreme Court of Indiana in Sullivan v. State. The Court's citation of this case indicates that it considered and rejected the approach to the issue approved in this case in favor of the Ohio rule.

In Sullivan, the indictment charged the defendant with voluntary manslaughter as a result of a stabbing. All the evidence presented supported the contention that the stabbing caused the victim's death. Therefore, if the defendant were found to have done the physical act of stabbing, he would be guilty of the crime charged and nothing less. The jury so found, and the defendant was convicted of voluntary manslaughter. On appeal, the Supreme Court of Indiana ruled that even in the face of the evidence produced at trial that the defendant killed the victim by stabbing, the trial judge had a duty to instruct the jury on lesser included offenses. The defendant had the right to insist that the judge instruct the jury that it could find the defendant guilty of voluntary manslaughter, of assault and battery with intent to commit a felony, of assault and battery, or of simple assault. The underlying principle of this holding seems to be that the jury should be the sole evaluator of the evidence. Thus, the right to an instruction on lesser included offenses should not depend upon the court's evaluation of such evidence. In contrast to this approach, in Ohio, and now in Massachusetts, the trial judge must weigh the evidence in order to determine if the jury should receive an instruction on the lesser included offenses. A serious question might be raised here as to whether Massachusetts should allow the trial judge to evaluate the evidence in the way he must after Myers. It is arguable that in so doing, he is invading the jury's domain. Under the rule in Myers, the trial judge, in deciding if an instruction on lesser offenses is warranted, must determine whether a reasonable doubt exists as to the cause of death. But what constitutes a reasonable doubt? Is a mere shadow of doubt sufficient, or must there be substantial evidence to support the doubt as to the cause of death? Since the trial judge in Massachusetts must an-

23 109 Ohio St. 281, 287, 142 N.E. 141, 143 (1924).
24 236 Ind. 446, 139 N.E.2d 893 (1957).
25 Id. at 454, 139 N.E.2d at 897.
swer these questiones in determining whether to instruct on the lesser offenses, it can be strongly contended that he is being allowed to encroach upon the province of the jury, whose duty it is to assess the evidence. In Sullivan, the court’s major concern appeared to be preserving this function of the jury; hence that court held that despite the conclusiveness about the cause of death, the trial court had a duty to instruct on the lesser included offenses.

In probing the likely impact of the newly adopted Myers rule, it must be noted that since the facts of the case before the Myers Court did not fall under the limits of the test which the Court purported to adopt, it could be validly argued that Myers has not actually stated any new positive law. Under the Myers test, an instruction on lesser included offenses can be had only if the evidence raises a reasonable doubt that the acts of the defendant did not cause the victim’s death. In Myers the Court found, however, that the facts of the case before it did not meet this test. The defendant had not introduced evidence raising a reasonable doubt that anything other than his act had caused the victim’s death. Since the facts in Myers did not fall under the limits of the test which the Court purported to adopt, it is arguable that the Myers decision only indicates when the test does not apply. While this possibility should not be ruled out, it is more probable that since the Supreme Judicial Court specifically noted the Ohio rule as most desirable, it may be expected that future development of the Myers doctrine will closely parallel Ohio’s application of the rule.

Judging from the Ohio experience in applying its instruction rule about lesser included offenses, there may be times when the newly adopted Massachusetts rule will aid the defendant. The Ohio decision of Dresback v. State\(^{26}\) is illustrative of this possibility. In Dresback, the defendant was charged with murdering his wife by the administration of poison. The evidence was circumstantial, attempting to show that the defendant substituted the poison for pills prescribed by his wife’s physician. The defendant gave evidence tending to show that any poison contained in the pills was due to the negligence of the doctor. The trial judge charged the jury that it should return a verdict of murder in the first or second degree, or of manslaughter, or of not guilty. The Supreme Court of Ohio held that such instruction was erroneous.\(^{27}\) The evidence against the accused tended to prove that he purposely killed his wife by administering poison to her; it tended to prove no other grade of offense. If the jury found him guilty, its duty was to find him guilty of murder in the first degree; if that charge was not proved beyond a reasonable doubt, he was entitled to an acquittal. In these circumstances, the Ohio court reasoned that an instruction on lesser included offenses, not warranted by the evidence, would be actually prejudicial to the defendant. If a jury was not willing to find the defendant guilty beyond a reasonable doubt as charged, and yet

\(^{26}\) Ohio St. 365 (1882).
\(^{27}\) Id. at 369, 370.
was not completely convinced of his innocence, it might well use the erroneous instruction on lesser offenses to effect a compromise verdict to satisfy its own doubts. Today, a defendant who found himself in such a situation in a Massachusetts court might want to invoke the Myers rule to prevent an instruction on lesser offenses not warranted by the evidence.

In conclusion, it should be noted that certain procedural difficulties may arise in the application of this doctrine. As seen above, one such difficulty could arise because the judge must weigh the evidence before deciding whether an instruction on lesser offenses is warranted. In so doing, the judge could be said to encroach upon the function of the jury. A consequent problem would then arise on appeal, where the reviewing court would be forced to decide what weight should be given to the trial judge's evaluation of the evidence.

On balance, however, the decision in Myers should be welcomed by both prosecution and defense as further insurance that the jury's verdict will reflect the proper disposition of each case. When the evidence quite conclusively establishes the causal connection between the defendant's act and the death of the decedent, then the prosecution can prevent an instruction on lesser included offenses. On the other hand, if the evidence about the crime charged does not prove guilt beyond a reasonable doubt, and yet there is no basis for finding the defendant guilty of any lesser crime, then the defendant can prevent an instruction on the lesser offenses.

MARY KELLY

§15.12. Sham arrests and unlawful detention: Commonwealth v. Perez. The defendant was approached by police at a cleaning establishment near the scene of a recent murder after he had attempted to redeem a bloodstained sweater which the police suspected was connected with the crime. The police arrested him without warrant when he admitted owning the sweater, and took him immediately to the police station. Later that same afternoon, after conducting further investigation and questioning, the police telephoned the clerk of the district court and related the evidence which they had accumulated against Perez. Although two offenses were discussed for which complaints might have been issued, it was ultimately decided to book him for vagrancy, and a complaint for vagrancy was duly issued by a district court clerk the next morning. A complaint for murder was not issued until two days later, when the police received a report from the police chemist that the type of blood found on Perez's sweater was the same as that of the murder victim. The vagrancy complaint was then dismissed for lack of prosecution, and Perez was subsequently indicted by the Grand Jury of Hampden County, Massachusetts, on charges of murder in the first degree, armed robbery, and breaking

and entering in the nighttime with intent to commit a felony. Before his trial, the defendant moved to suppress the evidence which had been discovered as a result of his arrest, but his motion was denied. At his trial, the defendant was convicted on all three indictments.

The defendant appealed from his convictions. He contended, inter alia, that the police had demonstrated their lack of probable cause to arrest him for murder by the officer's use, during the first arrest, of the words "for suspicion of" (murder), and by the decision of the police and clerk of the district court to book him for vagrancy rather than murder. He argued that since the police had had no probable cause to arrest him, his arrest had been illegal, that the evidence seized as the result of the arrest had therefore been illegally seized, and that the trial judge had erred in admitting the contested evidence.

The Supreme Judicial Court HELD: The arresting officer, under the facts available to him at the time, had probable cause to arrest the defendant for murder, and neither the issuance of the initial complaint for vagrancy nor the offense charged at the time of arrest compelled a finding that probable cause had not existed. Furthermore, the Court, finding that the evidence challenged by the defendant in his motion had been discovered by the police before the defendant was booked on the vagrancy charge, observed that even if the detention under the vagrancy charge had been illegal, the police had not, during that time, found any evidence which was detrimental to the defendant and which should therefore have been suppressed.

In setting forth the constitutional requirement for a valid arrest, the Court adopted a statement by the Supreme Court in Beck v. Ohio:

... Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

The Supreme Judicial Court found that the police, at the time of the arrest...

2 Ibid. The findings of fact concerning the defendant's motion to suppress were set forth in the Summary of Record at 9: "The Court specifically finds that [the police] arrested the defendant ... for suspicion of the commission of a felony. Subsequently, two days later after receiving a report from the State Police chemist ... the defendant was arrested for murder. The Court specifically finds ... that the arrest that subsequently ensued was also a proper arrest."

3 The defendant also argued that the seizure of his sweater from the cleaning establishment had been without probable cause and therefore illegal, that the search of his room and the seizure of his clothing therefrom were likewise illegal, that the trial judge had erred in his findings of fact on the defendant's motion to suppress, and that the instructions of the trial judge concerning the weight to be given circumstantial evidence had been in error. The Supreme Judicial Court found for the Commonwealth on all these issues.

arrest, had known that the defendant was the owner of the blue sweater which had been left at the cleaning establishment the morning after a murder; that blood, rope fibers similar to the fibers of a rope found at the scene of the crime, and particles of puttylike material had been found on the defendant's sweater; and that the murderer had entered the store where the crime had occurred by climbing through a skylight and sliding down a rope. The Court concluded that these facts were sufficient to create a "reasonable ground for belief of guilt."

The Court discounted the significance of the officer's use of the words "on suspicion of" (murder) in arresting the defendant. It stated that the use of the word "suspicion" would not "operate to convert probable cause to arrest, if it existed, into mere suspicion" and cited **Commonwealth v. Lawton** as its authority. In **Lawton**, a police officer who had had probable cause to arrest a suspect for robbery arrested him instead under a state statute which empowered the police to arrest those persons abroad at night who could not give satisfactory accounts of themselves. A search of the suspect at the police station disclosed burglaurious instruments and proceeds from a robbery. At Lawton's trial for possession of burglaurious instruments and breaking and entering, the Court held that the existence of probable cause for the robbery arrest was sufficient grounds to sustain the arrest, and that the search which revealed the evidence was therefore valid. The Court concluded:

... To be sure, the police officer, who was a layman and not a legal technician, did not state this [robbery] to be the grounds of the arrest... But the citizens of the Commonwealth... and the Commonwealth [itself] should not be conclusively bound or

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5 The findings of the Supreme Judicial Court concerning the information obtained through analysis of the defendant's sweater were not corroborated by the record. Although the arresting officers claimed that they had received that information the evening before the defendant was arrested, their testimony conflicts with the testimony of the police chemist who performed the analysis. The chemist testified that he had found blood, rope fibers, and a granular material on the sweater the day before the defendant's arrest and that he had discussed his findings with the deputy chief of police that evening. On the day of the arrest, the chemist matched the rope fibers and found a similarity. The day after the arrest, the chemist performed blood grouping tests. The granular material was not identified as puttylike until several weeks later. Brief for Commonwealth at 29, 30. It would seem that at the time of arrest the police could have known only that blood, rope fibers, and a granular material were present on the sweater, as noted by the Court itself earlier in its opinion. 1970 Mass. Adv. Sh. 545, 547, 258 N.E.2d 1, 4.

6 Id. at 554, 258 N.E.2d at 7, citing and quoting Brinegar v. United States, 338 U.S. 160, 175 (1949): "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'"

7 Id. at 553, 258 N.E.2d at 7.

limited by the officer's choice of words made subjectively in the active execution of his duties.9

In discussing the effects of Perez's vagrancy charge, the Court considered a contention which had not been specifically presented by the defense, to wit: that an arrest by police for a sham offense would render any evidence obtained from the arrest inadmissible, even though there might have been probable cause to make the arrest for another offense. That conclusion had been reached by the Fifth Circuit in Mills v. Wainright.10 Mills was apprehended at a drive-in theater under circumstances which arguably afforded the police probable cause to arrest him for breaking and entering. The charge on which he was arrested, however, was vagrancy, and he was booked for that offense when the victim of the attempted crime could not positively identify him. After being questioned, Mills was fingerprinted. When compared against the police fingerprint files, his fingerprints were found to match those taken from the scene of another crime. At his trial on charges stemming from the earlier offense, Mills objected to the admission of the fingerprint comparison, but his objection was denied.

Appealing from the federal district court's denial of his petition for a writ of habeas corpus, the defendant argued that the admission of the fingerprint evidence had been improper because his arrest had been illegal. Both parties agreed that there had been no probable cause to arrest the defendant for vagrancy. The existing evil, said the court in reversing the conviction,

. . . is that, without doubt, the arrest on vagrancy was simply a means employed by the police to discover evidence to further connect the petitioner with the . . . offense, i.e., an investigatory tactic. In fact, it was while Mills was being detained on the vagrancy offense that fingerprints were taken that connected him with the crime of which he was later convicted. There is no question that the vagrancy arrest was a sham.11

Since the arrest was found to be a sham, the court concluded that the fingerprints taken during the resultant illegal detention were inadmissible, and that a ruling to the contrary was reversible error.

The Supreme Judicial Court distinguished Perez from Mills, noting that in Mills the suspect had been arrested and booked on a charge of vagrancy, and that the evidence which was successfully challenged had

9 Id. at 132, 202 N.E.2d at 826. In affirming the lower court's denial of a writ of habeas corpus, the First Circuit Court of Appeals said: "If [the arresting officer] was justified in doing what he did, in the absence of an affirmative showing of prejudice it should make no difference that his legal thinking may have been short of perfection." 352 F.2d at 61.
10 415 F.2d 787 (5th Cir. 1969).
11 Id. at 790.
been the product of that illegal detention. In Perez, on the other hand, the defendant had been arrested on a charge of murder, and the damaging evidence had been discovered prior to the commencement of the vagrancy detention. In addition, the Supreme Judicial Court emphasized that the Mills court had carefully and precisely limited its decision to the facts of that case. The Perez Court indicated that the differences in the fact situations properly warranted the trial court's denial of Perez's motion to suppress, and stated that the "determinative question" was whether the police had had probable cause to make the arrest in the first place.

This comment will discuss the legal implications of arresting and/or detaining a criminal suspect on a charge which is known by the police to be false, even though the suspect has been arrested under circumstances which may have afforded the police probable cause to arrest for a wholly different offense.

Although the United States Supreme Court has not as yet decided a case dealing directly with the arrest and detention issues partially outlined in Perez, such cases have been considered and resolved in the circuit courts of appeal. The circuit courts have approached the cases in different ways, and, as might be expected, have produced inconsistent and occasionally conflicting decisions. The Fifth Circuit has developed a policy of suppressing evidence which has directly resulted from arrests and detentions for offenses not described by state law (for example, arrests and detentions for "investigation") and from arrests and detentions for proper offenses where there was no probable cause to arrest for the offense charged (for example, the arrest and detention of a suspected murderer on a charge of vagrancy).

The policy of the Fifth Circuit was initially formulated in Collins v. United States.12 Collins had been arrested without a warrant and booked on a charge of "under investigation of loitering." During a subsequent search of the defendant's vehicle and possessions therein, the police found evidence of the federal offense for which Collins was ultimately tried and convicted. On appeal, he contended that the search had been illegal, and the court agreed. The legality of the search turned on whether or not it had been incident to a valid arrest. Since the arrest had been made by state officers for a state offense, the court was required to look to state law to determine the legality of the arrest.13 The state code permitted an arrest without warrant if the offense was committed in the presence of the arresting officer, or if the offender was attempting to escape, or if for other cause there was likely to be a failure of justice for want of an officer to issue a warrant.14 Conceding the existence of probable cause to arrest Collins

12 289 F.2d 129 (5th Cir. 1961).
13 United States v. Di Re, 332 U.S. 581, 589 (1949): "[I]n the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity."
for any of several state offenses, the court nonetheless questioned the police procedure of arresting and detaining him on a charge of investigation: "If we should assume that any law could validly authorize an arrest for 'investigation' or 'investigation of loitering,' no such law has been cited." Although the court implied that the absence of such authorization made the defendant's arrest illegal, it did not rest its decision on that foundation, but remarked instead on the failure of the record to indicate that the police had informed Collins, at the time of his arrest, of the offense with which he was to be charged. The court further noted that the evidence plainly indicated that the defendant had not been charged with the commission of any legally defined crime at the time of the search of the vehicle:

... [T]he evidence does not show that either of those charges was ever placed against him [Collins]. Nor does the evidence show that he was ever informed of his arrest for any offense other than the charge on which he was "booked," viz: "under investigation of loitering." However, even if we should assume a valid prior arrest, that came to an end when he was confined in jail under the charge "under investigation of loitering."

Since the detention on an improper charge was invalid, the court held that the warrantless search conducted during such invalid detention could not be valid as incident to a lawful arrest: "The rationale for upholding as reasonable a search incidental to a lawful arrest . . . [has] no application to a person unlawfully arrested or to one whose arrest has terminated in an illegal detention."

In a subsequent decision, Staples v. United States, the same court reiterated its Collins rationale. Although in Staples the state police officers had had probable cause to arrest a suspect (McNamara) for

15 289 F.2d 129, 131 (5th Cir. 1961). A similar rationale was suggested in dicta of the Tenth Circuit Court of Appeals in Simpson v. United States, 346 F.2d 291, 293 (10th Cir. 1964): "This record reveals to us a complete and continuing disregard by police . . . of the constitutional protections afforded appellant in regard to arrest, search and seizure. While the information furnished to the Wyoming police might well have served as probable cause for a federal arrest for a violation of the Dyer Act, it is difficult to visualize a justification for appellant's arrest and incarceration as a vagrant . . . Since the offense is a misdemeanor, an arrest without warrant is not justified unless the offense is committed in the presence of the officer or the elements of the offense are apparent by observation. . . . [Neither is true here.] The purported arrest for "investigation" is unknown to the law of Wyoming. But we need not decide the lawfulness of the arrest. . . ."

16 The Georgia common law requirement of notice is set forth in Morton v. State, 190 Ga. 792, 799, 10 S.E.2d 836, 840 (1940): "It is the duty of an officer, when authorized to arrest, but where the circumstances afford reason to believe that his object and official character are unknown to the person whom he seeks to arrest, so to inform him . . . ."

17 289 F.2d 129, 132 (5th Cir. 1961).

18 Ibid.

19 320 F.2d 817 (5th Cir. 1963).
passing counterfeit federal reserve notes, both his arrest and booking were for "investigation of passing counterfeit notes." A search of the suspect disclosed the keys and registration for an automobile, which was quickly located and searched without warrant. That search uncovered a motel room key, which was used to gain entry to a motel room, again without warrant. There the defendant Staples and some incriminating evidence were seized. At their trial, both defendants moved to suppress the evidence seized from the automobile and the motel room. Upon conviction, they appealed from the trial judge's denial of their motions.

The government sought to justify its searches as incident to lawful arrests, but the court, as it had in Collins, found for the defendants. The court said that McNamara's situation was similar to that of Collins in that neither defendant had been under lawful arrest at the time the police conducted the challenged search. "Perhaps," the court said, the defendant "could have been validly arrested for passing the counterfeit bill, but what we said in Collins v. United States [that even assuming a valid arrest, its validity ceased when the suspect was detained upon a false charge] is pertinent here."20

In excluding the evidence which had been seized contemporaneously with the arrest of the defendant Staples in the motel room, the court relied on its dictum in Collins concerning arrests for "investigation," and held that even though there had been probable cause to arrest Staples for passing counterfeit bills, the arrest was invalid ab initio because it had been made for "investigation." Noting that the information possessed by the police was sufficient to support a reasonable belief of guilt, the court said: "Whether the officers actually entertained such a belief is questionable in view of the fact that instead of arresting Staples on a legal charge, they arrested him simply for "investigation." 21 In passing, the court also observed that a statute of the state where the arrest had occurred required officers who arrested without warrant to state the reason for the arrest 22 and that the police had not complied with the statute in arresting Staples.

In Manuel v. United States 23 and Barnett v. United States,24 the Court of Appeals for the Fifth Circuit further elaborated upon the police practices it had found to be improper. In Manuel, there had been probable cause for the arrest of the defendant on the charge of possession of a stolen check, but he nonetheless appealed on the

20 Id. at 820.
21 Id. at 821.
22 Fla. Stat. Ann. §901.17 (1944): "When making an arrest without a warrant, the officer shall inform the person to be arrested of his authority and the cause of his arrest, unless the person to be arrested is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer has opportunity to so inform him, or unless the giving of such information will imperil the arrest."
23 355 F.2d 344 (5th Cir. 1966).
24 384 F.2d 848 (5th Cir. 1967).
ground that the handwriting sample admitted into evidence against him had been obtained during his illegal detention on a charge of "suspicion—bad checks." Although the court found the handwriting sample to have been freely given and refused to reverse the conviction, it did quote what it considered to be a revealing exchange in the cross-examination of the arresting officer:

Q. I asked you, that suspicion, when you arrest someone on suspicion, if you find someone suspicious you arrest them and hold them until you can investigate and find out exactly what he did wrong, and then book him on the exact charge, or named specified crime?
A. Yes, sir that was what it was.

The court continued: "Appellant's booking was precisely the type of police procedure which this court has declared unlawful in [Collins and Staples]. Such a booking did not charge appellant with the commission of any legally defined crime."26

In Barnett, two defendants had been arrested by state authorities after it was learned that out-of-state warrants had been issued for their arrest. They had been booked for "defrauding," which was not a defined crime under state law. During the booking procedure, the police had searched the defendants and had discovered evidence of an unrelated federal offense for which the defendants were later convicted. The defendants argued that their booking on a nonexistent charge invalidated their detention and required the suppression of the evidence that had been seized. The court, however, affirmed their convictions:

... [Both] Collins and Staples involved bookings for "investigation" and "on suspicion," and the holdings were aimed at police practices under which subjects were detained on these fictitious charges until additional investigation could be carried out. . . . [Here the defendants] were arrested for the specific purpose of holding them for Tennessee authorities, and they were so informed. . . . Where a valid basis for arrest and detention exists, is relied upon by the arresting officers and is communicated to the arrestees, the use by the jailer of an imprecise term to describe the basis for detention will not invalidate that detention.27

In Mills, the Fifth Circuit's latest case concerning sham arrests, the court (in reaching the conclusion that Mills's arrest had been a sham) examined the circumstances surrounding the arrest itself. A police officer testified that the arrest had occurred at a drive-in theater after he had finished questioning the defendant. Mills testified that the offi-

25 355 F.2d 344, 348 (5th Cir. 1966).
26 Ibid.
27 384 F.2d 848, 855-856 (5th Cir. 1967).
cer had not informed him that he was charged with vagrancy until after the victim of the breaking and entering attempt had been unable to positively identify him. The state contended that even though probable cause for the vagrancy arrest was lacking, probable cause did exist to arrest Mills for breaking and entering, and that it was therefore immaterial that the defendant had been booked on a vagrancy charge. The state also argued that the arresting officer was guilty of no more than mistpering an offense. The court found that there was "no dispute that Mills was arrested for vagrancy" and that he was booked on that charge at the station.\(^{28}\)

The test for determining the validity of Mill's arrest was described by the court: "[W]e want it well understood that when a crime under which the arrest is made and the crime for which probable cause exists are in some fashion related then there is no question but that there is a valid arrest."\(^{29}\) The court, however, was not able to find a connection between the vagrancy charge and breaking and entering, nor was it able to find probable cause for the arrest of the defendant on a vagrancy charge. It therefore held the arrest to be invalid and the evidence obtained as a result of the arrest inadmissible.

In *Collins* and *Staples*, the court was dealing with defendants seeking review of federal court convictions. In *Mills*, the court was faced with a state petitioner seeking a writ of habeas corpus in federal court. In the latter situation, the court is restricted to a consideration of petitions from prisoners "in custody in violation of the Constitution or Laws . . . of the United States."\(^{30}\) Nonetheless the *Mills* court, citing *Collins* and *Staples* as authority, described its function as being "to determine if the arrest was merely a sham or fraud wholly unrelated to the crime for which probable cause existed to arrest the individual."\(^{31}\) By applying the same test to federal and state petitioners, the court implied that the test of a valid arrest thus employed was not based on state or federal statutes or rules, but rather was constitutional in nature and was to be applied under any circumstances.

In *Collins*, *Staples* and *Mills*, the court accepted either outright or arguendo the existence of probable cause, yet went on to invalidate the arrests or detentions. The essence of the court's argument seemed to be that the existence of probable cause was not alone sufficient to sustain the arrests, but that it was also necessary for the police, in making the arrest, to rely upon the actual charge for which probable cause existed. The fact that the arresting officers resorted to a charge unrelated to the probable cause was treated by the court as a prima facie indication that the arrest was made not for the purpose of bringing the suspect to court to answer for a crime, but rather for the pur-

\(^{28}\) 415 F.2d 787, 789 (5th Cir. 1969).
\(^{29}\) Id. at 790.
\(^{31}\) 415 F.2d 787, 790 (5th Cir. 1969).
pose of holding him until evidence could be found sufficient to justify the issuance of a complaint. When such an improper arrest or detention has been found, the court has held that any prejudicial evidence discovered by the police as a result of the illegal procedure should be excluded by the trial court.

Other circuit courts, in reaching conclusions contrary to those reached in the Fifth Circuit, have used a different approach in analyzing similar cases, either differentiating them on the basis of fact from *Collins, Staples* and *Mills*, or simply choosing not to follow them. The Fourth Circuit Court of Appeals, in *Ralph v. Pepersack*,\(^{32}\) refused to grant a petition for a writ of habeas corpus to a prisoner who had been tried in the state courts and convicted of rape. Ralph argued that his warrantless arrest and detention had been illegal, and asserted that his confession, obtained while he was in police custody, should not have been admitted into evidence. After determining that probable cause to arrest Ralph for rape had existed, the court admitted that the preponderance of the testimony was consistent with the defendant's contention that he had been arrested for "investigation." The court did not feel, however, that the admission of the confession had been a denial of due process:

... To make constitutional questions turn on the term chosen by police officers to describe their activity — officers who are accustomed to the vernacular of the police station and unschooled in the accepted constitutional vocabulary — is to engage in a futile and unwarranted exercise in semantics. ... We think untenable the proposition that an arrest based on probable cause becomes unconstitutional because described by an officer as an arrest for "investigation."\(^{33}\)

Examining the arrest in the light of District of Columbia laws, the court, rather than looking to a statute which would specifically authorize an arrest without warrant for "investigation," as the Fifth Circuit had done, found instead that: "At the time of Ralph's arrest, the District of Columbia had no statute or ordinance prohibiting arrests for investigation where probable cause was present."\(^{34}\) (Emphasis added.) The court also found that the Court of Appeals for the District of Columbia, where the arrest had been made, had already rejected an argument similar to Ralph's in *Bell v. United States*:

... Of course there is no such crime as "Investigation". But this description given by the officer does not go to the question of probable cause. The question is not what name the officer at-

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\(^{32}\) 335 F.2d 128 (4th Cir. 1964).

\(^{33}\) Id. at 134.

\(^{34}\) Id. at 135.
tached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that [the suspects] had committed it.\textsuperscript{35}

Finally the Ralph court held: "Insofar as Staples may be read as indicating that an arrest on probable cause is rendered unconstitutional because it is termed an arrest for investigation, we do not choose to follow it."

The Eighth Circuit Court of Appeals, in upholding the conviction of the defendant in Klingler \textit{v. United States},\textsuperscript{37} has also chosen not to follow the Fifth Circuit on this issue. Klingler had been arrested by the state police for vagrancy. A search of his vehicle immediately after his arrest had yielded evidence of a federal crime for which he was subsequently convicted. On appeal the defendant sought to suppress the evidence resulting from the search of his vehicle, and argued that his arrest had been invalid. The court found that there had been probable cause to arrest the defendant for robbery, and agreed that vagrancy was an unsuitable ground for the arrest since the record was "devoid of evidentiary support"\textsuperscript{38} for that charge. The court, however, went on to say that

\ldots the record in this case fails to show bad faith on the part of the officers in making the arrest for vagrancy. The testimony suggests that [the officer] made what appears to be an honest mistake in specifying the reason for arrest. The circumstances do not give rise to the inference that the arrest was effected for the purpose of creating an excuse to search. . . . Notwithstanding the officer's mistaken statement of grounds, the existence of probable cause for a robbery arrest prevents the vagrancy arrest from being considered pretextual.\textsuperscript{39}

It is submitted that the position adopted by the Fifth Circuit is correct and that it is in accord with opinions of the United States Supreme Court. The constitutional standards against which arrests must be tested are embodied in the Fourth Amendment.\textsuperscript{40} In Terry \textit{v. Ohio}, the Supreme Court stated: "[T]he conduct [of the police] must

\textsuperscript{35} 254 F.2d 82, 86 (D.C. Cir. 1958), cert. denied, 358 U.S. 885 (1958). Accord, Kuhl \textit{v. United States}, 322 F.2d 582, 587 n.5 (9th Cir. 1963): "There is, of course, no such crime as 'suspicion of forgery or counterfeiting.' The crime is that of forgery or counterfeiting. A person is sometimes referred to as having been arrested for suspicion of murder, but actually must be arrested for the crime of murder. The real question is, did reasonable cause exist to believe that this appellant had committed the crime of forgery or counterfeiting?"

\textsuperscript{36} 335 F.2d 128, 135 (4th Cir. 1964).

\textsuperscript{37} 409 F.2d 299 (6th Cir. 1969).

\textsuperscript{38} Id. at 304 n.4.

\textsuperscript{39} Id. at 305; see United States \textit{v. Frazier}, 385 F.2d 901, 904 (6th Cir. 1967).

\textsuperscript{40} "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."
be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context."41 The Court went on to summarize its earlier holdings concerning the Fourth Amendment requirements for valid arrest:

... [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. ... [In assessing the reasonableness of a particular search or seizure] it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? ... And simple "'good faith on the part of the arresting officer is not enough' ..."42

Taken singly, the commands of the Supreme Court are quite clear, and have given rise to the relatively uncomplicated test of objective probable cause which was applied by the courts in Ralph and Klingler. Taken together, however, and in conjunction with the expressed preference of the Court for arrest by warrant,43 the requirements seem to compel the proposition maintained by the Fifth Circuit — that an arrest or detention under a sham charge is constitutionally invalid. What has been generally ignored by courts not following the Fifth Circuit is that the Supreme Court has held the Fourth Amendment to require that arrests be tested not only against the notion underlying the standard of probable cause but also against the notion underlying the warrant procedure. Underlying the warrant procedure is the concept that the person who seeks a warrant does so on the basis of facts coming to his attention which indicate that a crime has been committed and that a certain individual is guilty of its commission. Were the police required in every instance to comply with the warrant procedure in making an arrest, a warrant would only be sought in instances where a police officer, relying upon certain facts, had formed a reasonable belief from those facts as to the guilt of the person sought to be arrested. If the arresting officer did not believe that the available information constituted probable cause (reasonable ground for belief in the guilt of the suspect), he would have no reason to apply for a warrant. Thus, even though an officer in fact need not always seek a warrant before making an arrest, he is not relieved of the underlying duty to base his own belief of guilt on the facts before him. Therefore it is submitted that the constitutional test of a valid arrest em-

41 392 U.S. 1, 20 (1968).
42 Id. at 21-22.
braces not only the existence of probable cause in fact, but also actual belief in and good faith reliance upon that probable cause by the arresting officer.

In the federal cases thus far discussed, the two related issues involved have been the validity of the arrest and the validity of the detention. The cases concerned with the validity of arrests are Staples, Mills, Ralph and Klingler. Although in Staples and Ralph the courts were concerned with arrests for "investigation" and in Mills and Klingler with arrests for vagrancy, the arguments for or against the legality of the police procedures are equally applicable in either circumstance. In Ralph, the court stated that neither the police officer nor the government should be held to the exact words used by the officer in the heat of an arrest. That argument is sound. No court should hold that a slip of the tongue or a misterming of an offense by a police officer in good faith (for example, an arrest on a stated charge of robbery rather than breaking and entering) would invalidate an otherwise proper arrest. Certainly an officer making an arrest may have other, more immediate concerns than informing the suspect, in exact statutory terms, of the offense of which he is suspected. Nevertheless, there is a great difference between the misterming of an offense and a deliberate arrest and detention on nonexistent grounds. The latter may well involve bad faith on the part of the arresting officer. At the very least, whether or not probable cause does in fact exist, the inability or unwillingness of a police officer to name the crime for which probable cause does exist would seem to be a prima facie indication that he is acting on a hunch or bare suspicion and not on probable cause.45

Furthermore, it seems inherently inconsistent to require, on the one hand, that a citizen be on notice of the myriad of statutes which influence his daily activities, and not to require, on the other hand, that the police officer, whose duty is to enforce the same statutes, be able to explain why and upon what authority he is making a particular arrest. As the Supreme Court noted in United States v. Di Re: "It is the officer's responsibility to know what he is arresting for, and why. . . ."46

In addition, there is the more practical consideration originating from the common law requirement that the officer arresting without warrant inform the suspect of the charge against him, and the concomitant right of a person not so informed to resist the arrest:

. . . [T]he historic English requirement [is] that an arresting officer must give notice of his authority and purpose to one whom


45 Arrests for anything less than probable cause have been consistently invalidated by the Supreme Court, e.g., Terry v. Ohio, 392 U.S. 1, 22 (1968), and cases cited therein.

46 332 U.S. 581, 595 (1948).
he is about to arrest. In the absence of such notice, unless the person being arrested already knew of the officer's authority and mission, he was justified in resisting by force, and might not be charged with an additional crime if injury to the officer resulted.47

This common law requirement is embodied in the arrest statutes of many states.48 In *Klingler*, the court noted that the evident purpose of such statutes was to "establish a procedure that is likely to result in a peaceful arrest"; and that to that end the defendant, having been informed by the police of a charge which was to be placed against him, "had notice that the officers purported to act under authority of the law."49 By holding that the requirements of the statute had been met and that the arrest was therefore legal, the court implied that once a citizen who was being arrested was informed of the grounds for his arrest or of the authority under which the arresting officer purported to act, his right to question the actions of the officer ceased until he appeared before a judge. Such a position fails to take into account the fact that every act of a police officer on duty, no matter how egregious, is purportedly done under authority of law. Hence, rigid adherence to this standard could have the effect of leaving a citizen defenseless against even the most unlawful acts of the police, and might have the unfortunate consequence of encouraging police to encroach upon individual liberties. In short, it is submitted that the interests of society will be better served by requiring the police to adhere to all the constitutional requirements of arrest (including that of relying upon their own belief in the guilt of the suspect for the crime for which he is arrested) and by not permitting the validation of improper arrests through the accuracy of judicial hindsight.50

Turning to the legality of detentions under a charge for which there was no probable cause to arrest, or detentions under a charge such as "suspicion" or "investigation," the same considerations which obtain to invalid arrests also apply. To the extent that an arrest is invalid because of the failure of the police to rely on the only proper grounds for the arrest, the continued detention of a suspect is clearly a deprivation of liberty without due process of law and thus a violation of the Fifth and/or Fourteenth Amendment. Where the arrest has been valid but the defendant has been detained under a sham charge, as in *Perez*, the issue is whether such a charge is per se constitutionally defective. It may be argued that as the arrest for a sham

48 G.L., c. 263, §1, reads in part: "Whoever is . . . taken into custody by an officer, has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made. . . ."
49 409 F.2d 299, 306 (8th Cir. 1969).
50 Some of the evils which may flow from arrests for investigation are detailed in *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation [for the District of Columbia] (1962)*, noted in Ralph v. Peper·sack, 335 F.2d 128, 137 n.12 (4th Cir. 1964).
offense is a prima facie indication of an absence of probable cause, so the detention of a suspect for a sham offense is a prima facie indication that the police do not have a valid charge upon which the suspect may be booked. Where a detention under a false charge follows a valid arrest, the inference may be drawn that the court clerk or another officer at the station house evaluated the evidence against the suspect and decided that it did not afford a sufficient basis upon which to seek a complaint. If such is the case, the police no longer have any reason to detain the suspect and should release him. A continued seizure violates the Fourth Amendment because it is lacking, as much as the invalid arrest lacked, reliance upon probable cause, and is therefore an unreasonable restraint. It is submitted that the test of good faith reliance must be applied as the standard against which to measure detentions as well as arrests, and that any evidence gathered as a direct result of an invalid detention ought to be no more admissible than the direct fruits of an illegal arrest.

Former Chief Justice Warren, in his dissenting opinion in Wainwright v. City of New Orleans, enunciated a position similar to that espoused by the Fifth Circuit. Wainwright had been arrested and booked by the police for “vagrancy by loitering,” but was tried on charges of assault arising from an altercation in the station house. The petitioner appealed from his conviction on the ground that his arrest had been illegal, and that he therefore had the right to resist. The police contended that there had been probable cause to arrest the petitioner for murder, and that the arrest was therefore legal. After hearing argument, the Supreme Court decided that the record was too obscure to permit a proper evaluation, and dismissed the writ of certiorari as having been improvidently granted.

The then Chief Justice noted that the officers had neither a warrant nor probable cause to arrest the petitioner for “vagrancy by loitering.” Although he agreed with a concurring opinion which suggested that the record did not reveal whether the police had had probable cause to arrest the petitioner for murder, he felt that that was “an irrelevant inadequacy” in the record:

... The record does establish that petitioner was not arrested for murder ... that the police interrogated petitioner for about 10 minutes concerning the murder before it was decided that he would not be booked for murder ... [and] that petitioner was booked only for vagrancy by loitering, resisting an officer and reviling the police.

... I see no more justification for permitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the “low-visibility” sphere of police investigatory practices,

51 392 U.S. 598 (1968).
there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges. Nor would holding the police to official records frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder. If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge to verify their suspicions.

... This technique, using a minor and imaginary charge to hold an individual, in my judgment deserves unqualified condemnation. It is a technique which makes personal liberty and dignity contingent upon the whims of a police officer, and can serve only to engender fear, resentment, and disrespect of the police in the populace which they serve.52

Viewing Perez in the light of the pertinent federal cases, it would appear that the Supreme Judicial Court was correct in its holding, but incorrect in that it relied on the existence of probable cause as its sole constitutional standard against which to measure arrests and detentions. At the time of the arrest, the police had probable cause to arrest the defendant for murder.53 The arresting officer informed the defendant that he was from the police and that the defendant was under arrest on “suspicion of the murder of Charles Alpert.”54 The words of the arresting officer were reasonably related to the crime which the defendant was believed to have committed, and there was no indication that the officer was not relying in good faith upon the existence of probable cause to arrest the defendant for murder. Although “suspicion of murder” is not a crime for which one can be arrested, such a charge would not have misled an innocent man about the nature of the crime for which there was probable cause to arrest. The arrest itself was legal.

The legality of the defendant’s detention on the charge of vagrancy, however, is a different question. Although the Supreme Judicial Court was correct in deciding that the resolution of that issue was not necessary to the decision of the Court on appeal, it is submitted that the detention was, in fact, illegal; and that, had any evidence prejudicial to the defendant been developed as a direct result of the detention, it should have been excluded by the trial court. The police officer testified about his conversation with the clerk of the court in reference to the charge under which Perez was to be detained:

... I told [the clerk] that we had a fellow under arrest [for the

52 Id. at 605-607.
53 See discussion, note 5 supra.
murder]; that I was interested in a complaint for murder for this fellow; that we did not have the actual documents from the chemical laboratory to support the evidence we had at that time. I asked him what he would suggest . . . and he suggested a vagrancy complaint. His conversation was to the effect that he could be charged with suspicion of a felony or vagrancy. And I said, "Well, we'll charge him with vagrancy."55

No facts or reasons were given to the clerk during that conversation in relation to a charge of vagrancy against the defendant;56 clearly the state officials deliberately chose the vagrancy charge—one that was without probable cause—over the felony charge. The reason for this decision was that the police were waiting for a written report from the police chemist.57 The report would confirm the presence of blood on the sweater, indicate whether the type of the blood found on the sweater matched that of the victim, and indicate whether the rope fibers found on the sweater matched those from the rope found at the scene of the crime.58 When the report did arrive on Monday, three days after the defendant's arrest for vagrancy, the police obtained a second complaint against Perez and arrested him for murder. There was testimony by the police that prior to that time the defendant had not been under arrest for murder.59

It is submitted that the facts and circumstances surrounding the arrest and detention of Perez would require a court, faced squarely with the question, to rule that the detention of Perez on the vagrancy charge was illegal because the police did not rely in good faith upon the one possible valid charge under which he could have been detained; and that any evidence which directly resulted from the detention should have been suppressed. Since the Court in Perez was not required to decide that issue on the facts presented, it is likely that the question will return to the Court for consideration at a future date.

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55 Brief for Commonwealth at 9. The powers and duties of the clerk of the district court in regard to the complaint procedure are described in G.L., c. 218, §§32-34, which reads in part: "District courts may receive complaints and issue warrants and other processes for the apprehension of persons charged with crime. . . . A clerk . . . may receive complaints, administer to complainants the oath required thereto, and issue warrants. . . . Said courts may dispense with the issuing of a warrant if the person charged with a crime has been arrested without warrant and brought before the court or admitted to bail. . . ."

56 Brief for Appellant at 12.
57 Brief for Commonwealth at 9.
58 See discussion, note 5 supra.
59 Brief for Commonwealth at 9.
§15.13 Defendant's right to disclosure of presentence report in Massachusetts: Commonwealth v. Martin. Defendant Martin was tried before a jury for unarmed robbery and found guilty on April 22, 1968. On disposition, the court examined the probation report, which consisted of two parts. The first part contained the defendant's criminal record, and the second was comprised of "information about the defendant gathered by the probation department from the defendant himself, former employers of the defendant and others." Counsel for the defendant asked that he be allowed to examine the entire report. The court permitted the defendant's counsel to examine part one of the report containing the defendant's criminal record, but refused to permit him to examine part two of the report. The defendant took timely exception and subsequently took a bill of exceptions to the Supreme Judicial Court.

In considering this issue for the first time, the Supreme Judicial Court, one Justice dissenting, HELD: no error had been committed since it was within the court's discretion to allow, or disallow, disclosure of the entire presentence report. The Court in so ruling considered three arguments proffered by the defendant: first, that the Massachusetts statutory provisions could be read as requiring disclosure of the entire presentence report; second, that the Sixth and Fourteenth Amendments to the Constitution of the United States and Article XII of the Massachusetts Declaration of Rights had been abrogated by denying defendant access to the entire report; and third, that the requirements of "the proper administration of criminal justice" mandated the disclosure of the presentence report. The Court rejected all of these arguments.

This casenote will discuss the reasoning and underlying rationale of the Supreme Judicial Court in rejecting the defendant's arguments, compare this decision to other authority, and offer a considered alternative.

The Court, in rejecting defendant's argument that Massachusetts statutory requirements could be read as requiring full disclosure of the presentence report, noted that three statutes provided for the preparation and receipt of presentence reports. Chapter 276, Section

2 G.L., c. 265, §19.
3 Terminology used in Defendant's Bill of Exceptions [hereinafter referred to as the presentence report].
5 Id. at 216, 244 N.E.2d at 305.
6 Id. at 222, 244 N.E.2d at 308.
7 G.L., c. 276, §§85; G.L., c. 276, §100; G.L., c. 279, §4A [hereinafter referred to as Sections 85, 100 and 4A, respectively].
8 Mass. Const. pt. 1, art. XII, in pertinent part reads: "And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or counsel, at his election."
85, provides, in relevant part, that the probation officer, in a case of criminal prosecution charging an offense punishable by imprisonment for more than one year, at the direction of the court, must present to the court such information as the commissioner of probation has in his possession relative to prior criminal prosecutions, if any, of such person and to the disposition of each such prosecution, and all other available information relative thereto, . . . before disposition of the case against him by sentence. . . .

Under Chapter 279, Section 4A, the court has a corresponding duty, in a case of criminal prosecution charging an offense punishable by imprisonment for more than one year, to obtain from its probation officer all available information relative to prior criminal prosecutions, if any, of the defendant and to the disposition of each such prosecution. . . .

Both of these statutes contain clauses excluding any record of criminal prosecutions where a defendant was found not guilty. Chapter 276, Section 100, the third relevant statute, provides in part:

. . . under the direction of the commissioner a record shall be kept of all such cases as the commissioner may require for the information of the justices and probation officers. . . . The information so obtained and recorded shall not be regarded as public records and shall not be open for public inspection but shall be accessible to the justices and probation officers of the courts. . . .

Approximately one month after Martin's sentencing, Sections 85 and 4A were amended to include the following:

. . . Prior to the aforesaid disposition such record of the probation officer shall be made available to the defendant and his counsel for inspection.10

Counsel for the defendant argued that since the statute, as amended, was operative before the case was entered in the Supreme Judicial Court, the defendant was entitled to its protection.11 The Court, however, declined to consider this point and ruled that Sections 85 and 4A, as amended, pertained merely to the prior criminal record of the defendant, that is, part one of the report which the trial court had permitted defendant's counsel to examine. On the other hand, the Court held that Section 100 was controlling as to part two of the report containing the information about the defendant from the de-

fendant himself, former employers of the defendant and others,\textsuperscript{12} and that disclosure was therefore not mandated.

The Court predicated its ruling on two bases. First, it noted that the general practice of Massachusetts trial courts had been to disclose to the defendant his prior criminal record — part one of the report.\textsuperscript{13} It then reasoned that the amendments to Sections 85 and 4A were merely a legislative recognition of this practice. Second, the Court presumed that the part of Section 100 which reads “a record shall be kept of all such cases as the commissioner may require for the information of the justices and the probation officers” was the basis for the preparation of part two of the report.\textsuperscript{14} Having made this presumption, the Court went on to point out that Section 100 specifically prohibited the public disclosure of this information.\textsuperscript{15} The Court then noted that, unlike Sections 85 and 4A, Section 100 had not been amended, and concluded “that there was no statutory requirement that the defendant be furnished with part two of the report.”\textsuperscript{16}

This conclusion by the Court appears to be well reasoned when one considers the three statutes together. Defendant’s counsel argued that:

It is significant that Chapter 279, §4A and Chapter 276, §85 do not speak only of the list of criminal prosecutions. They speak more broadly of “all available information relative to prior criminal prosecutions,” (Chapter 279, §4A) and “such information as the commissioner of probation has in his possession relative to prior criminal prosecutions . . . and all other available information relative thereto.” (Chapter 276, §85). There is thus a basis in the statutes for the administrative interpretation that the probation report given to the court contained general information about the history and character of the defendant which may shed light on the bare record of criminal prosecutions — the degree of culpability, the presence or absence of extenuating circumstances, etc.\textsuperscript{17}

Defendant, however, disregarded established practice of the probation department. The department had always separated the report into two sections — one pertaining only to prior convictions, and the other to general information about the defendant. The Court acknowledged this procedure and reasoned that, since both Sections 85 and 4A had been amended in 1950 to preclude the inclusion of information about crimes of which the defendant had not been found guilty, the broad language of Sections 85 and 4A referred to matters which appear in

\textsuperscript{13} Id. at 216, 244 N.E.2d at 304.
\textsuperscript{14} Ibid.
\textsuperscript{15} “The information . . . shall not be regarded as public records and shall not be open for public inspection . . . .”
\textsuperscript{17} Brief for Defendant at 3.
the records of prior criminal convictions but not to the general information found in part two of the presentence report.

The conclusion of the Court is further fortified by the mere existence of Section 100. To follow the defendant's argument and construe Sections 85 and 4A as including the general information at issue in Martin would render Section 100 meaningless. If "all available information relative to prior criminal convictions" (Section 4A) and "such information . . . relative to prior criminal prosecutions . . . and all other available information relative thereto" (Section 85) refer to the general information about the defendant found in part two of the presentence report, then to what does "a record of all such cases as the commissioner may require for the information of the justices and probation officers" (Section 100) refer? Presuming that the legislature is not inclined to enact superfluous legislation, the Court's conclusion that Section 100 applies to part two of the report would seem persuasive. This is especially so when one considers that Sections 85 and 4A are limited to information about prior criminal prosecutions in which the defendant was found guilty, and all information relative thereto. General information about a defendant gathered from "himself, former employers and others," would appear not to fall within the limits of this language, but rather within the broad provisions of Section 100.

One problem relative to these statutes remains, however. Section 100, regarded by the Court as encompassing the information at issue in Martin, specifically provides that such information will not be public record, but rather shall only be available to the court and the probation department. If the trial judge exercises the discretion granted him by the Supreme Judicial Court in Martin,18 thereby permitting a defendant's counsel to examine part two of the report, and the defendant raises questions as to some of this information, the report would then appear in the transcript. This, of course, is a public record, and the proscription of Section 100 would be thereby violated.

Nevertheless, this conflict is not insoluble. As suggested by the United States Court of Appeals for the Fourth Circuit in Baker v. United States,19 at a minimum the presentence report can be sealed and made part of the record, to be revealed only to the appellate court. Later, resealed, it could be returned to the trial judge for his confidential custody.20 In Baker the court recognized that lack of disclosure prevented a defendant, convicted of armed robbery and sentenced to 14 years' imprisonment, from refuting allegations of supposed payoff for a past offense. At least, by the use of the sealed report, the

18 The Supreme Judicial Court held that disclosure of part two of the presentence report was within the discretion of the trial judge, and that such discretion should be exercised under the guideline of "generosity." 1969 Mass. Adv. Sh. 215, 221-222, 244 N.E.2d 303, 307-308.
19 388 F.2d 951 (4th Cir. 1968).
20 Id. at 953.
appellate court could, based on an actual record, determine whether the defendant was afforded an opportunity to refute damaging information. This, of course, falls short of giving the defendant an opportunity to know all that goes into the trial judge's disposition, but at least a better opportunity is afforded for an effective and equitable review.

The second part of the Supreme Judicial Court's opinion dealt with the constitutional arguments raised by the defendant. The Court first discussed *Williams v. New York*, the case that is considered by many authorities to stand for the proposition that the due process clause of the Fourteenth Amendment does not require the disclosure of the presentence report. In *Williams*, the defendant, convicted of murder, was sentenced to death by the trial judge. The defendant contended on appeal that his right to confrontation of witnesses had been violated when the court relied, at sentencing, on a presentence report. The United States Supreme Court held that once guilt had been properly established a court could, consistent with the due process clause of the Fourteenth Amendment, consider out-of-court, unsworn statements in imposing sentence.

The Supreme Judicial Court went on to point out that the Supreme Court in *Williams* had not decided whether a defendant has a constitutional right to see a presentence report, but only that a judge can rely on out-of-court, unsworn information in passing sentence. The United States Supreme Court did note, however, that the sentencing procedure must nevertheless meet due process requirements.

The Court in *Martin* next turned to considering whether the denial of access to the presentence report violated the defendant's right to counsel. Defendant argued that to be afforded effective counsel it was necessary that his attorney be given access to the withheld portion of the report. In support of this contention, the defendant cited *Kent v. United States*. In that case, the Juvenile Court of the District of Columbia waived jurisdiction and directed that the defendant be held for trial before the federal district court. In so doing, the juvenile court based its decision, in part, on a report by the juvenile probation section and the social service file, neither of which was made available to the defendant's counsel. The United States Supreme Court held that, under the applicable statute, the defendant had a right to re-

22 337 U.S. 241 (1949).
23 Id. at 252.
25 "What we have said is not to be accepted as holding that the sentencing procedure is immune from scrutiny under the due process clause. See Townsend v. Burke, 334 U.S. 736." 337 U.S. 241, 252 n.18 (1949). In Townsend the presentence report included offenses of which the defendant had been found not guilty. This the Court found inconsistent with due process.
28 D.C. Code § 11-1586(b) (Supp. IV 1965) (records, limited inspection, and penal-
view the reports. As the Supreme Judicial Court noted in Martin, however, the basis of this decision was the statutory right given to "such persons . . . as have a legitimate interest in the protection . . . of the child," and the defendant's counsel had a "legitimate interest" in protecting the child.

The Supreme Judicial Court, therefore, finding no authority for the proposition that due process, or the right to counsel, required the disclosure of the presentence report, held "that the defendant did not have a constitutional right to see part two of the report." Concerning this portion of the Court's opinion, at least as to the due process issue, little fault can be found in its reasoning. While the Supreme Court of the United States has never specifically ruled on the question of a defendant's constitutional right to see the presentence report, and while at least one commentator has suggested that such denial is in fact a violation of due process, there exists substantial authority for the Supreme Judicial Court's position.

However, concerning the right to counsel argument proffered by the defendant, there are two bases upon which the Supreme Judicial Court's holding can be questioned. First, the Court's distinguishing of Kent, on the grounds that the Supreme Court was merely holding that the District of Columbia statute required disclosure of the report in question to the defendant's counsel, is not so persuasive on a complete reading of Justice Fortas' opinion. It is arguable that the basis of this decision was not the District of Columbia statute itself, but rather the Court's broadening of the scope of the statute in recog-

ties for unlawful disclosure or use): "The records or parts thereof made by officers of the court pursuant to sections 11-1525 and 16-2302, referred to in subsection (a) of this section as social records, shall be withheld from indiscriminate public inspection except that they shall be made available by rule or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child under 18 years of age, and to any court before which the child may appear. The court may also provide by rule or a judge may provide by special order that any such person or agency may make or receive copies of the records or parts thereof. Persons, agencies, or institutions receiving records or information pursuant to this subsection may not publish or use them for any purpose other than that for which they were received."

34 Note, Right of Criminal Offenders to Challenge Reports Used in Determining Sentence, 49 Colum. L. Rev. 567 (1949).
35 Baker v. United States, 388 F.2d 931 (4th Cir. 1968); Thompson v. United States, 381 F.2d 664 (10th Cir. 1967); Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); State v. Delano,—Iowa—, 161 N.W.2d 66 (1968); People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966); United States v. Trigg, 392 F.2d 860 (7th Cir. 1968), cert. denied, 391 U.S. 961 (1968).
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nition that the "critical importance" of waiving jurisdiction required disclosure of the report in question. As the Court stated, "We believe that this result [disclosure of the report] is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."38 (Emphasis added.) Second, while the Supreme Court did rule in Williams that a court, upon sentencing, may, consonant with due process, considered hearsay information, the Supreme Court has not ruled that a defendant is not entitled to effective counsel. In fact, to the contrary, the Supreme Court has held that a defendant is entitled to counsel at the disposition stage of a criminal proceeding.

In Mempa v. Rhay,37 the Supreme Court considered the habeas corpus petitions of two defendants who had been sentenced, in two separate proceedings, to differing prison terms upon the revocation of their probabilations. The Court found that the disposition stage of any criminal prosecution was of a "critical nature," and, applying the Sixth Amendment to the states through the Fourteenth Amendment,38 held that a defendant has a right to counsel at sentencing.39 In reaching this decision, the Supreme Court quoted from one of its earlier decisions:

[H]e [counsel for the defendant] could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.40

The Court then went on in Mempa to note:

[T]he necessity for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.41

This sweeping language of the Court in Mempa, if read so as to give full effect to its implications,42 together with the above-mentioned interpretation of Kent, could be regarded as circumventing the Williams case and requiring disclosure of the presentence report based on a recognition of the critical nature of the disposition stage of a criminal trial.

The above result — disclosure of the presentence report — is fur-

38 Id. at 134.
39 Id. at 137.
ther supported by the argument that since the Supreme Court in
Mempa has ensured a defendant of representation by counsel at sen-
tencing, this right would be meaningless if the attorney was not per-
mitted to see what the court was considering in passing sentence. In
this vein, it is interesting to note that in one of the very cases cited
by the Supreme Judicial Court in support of its position in Martin,
the New York Court of Appeals in People v. Peace stated:

To the extent that confrontation and cross-examination are de-
nied, there is a real denial of the right to controvert what is said
in the report and thus, to a significant degree, any value in afford-
ing a defendant access to the report itself is successfully thwarted.44

The Supreme Judicial Court turned finally to “the serious and
difficult question” of whether or not the “proper administration of
criminal justice” required disclosure of the report.45 The Court, not-
ing the lack of unanimity in authority and scholarly comment,46 chose
to view the problem as one of balancing the conflict between the in-
terests of the courts in maintaining a viable source of information (the
courts’ need for confidentiality) and the concern of the defendant in
being able to controvert damaging information (defendant’s need for
disclosure). The Court viewed the dilemma

... as “basically ... one of balancing the benefit derived from
a confidential report and its presumably greater access to sources
of information, protection of informants, and prevention of long
collateral disputes, with the possibility that an erroneous report
will influence the court in the sentence which it imposes.”47

The Court in Martin, holding that disclosure is properly within the
sentencing judge’s discretion, based its opinion on the belief that the
probation report, which supplies valuable information to the court,
and which is prepared by “professionals” in a nonadversary climate,
would be unduly jeopardized by requiring disclosure. In so holding,
the Court explained that this discretion should be exercised in a
“liberal and generous” manner, thereby affording the defendant max-
imum access without jeopardizing the confidentiality of the report.48

The Supreme Judicial Court, in this portion of its opinion, fol-
lowed the Federal Rules of Criminal Procedure,49 which allows dis-

New York Court of Appeals held, in effect, that there was no violation of the due
process clause where a trial judge denied the defendant access to the presentence
report on sentencing him for robbery.
46 Id. at 221, 244 N.E.2d at 307.
47 Id. at 220, 244 N.E.2d at 307, quoting from People v. Peace, 18 N.Y.2d 230, 236
48 Id. at 221-222, 244 N.E.2d at 308.

http://lawdigitalcommons.bc.edu/asml/vol1970/iss1/18
closure at the judge's discretion. This rule has received considerable favor among commentators and is being followed in many states. Still there exists impressive authority for complete disclosure of the presentence report. Several states require disclosure by statute; others have mandated it by judicial decision. In addition, numerous commentators have expressed their support for full disclosure.

There exist three basic reasons, independent of case authority, that are proffered to support nondisclosure. First, it is argued that complete disclosure will cause a "drying up" of the present "confidential" sources of information. Second, proponents of nondisclosure suggest that disclosure and the expected rebuttal offered by the defendant would interminably delay the proceedings. Third, some experts argue that shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.”

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that disclosure of some parts of the report would be affirmatively harmful to any rehabilitative efforts in process. All these arguments are buttressed by the contention that it is not unfair to the defendant to proceed against him in this manner, since after conviction a case is no longer an action at law but rather a social problem; that is, once guilt has been established, the treatment afforded the convicted defendant involves considerations of retribution, punishment and rehabilitation which historically are not considered questions of law but rather questions of penology and social policy.

On closer examination, these arguments may not be as well-founded as the proponents of nondisclosure claim. The ABA Advisory Committee on Sentencing and Review, in preparing the 1967 Tentative Draft of Standards Relating to Sentencing Alternatives and Procedures, with but one member dissenting, questioned these assumptions. In examining the argument that disclosure would eliminate present sources of information, the committee noted that those states which have mandated disclosure have not, in fact, reported such a problem. The committee then went on to point out that by allowing disclosure and not relying on the excuse that confidentiality requires nondisclosure,

[the quality and value of the presentence report will turn to an infinitely greater extent on the skill of the probation service and the availability of adequate supporting facilities than it will on whether its contents remain a secret.]

The committee further noted that the fundamental value of our criminal system is undermined by not allowing a defendant to know on what basis his sentence is passed, thereby in effect rendering him incapable of properly refuting damaging information.

As to the second contention of proponents of nondisclosure, that disclosure will cause an undue delay in the criminal process, the committee's answer is twofold: first, that "fair play and substantial justice" should never be subverted in the name of expediency, and second, that it remains questionable whether or not any actual delays would in fact occur.

Turning to the final argument on rehabilitation, the Advisory Committee agreed that disclosure to the defendant could in fact be harmful to him and therefore, in their proposal, they provided for exclusion

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56 Id. at 225.
57 Id. at 216-225.
58 Id. at 219.
59 Id. at 220.
60 Id. Part IV, §4.4 at 213-214 (presentence report: disclosure; parties):
   “(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.
of harmful information from the presentence report. However, the committee felt that if such information were included, the defendant should be apprised of it.

Beyond the above three reasons given in support of nondisclosure, the New York Court of Appeals in *People v. Peace* felt that there would be but small risk of undue prejudice to the defendant. The probation report is not prepared by a lawyer, nor is it prepared for adversary use; therefore, there will not be the coloring of facts normally found in other litigation papers. Further, the sentencing court is aware of the hearsay nature of the report and will undoubtedly give that fact full consideration. Finally, the defendant still has an opportunity to address the court and offer evidence of good character at sentencing.

On considering this argument of reliability raised by the New York Court of Appeals, there is no reason to assume that the nonadversary nature of the presentence report is any real basis for assuming the correctness of its contents. Several cases have dealt specifically with instances of error committed in the use of a presentence report or in the procedure followed by the sentencing court. In *Thomas v. United States*, for example, the Fifth Circuit Court of Appeals, dealing with a procedural error in sentencing, vacated the sentence of a defendant convicted of bank robbery where it appeared that the sentencing judge imposed a severe penalty due to the defendant's persistent claims of innocence in the face of "overwhelming evidence." Similarly, as to error committed in the use of the presentence report, the United States Supreme Court in *Townsend v. Burke* reversed the conviction of a defendant who had pleaded guilty to burglary and robbery on the grounds, inter alia, that part of the presentence report contained accusations about crimes of which the defendant had not been found guilty.

What the Court of Appeals of New York and other authorities have failed to consider is how a defendant is to claim error as to a presentence report. The report should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.

"(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review."

62 E.g., Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).
63 368 F.2d 941, 943 (5th Cir. 1966).
64 334 U.S. 736, 740 (1947).
Sentences report when he is not given access to the report. The fact that a defendant is afforded an opportunity to address the court at sentencing does not obviate the problem. The problem is in a defendant's inability to refute damaging information and his inability to raise on appeal the use of erroneous information in a presentence report. Stated in its simplest form: How is a defendant to claim error when he does not see the report?

The magnitude of this problem becomes all too apparent in the New Jersey case of State v. Pohlabel. The defendant in Pohlabel had been employed to paint the interior of an apartment and while there had stolen the owner's checkbook. He wrote seven checks, totaling $1,467. Seven indictments were returned, to each of which he pleaded non vult. He was sentenced to 7 consecutive 3-to-5-year terms, thus receiving a sentence of 21 to 35 years. Eight years after the conviction, the defendant for the first time was able to examine the presentence report. In it he discovered the statement of the probation officer that he was a “master of deception” and had a “contemptuous attitude toward law enforcement agencies.” The report indicated that the defendant had “spent the greater part of his life in penal institutions” and that he had numerous prior convictions, including one life-sentence for escape from a California prison. His true record, however, was that he had had only one prior conviction, and that was for stealing an automobile 7 years before, at the age of 18. He had served only 4 years for that offense. The disclosure of these discrepancies moved the prosecution to join in a motion for resentencing, which was granted some 9 years after the original conviction and sentence. Had the discrepancies been pointed out at the time of sentencing, the defendant might well have been given concurrent terms, and might thus have been free for at least 4 years by the time he finally was able to discover the errors.

Cases such as Pohlabel clearly show that plans such as that suggested in Baker v. United States, where the presentence report would, though not disclosed to the defendant, be sealed and made part of the record reviewable by the court of appeals, are plainly insufficient. Such a plan still does not solve the problem of the defendant's ignorance about the contents of the report, and, further, lends itself to spurious appeals. Any conscientious defense counsel would almost automatically move for resentencing on the gamble that there might be some erroneous information in the report.

Clearly the best solution, as suggested by the ABA Standards, is complete disclosure of the presentence report. The only possible exception could be the sources of confidential information and diagnostic

66 388 F.2d 931 (4th Cir. 1968).

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material, with the sentencing judge noting these deletions in the record. In this way a defendant would be apprised of all the information which the court is going to consider in passing sentence. With such knowledge, a defendant could properly and effectively attempt to refute information which, if left uncontradicted, would in many cases result in excessive sentences. Our courts have gone to extended lengths to protect an accused up to the time when he is declared guilty. To leave one of the most important matters, the accused's sentence, to the discretion of the trial judge, and to further allow the basis of the judge's decision to remain undisclosed and unchallengable, seems indeed inconsistent. This is even more apparent when one considers that 90 percent of all cases are settled on guilty pleas.  

In conclusion, while the Supreme Judicial Court may have been correct in finding that the Massachusetts General Laws did not require full disclosure of the presentence report, and while the due process clause of the Fourteenth Amendment or the Sixth Amendment may also not require full disclosure, the Court's holding that disclosure of the presentence report lies within the discretion of the trial court appears to be a misplacement of emphasis. Though the states which mandate disclosure still vest some discretion within the trial court, the emphasis is on disclosure. In the Court's decision, however, the trial judge is not bound to complete disclosure. In other words, in the mandatory states, the court must disclose and then may narrowly delete certain sources of information and information concerning rehabilitation. In Massachusetts, on the other hand, under Commonwealth v. Martin, the court may, in its discretion, disclose under the guideline of generosity. And while the Court did stress strongly this generosity in favor of disclosure, the law remains that disclosure is solely within the court's discretion.